Federal Court  Cour fédérale

Date: 20090921

Docket: T-1761-05

Citation: 2009 FC 937

Ottawa, Ontario, September 21, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

GREGORY J. McMASTER

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal by the Defendant from an October 14, 2008 judgment by Prothonotary Aalto finding the Correctional Services of Canada (CSC) liable for misfeasance in public office. The Defendant asks this Court, pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR 98-106 to grant the appeal, set aside the Prothonotary's decision, dismiss the Plaintiff's action and award costs.

[2] The Plaintiff, Mr. Gregory McMaster, is serving a sentence of life imprisonment for second degree murder. He requested a replacement pair of running shoes, size 13-4E from CSC. He received a replacement pair nine months later. In the interim, he incurred a knee injury while exercising wearing his old running shoes. He successfully sued CSC for misfeasance in public office for its delay in providing replacement footwear.

[3] The Defendant appeals the decision of the Prothonotary on a number of grounds including errors of law and errors of mixed fact and law.

BACKGROUND

[4] Collins Bay Institution issued Mr. McMaster a pair of size 13-4E New Balance running shoes in January 2003 while he was incarcerated there. On July 17, 2003 he was transferred to Fenbrook Institution, a medium security facility. In March of the following year Mr. McMaster requested a replacement pair of New Balance running shoes. On March 10, 2004, CSC Acting Chief of Institutional Services officer Ms. Cathy Wherry confirmed Mr. McMaster's shoe size as 13-4E and advised she would order his running shoes. He did not receive the replacement size 13-4E running shoes until December 20, 2004.

[5] Ms. Wherry was the Acting Chief of Institutional Services at Fenbrook Institution between January and September 2004. She had a range of responsibilities, including procuring clothing and footwear for inmates.

[6] Between March 2004 and June 2004, Ms. Wherry offered Mr. McMaster three different pairs of running shoes of differing sizes, size 13 Brooks in early May, size 14 Brooks at a later meeting, and a third pair of Brooks on June 7. Ms Wherry tried to persuade Mr. McMaster the shoes were his size. Mr. McMaster refused them all because they did not fit. At the last meeting on June 7 the Plaintiff says Ms. Wherry told him, "you'll be lucky to get a pair that fits before you're released." During this time, he kept wearing his old running shoes.

[7] In June 2004 Mr. McMaster commenced a grievance. He wrote to Ms. Annette Allen, the Assistant Warden Management Services on June 14, 2004, "…my current running shoes are worn and offer little support." Ms. Allen met with Mr. McMaster on July 22, 2004 and had him try on the same Brooks running shoes Ms. Wherry presented on June 7. Mr. McMaster tried them on and told Ms. Allen they were not his size, they did not fit, and refused them.

[8] Mr. McMaster finally received the correct sized pair of shoes on December 20, 2004. Ms. Wherry acquired them after Ms. Allen directed her to purchase the size 13-4E running shoes from another footwear supplier.

[9] Earlier, on July 1, 2004, Mr. McMaster injured his right knee while engaged in a vigorous exercise workout. He attributed the cause of his injury to the lack of adequate support provided by his old running shoes that caused his right foot to invert when stepping back in the course of his exercise regime.

[10] After his injury, Mr. McMaster pursued this lawsuit against the CSC. He claimed damages for misfeasance in a public office. He accused institutional staff of the CSC of "ignoring the plaintiff's need for special shoes when the staff at Fenbrook Institution knew or should have known that the plaintiff would suffer as a result of the refusal or neglect to order special shoes."

[11] Mr. McMaster proceeded by way of a simplified action under Rule 50(2) *Federal Courts Rules.* In a simplified action, the parties present evidence by affidavit. Affiants may be cross-examined on their respective affidavits in the trial before a prothonotary.

[12] The Plaintiff presented affidavit evidence and was briefly cross-examined at trial. His one witness, Ms. Cristol Smyth, a chiropodist, gave expert evidence about the worn condition of his old running shoes and provided an opinion on the lack of support for the foot provided by the worn shoes. This affidavit was accepted at trial and admitted for the truth of the matters stated without cross-examination.

