

Federal Court



Cour fédérale

**Date: 20120119**

**Docket: T-307-07**

**Citation: 2012 FC 77**

**Toronto, Ontario, January 19, 2012**

**PRESENT: Madam Prothonotary Milczynski**

**BETWEEN:**

**STEPHEN NEESON**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**REASONS FOR JUDGMENT AND JUDGMENT**

Introduction

[1] On September 12, 2006 the Plaintiff, Stephen Neeson, was attacked in the Lower B range of Kingston Penitentiary. He suffered numerous stab wounds to his head, neck and facial area, and a broken nose. This attack took place a mere 45 minutes after Mr. Neeson's release from segregation, where he had been placed for his own protection, following a brawl in the prison exercise yard that took place on July 25, 2006.

[2] As a result of the September 12<sup>th</sup> attack, Mr. Neeson claims damages from the Defendant for not only the physical injuries he suffered, but also for emotional upset, anxiety and what he has alleged to be the effects of post traumatic stress disorder. Mr. Neeson claims that the Correctional Service of Canada (“CSC”) was negligent and breached its duty of care to provide for the safety of inmates in its custody. Specifically, Mr. Neeson claims:

- i. The inmate who attacked him on September 12<sup>th</sup> was known to CSC as a person who suffered from a psychiatric illness and was not on his prescribed medication;
- ii. Consequently, in such state, CSC was under a duty to warn Mr. Neeson and others of the danger this inmate posed;
- iii. There was some friendship between Mr. Neeson’s attacker (referred to as “Mr. A”) and another inmate (referred to as “Mr. B”), with whom Mr. Neeson had been engaged in a fight, that led to the July 25<sup>th</sup> brawl; and that
- iv. Consequently, CSC either knew or should have known that Mr. Neeson’s safety was in jeopardy.

[3] It is clear from the evidence heard over the course of the trial (and seen through video evidence), that the assault on Mr. Neeson was brutal and severe. The attack had immediate and long-term consequences, which were both physical and psychological. In describing his injuries, I found Mr. Neeson to be a candid and forthright witness who did not exaggerate what had happened or its effects, but for whom the assault was clearly a sobering and life altering experience.

[4] The difficulty, however, is in ascribing fault or liability to CSC for what happened to Mr. Neeson. Far from acting negligently in the case of Mr. Neeson's safety at Kingston Penitentiary, I am satisfied that CSC did what it could on an ongoing basis to gather information about the possible risks and dangers to Mr. Neeson during the relevant timeframe. Following the July 25<sup>th</sup> fight and subsequent riot, CSC monitored the dynamics of prison politics, inter-relationships and the issues that could spark further violence. CSC took steps to protect Mr. Neeson by placing him in protective segregation after the July 25<sup>th</sup> fight involving Mr. B. At the time of this incident, Mr. A was himself in protective segregation following a separate and unrelated incident. Mr. A returned to the general prison population in August when Mr. Neeson was in segregation. There was no evidence of any friendship between Mr. A and Mr. B that would suggest the attack on Mr. Neeson by Mr. A was an act of vengeance for the fight between Mr. Neeson and Mr. B. In fact, the evidence leads to a finding that the reason for the attack was because Mr. A suspected Mr. Neeson had stolen items from his cell on previous occasions, while they were both on Upper G.

[5] There was also insufficient evidence regarding Mr. A's psychiatric condition or mental illness. Although imprisoned for a particularly violent index offence, no evidence was led regarding any specific psychiatric illness for which Mr. A had refused to take prescribed medication, with the consequence that such failure to take medication would render him psychotic and/or a threat to others or himself.

[6] Accordingly, although horrific in its violence and its consequences for Mr. Neeson, there are insufficient grounds in the circumstances of this case to find that any act or omission on the part of CSC constituted a breach of its duty or the applicable standard of care to ensure the safety of

inmates generally, or that of Mr. Neeson in particular. CSC cannot, on the record adduced through the trial, be found liable for the attack on Mr. Neeson.