[13] Two witnesses provided affidavits for the Defendant and they were cross-examined during the trial. The witnesses were Ms. Annette Allen, Assistant Warden, and Ms. Susan Groody, Chief of Health Services at Fenbrook and the neighbouring Beaver Creek Institution. The Defendant did not call on Ms. Wherry to provide affidavit evidence for the Defendant even though she was still an employee of the CSC.

[14] The parties also agreed the documentation in the file can be taken for the truth of the matters stated. The running shoes worn by the Plaintiff at the relevant times were admitted as an exhibit after identification by Mr. McMaster.

DECISION UNDER APPEAL

[15] The Prothonotary found the CSC liable for damages arising from the tort of misfeasance in public office. He gave no weight to the evidence of Ms. Groody and Ms. Allen where they relied on information and belief from Ms. Wherry because she was not called to provide affidavit evidence. Pursuant to Rule 81(2) of the *Federal Courts Rules*, Prothonotary Aalto drew an adverse inference, concluding Ms. Wherry's evidence would not support the lawfulness of her actions. Based on the evidence, the Prothonotary found Ms. Wherry acted unlawfully in contravention of her statutory obligations as a public officer. He further found the Defendant was aware the failure to provide the proper running shoes could cause harm to Mr. McMaster.

[16] Prothonotary Aalto also found Mr. McMaster's injury could be attributed to inadequate support from his worn sneakers. He also found the Plaintiff contributed to his injury by engaging in vigorous workouts when he was wearing worn out shoes.

[17] The Prothonotary awarded Mr. McMaster damages for pain and suffering, pre and post judgment interest on the amount, and costs. Because he found Mr. McMaster was partially liable due to contributory negligence, the Prothonotary lowered the damages award to $6,000 from $9,000.

ISSUES

[18] The Defendant raises the following issues in this appeal motion:

a. Did the Prothonotary err in law by:

i. finding there was a statutory obligation to provide replacement shoes to federal inmates, including the Plaintiff, on an annual basis;

ii. drawing an adverse inference against the Defendant for not calling Cathy Wherry as a witness in defence of the actions;

iii. discounting the entirety of the Defendant's evidence sworn on information and belief;

iv. applying an incorrect legal test for misfeasance in a public office;

b. Did the Prothonotary err in fact and law by:

i. failing to correctly apply the elements required for the tort of misfeasance in a public office to the evidence before him;

ii. inferring, in the absence of evidence to support such inference, that Cathy Wherry had the requisite awareness of an unlawful act and awareness that harm was likely to result from that act to make out misfeasance, and

c. Did the Prothonotary err in law and in fact by finding that the Defendant's conduct caused the Plaintiff's injury?

[19] In my view, the issues which are dispositive of this appeal are:

1. Did the Prothonotary err in law by failing to correctly identify the elements required for the tort of misfeasance in a public office?
2. Did the Prothonotary err in findings of fact?
3. Is the Defendant otherwise liable for misfeasance in a public office on the evidence before the court?

STANDARD OF REVIEW

[20] The Prothonotary's decision in this case is a decision on the substantive merits of the action. It is, stated simply, a judgment rendered after a trial, albeit a simplified one. As such the decision is subject to the standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33.

[21] In *Housen*, Justice Iacobucci and Justice Major writing for the Supreme Court of Canada found with regard to an appeal of a trial judge's findings the standard of review on a question of law is correctness. On findings of fact, they stated, "…where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error." *Housen* at para 36. Finally, when the application of facts to that legal test is the subject of review, they held the more stringent standard of review applies. That is, when the question involves mixed fact and law, it should not be overturned absent palpable and overriding error.

LEGISLATION

[22] The CSC is required by legislation to provide for a safe and healthful environment for inmates in Canada's penitentiaries. Section 70 of the *Corrections and Conditional Release Act*, 1992, c. 20 (CCRA) states:

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.

[23] By regulation, the CSC is tasked with providing adequate clothing for inmates. Section 83(2) of the *Corrections and Conditional Release Regulations*, (SOR/92-620) (CCRR) states:

83.(2) The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is	83.(2) Le Service doit prendre toutes les mesures utiles pour que la sécurité de chaque détenu soit garantie et que chaque détenu :
(*a*) adequately clothed and fed;	*a*) soit habillé et nourri convenablement;
(*b*) provided with adequate bedding;	*b*) reçoive une literie convenable;
(*c*) provided with toilet articles and all other articles necessary for personal health and cleanliness; and	*c*) reçoive des articles de toilette et tous autres objets nécessaires à la propreté et à l'hygiène personnelles;
(*d*) given the opportunity to exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors.	*d*) ait la possibilité de faire au moins une heure d'exercice par jour, en plein air si le temps le permet ou, dans le cas contraire, à l'intérieur.

[24] Included in the clothing allowance are shoes provided to the inmates. The Commissioner's Directive 352 provides:

> Each Regional Deputy Commissioner shall determine any restrictions, and the quantity and frequency of issue, for these items.
> … shoes, running (general purpose shoes)

[25] The evidence of the Plaintiff is that he has been provided shoes annually. Assistant Warden Ms. Allen indicated at Fenbrook Institution the annual replacement of shoes is the usual practice.

ANALYSIS

Did the Prothonotary err in law by failing to correctly identify the elements required for the tort of misfeasance in a public office?

[26] The CSC submits there is no statutory obligation to provide shoes on an annual basis to inmates. It asserts Directive 352 is a policy document which serves as a guideline for the CSC. The statutory scheme only requires the CSC take reasonable steps to ensure inmates' health and safety.

[27] The CSC submits the Prothonotary erred by concluding new shoes are required annually; it insists this conclusion is not supported by the legislative provisions. The CSC submits the Prothonotary drew an erroneous conclusion that there was a statutory obligation to provide replacement shoes to federal inmates on an annual basis when he stated:

> "The guidelines and directives issued under section 70 of the *Corrections and Conditional Release Act*, require that inmates of federal institutions receive certain minimal allotments including one pair of shoes per annum."

The CSC submits the regional interpretation of the Commissioner's Directive cannot have any force of law and consequently rise to a required statutory obligation.

Statutory Obligation

[28] Section 70 of the CCRA require the CSC take "all reasonable steps to ensure that ... the living and working conditions of inmates … are safe, healthful and free of practices that undermine a person's sense of personal dignity." Subsection 83 (2)(a) of the CCRR directs the CSC to "take all reasonable steps to ensure the safety of every inmate and that every inmate is … adequately clothed". The repeated use of the words "reasonable steps" provides the CSC a measure of discretion within the parameters of safe living conditions and, more specifically, adequate clothing.

[29] The Commissioner's Directive 352 does not unequivocally require institutions to issue new shoes annually. Each region has the authority to decide how often shoes are replaced and how many pairs of shoes are issued.

[30] In order to prove a breach of authority, the authority and obligation must be found in a statute: *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, 2001 MBCA 40, at paragraphs 37 and 38. In that decision Justice Kroft for the Manitoba Court of Appeal stated:

> "There is, however, nothing that gives the manual or any part thereof the status of a regulation or a Commissioner's standing order. It does not have the force of law and cannot be the basis of the torts that were alleged by the plaintiffs. … By itself, it cannot be taken either as a definition of the standard of care required or as a description of statutory authority."

[31] I agree the practice of providing inmates with shoes on a yearly basis is a Directive guideline. It is a guideline that does not rise to the level of a statutory obligation. But this does not mean the Plaintiff is precluded from raising a claim of misfeasance in a public office on the facts of this case.

[32] As I have already noted, the CSC is required by statute to "take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates … are safe, healthful and free of practices that undermine a person's sense of personal dignity." Further, the regulations provides "The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is … adequately clothed and fed". The effect of the statutory and the complementary regulatory provisions requires CSC officers take all reasonable steps to provide inmates with adequate clothing.

[33] Who is to decide the adequacy of used footwear? It would appear the CSC reviews its adequacy at the time an inmate brings the issue to the institution's attention. Where it does not assess the footwear, it replaces them on a yearly basis in acceptance of an assumption that after a year the footwear is worn.

[34] What criteria are used to assess if used footwear is inadequate? Given subsection 83 (2)(d) CCRR directs an hour of exercise time must be provided every day, adequate footwear must provide support during periods of authorized physical exertion. Shoes that can't provide support, because of wear, are inadequate.

[35] The statutory duty of a CSC officer is to take reasonable steps to provide replacement footwear when the officer is aware that an inmate's footwear is inadequate. That event does not necessarily occur annually.

[36] A CSC officer may be liable for misfeasance in a public office if the officer deliberately or knowingly fails to provide adequate footwear to an inmate when such is necessary, such as when the inmate's footwear is too worn and inadequate to provide proper support during an inmate's allotted time for exercise.

[37] I conclude the Prothonotary erred in law in deciding the CSC was under a statutory obligation to provide "inmates of federal institutions receive certain minimal allotments including one pair of shoes per annum." The correct statutory duty upon the CSC was an obligation to provide inmates with adequate footwear and replace footwear when it is inadequate.

[38] Notwithstanding the Prothonotary's error, it is still necessary to examine whether the Defendant is otherwise liable for misfeasance in public office. In *O'Dwyer v. Ontario (Racing Commission)* 2008 ONCA 446 Justice Rouleau decided the trial judge erred in finding misfeasance arising from the conduct of an official but found that all the necessary elements for misfeasance in public office were made out when the correct legal test was applied to the findings of fact made by the trial judge. Here too, the question arises whether the Defendant is liable for misfeasance in public office on the facts of this case.

Findings of Fact

[39] The Parties agreed the documentary evidence was accepted for the truth of its contents and the expert affidavit of Ms. Smyth, the chiropodist, was accepted for the truth of its contents.

[40] The Prothonotary had the benefit of viewing the witnesses when they were cross-examined. He conducted a thorough and careful review of the evidence.

[41] The standard of review for the trial judge's interpretation of the evidence as a whole is "…it should not be overturned absent palpable and overriding error." *Housen* at para 36.

[42] On review of the evidence, I do not find palpable and overriding error in the Prothonotary's findings of fact. I differ in his conclusion with regard to whether the Acting Chief of Institutional Services, Ms. Wherry, was singly responsible for an unlawful exercise of statutory power for reasons I will set out later.

[43] I now turn to the question of whether the Plaintiff has succeeded in his claim for misfeasance in public office on the facts of this case.

Misfeasance in a Public Office

[44] To find an individual official knowingly committed an unlawful act with the knowledge it would cause harm to an inmate is a serious allegation. It requires a close and careful examination of the evidence proving each element of the tort of misfeasance in a public office.

[45] Justice Iacobucci writing for the Supreme Court of Canada set out the defining elements of the tort of misfeasance in a public office in *Odhavji Estate v. Woodhouse* 2003 SCC 69. The required elements stated in *Odhavji* at para. 23 are:

- to identify a particular public officer for which each element of the claim is proven on a balance of probabilities, including;
- that the public officer engaged in deliberate and unlawful conduct;
- that the public officer was aware that his or her conduct was unlawful; and
- that the public officer was aware that his or her conduct was likely to harm the plaintiff.

[46] Justice Iacobucci categorized the tort of misfeasance: the first involves conduct by a public officer specifically intending injury to a person or class of people; the second involves a public officer acting with knowledge that he or she has no power to do the act complained of and that act is likely to injure someone. Justice Iacobucci identified two elements common to both. He stated:

> First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.

[47] Justice Iacobucci also noted:

> "… misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, according to a number of cases, the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct." *Odhavji at para 38*

[48] Justice Iacobucci limited the extent "subjectively reckless or wilfully blind" may extend misfeasance in public office by deciding the phrase "ought to have known" should be struck the from the *Odhavji* statement of claim. The terms "subjectively reckless or wilfully blind" require an element of knowledge which is recklessly disregarded or ignored to have application in a claim of misfeasance against a public official.

[49] Finally, Justice Iacobucci noted Lord Millett, in *Three Rivers District Council v. Bank of England (No. 3)* [2000] 2 W.L.R. 1220, found a failure to act can amount to misfeasance in a public office in circumstances in which the public officer is under a legal duty to act. Justice Iacobucci expressly endorsed inclusion in the tort of misfeasance in a public office the conduct of an officer who "wilfully injures a member of the public through … a deliberate failure to discharge a statutory duty." *Odhavji* at para 30.

[50] There is conduct which may give rise to a failure to perform a public duty but does not reach the level of misfeasance in a public office. The tort is not directed at a public officer who inadvertently or negligently fails to discharge the obligations of the office. Nor is the tort directed at a public officer who because of budgetary constraints has not deliberately disregarded his or her official duties. *Odhavji* at para. 26.

[51] Finally, misfeasance in a public office by an institution can arise even where the conduct of an individual member of that institution is lawful. In *O'Dwyer*, above, an official of the Ontario Racing Commission told a race track manager that the Plaintiff would not be approved if

employed as a track official. Justice Rouleau found the official's informal conduct was not "illegal" since he was obligated to deal with such situations. It was his action in combination with the Commission's denial of the plaintiff of any means of appealing the official's decision that constituted the unlawful act. Justice Rouleau found that while the individual official's conduct did not constitute an intentional "illegal act", the conduct of the corporate Commission taken together with the conduct of the individual officer could form the basis for a finding of misfeasance in a public office by the corporate entity.

[52] The evidence at trial clearly establishes Ms. Wherry, acting Chief of Institutional Services and Ms. Allen, Assistant Warden, Management Services are public officials. They were staff employed at Fenbrook Institution, part of Corrections Services Canada.

[53] The public officials, Ms. Wherry and Ms. Allen, were engaged in the process of responding to the Plaintiff's request for replacement footwear. The statutory obligation upon Ms. Wherry and later assumed by Ms. Allen was to "take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates … are safe, healthful and free of practices that undermine a person's sense of personal dignity" and "take all reasonable steps to ensure the safety of every inmate and that every inmate is … adequately clothed and fed". The effect of the statutory and the complementary regulatory provisions requires CSC officers ensure inmates are provided with adequate clothing including shoes. The obligation to provide adequate footwear includes replacing an inmate's shoes when inadequate from wear.

[54] I am satisfied the Plaintiff's shoes were worn and in need of replacement. The expert opinion of Ms. Smyth, the chiropodist, was the Plaintiff's shoes were worn and inadequately provided necessary support. Although the Plaintiff had worn the shoes some six months after his accident, that was due to the Defendant failing to provide replacement shoes. Ms. Allen acknowledged during cross-examination the shoes looked much the same as when she saw them at the meeting in July. Further, the Plaintiff informed Ms. Allen in his June 14th letter that his shoes were worn. All of which establishes the shoes were worn, inadequate and in need of replacement. Ms. Allen knew the shoes were worn. I am satisfied that Ms. Wherry would also know. She met the Plaintiff and would have observed the condition of his shoes. She placed three orders for replacement shoes. Accordingly the Defendant's CSC officials were under an obligation to provide replacement shoes for the Plaintiff.

The Public Officer was Aware that Her Conduct was Unlawful

[55] The letter of the Chief of Health Services, Ms. Groody, stated wearing a pair of shoes that do not fit will cause foot problems. However, the documentation does not demonstrate Ms. Wherry ordered the right size replacement running shoes for the Plaintiff. Since Ms. Wherry herself measured the Plaintiff's shoe size, determined the proper size was 13-4E, and placed the various purchasing orders, the absence of documentation showing that proper size shoes were ordered for the Plaintiff can only be explained by her. The handwritten notations on documents and statements to the Plaintiff that she would order the correct size shoes do not suffice. The Defendant's failure to have Ms. Wherry give evidence is inexplicable. It would seem that she is the one person who could explain why no documentary evidence exists for a timely order of proper

sized replacement shoes. She was still an employee of the Defendant and could have been called. The Defendant chose not to call her and is now bound by the consequences of that decision.

[56] I agree with the Prothonotary in giving no weight to the evidence of Ms. Allen where she relies on information and belief from Ms. Wherry. Prothonotary Aalto's adverse inference was that Ms. Wherry's testimony would not support the lawfulness of her actions. Rule 81(2) of the *Federal Courts Rules* provides that an adverse inference may be drawn from the failure to call a witness. There still needs to be some evidence, if only prima facie, to support a finding of fact that the Defendant's officials were aware that their actions were unlawful. In my view, the evidence supports an inference that they were aware their actions were unlawful.

[57] Ms. Allen was aware the shoes were worn and inadequate. The Plaintiff's letter to her on June 14, 2004 directly informs her:

> "… As Ms. Whirry [sic] pointed out in her attempts to have me take ill fitting shoes my current running shoes are worn out and offer little to no support.
> …
> Although I'm fairly confident that Ms. Whirry [sic] will not appreciate that I have contacted you on this matter I have been left with little to no choice. Three full months have passed since I initially requested my annual pair of running shoes. It is my sincere hope that not only will I be provided with a pair of running shoes A.S.A.P. but I will not experience any unwarranted antagonism for having pursued this matter." (emphasis added)

Ms. Allen would have been aware the Plaintiff required replacement shoes yet she did not meet with the Plaintiff until July 22, three weeks after his injury. She presented him with shoes previously presented by Ms. Wherry which the Plaintiff had previously refused because they do not fit. She took no further steps to obtain proper sized replacement shoes until November 2004.

[58] Ms. Allen testified to meeting with the Plaintiff on July 22, 2004 and observed him try on the shoes she says were size 13W. These were the size 13 shoes he says Ms. Wherry provided to the Plaintiff earlier in June. In her estimation the shoes fit. The Plaintiff thought otherwise on the two occasions he tried them, and refused them again because they did not fit.

[59] The Prothonotary preferred the evidence of the Plaintiff. He had the benefit of observing the Plaintiff and Ms. Allen testify. I see no reason to differ from the Prothonotary in his assessment of their evidence. The shoes in question did not fit.

[60] I am satisfied on the evidence that Ms. Wherry and Ms. Allen were well aware that the Plaintiff's footwear was worn and inadequate. Yet, they took nine months to replace a pair of old shoes. The Defendant's officers' prolonged delay in obtaining adequate replacement footwear of the correct size was contrary to the statutory obligation and they would know such excessive delay was unlawful.

The Public Officer Was Aware That Her Conduct Was Likely To Harm the Plaintiff

[61] I have concluded Ms. Wherry was aware the Plaintiff's shoes were inadequate; she should have known the Plaintiff was risking injury by exercising on inadequate shoes. If she was not, it was only because she was subjectively reckless or wilfully blind to the likelihood the plaintiff would injure himself if the situation persisted. However, the responsibility of securing running shoes for the Plaintiff passed to Ms. Allen who took over in June 2004.

[62] The Plaintiff advised Ms. Allen in his June 14 letter that his shoes were worn and did not provide adequate support. He asked for replacement shoes A.S.A.P. which presumably means as soon as possible. Ms. Allen was therefore aware of the condition of his footwear and the need for replacement.

[63] Ms. Allen acknowledged on cross-examination that worn out shoes provide less support and could cause damage. In these circumstances, Ms. Allen' acknowledgement suffices to establish she had the requisite knowledge the delay in provision of adequate footwear for the Plaintiff was likely to cause him harm.

Causation and Damages

[64] The medical evidence indicated the Plaintiff incurred a tear in the medial meniscus in his right knee. His medical diagnostic confirming the nature of the injury. He did have an intervening slip in the shower after his injury on July 1, 2004. The Defendant had the opportunity to cross-examine the Plaintiff on causation but did not. As a result, the Defendant cannot complain that the Prothonotary accepted the Plaintiff's explanation of how and when his injury occurred.

[65] Given the care the Prothonotary took in his detailed review of the evidence, the lack of any cross-examination of the Plaintiff at trial by the Defendant on the question of causation, and the higher standard for review required for setting aside a finding of mixed fact and law at trial, I would not disturb the Prothonotary's findings on causation and damages.

CONCLUSION

[66] The tort of misfeasance in a public office concerns the unlawful conduct or omission by a public official who knows his or her actions are unlawful and likely to harm a specific person or group of people. It is different from a claim of negligence or even gross negligence. It contemplates an element of bad faith which has been established in this case by the unexplained and excessive delay.

[67] The Plaintiff presented sufficient evidence to establish the misfeasance in public office on the part of the CSC. The Defendant's officers were public officials. They were aware the Plaintiff was in need of replacement footwear and they had a statutory duty to act. The unexplained excessive delay supports the inference that they were aware they were acting unlawfully in not complying with the statutory obligation. The CSC officers knew harm could result and it did.

[68] The appeal of the Defendant is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the Defendant's appeal is dismissed;
2. the Plaintiff is granted costs of this motion.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1761-05
STYLE OF CAUSE:	GREGORY J. McMASTER v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 3, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN, J.
DATED:	SEPTEMBER 21, 2009

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