Background Facts/Chronology

[7] Mr. Neeson, Mr. A and Mr. B were all, at one time, housed in the Upper G unit of Kingston Penitentiary. It was the evidence of Mr. Neeson and that of CSC witnesses, that the Upper G unit was an influential and powerful unit of inmates and that Mr. Neeson was a leader among the Upper G and broader prison population. He was someone who was both respected and feared. CSC acknowledged that Mr. Neeson had never created problems within the institution, but was a member of the inmate committee, including its chair and someone who was well regarded by CSC staff. CSC staff could consult or work with Mr. Neeson to facilitate or diffuse situations involving other inmates.

[8] Mr. A did not enjoy such status among the prison population. He was regarded as “weird” and somewhat of a loner. His belongings were the subject of thefts or “fishing”, something not regarded as egregious for someone of his lower status. Following an assault on Mr. A by his cellmate (he was “piped”) on April 17, 2006, Mr. A was placed in segregation for his own protection. Mr. A was kept in segregation from April 17<sup>th</sup> until his release into the Lower B range on August 24, 2006.

[9] At some point prior to July, 2006, Mr. B was transferred from Upper G and placed into Upper F.

[10] While Mr. A was in segregation, on July 23, 2006, a number of inmates staged a sit-in in the exercise yard to protest yard time and the problems and delays with transfers from Kingston Penitentiary (a maximum security facility), when inmates were classified such that they could be placed in a medium security facility. The protest ended peacefully, but before it concluded, Mr. B, who initially participated in the sit-in, decided he had had enough, and broke ranks and left the protest. This did not go over well; Mr. B lost face and was called insulting and racist names. To restore his status, Mr. B traded barbs with Mr. Neeson in the gym. Ultimately, Mr. B and Mr. Neeson arranged to have a consensual fight on July 25, 2006.

[11] It was agreed between Mr. Neeson and Mr. B that the fight would be with fists and no weapons. During the fight, however, racist remarks were directed at Mr. B (who is black) from the group of inmates watching, tensions grew and someone threw a knife to Mr. B for him to use against Mr. Neeson. This led to a bloody and violent swarming of Mr. B who was stomped on and severely injured. Mr. Neeson did not take part in the swarming of Mr. B, but Mr. Neeson's friends and supporters who were from largely white and First Nations communities, inflicted grave injuries on Mr. B.

[12] Prison officials used force to quell the violence and a lock-down was imposed. Mr. Neeson was taken into involuntary segregation, both for the purposes of investigation into the riot, and for his protection, as CSC was concerned about racial violence and retaliation for the injuries suffered by Mr. B.

[13] While Mr. Neeson was in segregation, CSC gathered information and remained concerned for his safety. His segregation was reviewed repeatedly and on a regular basis. For the purposes of these reviews, CSC generated security intelligence reports, met with the inmate committee and other representatives of the inmate population to determine whether and/or when Mr. Neeson could safely be released from segregation. Despite his protests and desire to be released back into general population, CSC kept Mr. Neeson in segregation because there were ongoing and credible concerns for his safety. This information was gathered and reviewed by the Assistant Warden David Page, Jeffrey Smith and Kim Breen, all of whom used the intelligence tools available to them.

[14] It should be noted that throughout these investigations, there was no information that Mr. A posed a threat to Mr. Neeson or that he was or should be listed as an incompatible with Mr. Neeson. There was also no information that Mr. A and Mr. B were friends or associates. There were no pre-indicators of violence whatsoever as between Mr. Neeson and Mr. A, and there were no issues while their time overlapped in segregation (July 25-August 24, 2006).

[15] CSC was eventually satisfied that Mr. Neeson could be released into open population and that there was little or no risk of violence as a result of the July 25<sup>th</sup> swarming of Mr. B and subsequent riot. At about the same time, CSC's concerns with the influence of Upper G inmates, led to the decision to break up that unit. Despite Mr. Neeson's preference to return to Upper G, on September 12, 2006, he was placed in the Lower B range.

[16] Upon release, Mr. Neeson went briefly to the exercise yard and then on to the range on Lower B. Mr. A called to Mr. Neeson to show him some papers under the stairway. Mr. Neeson

went over to Mr. A – at that point one of the cameras on the range was obscured by other inmates on Lower B and Mr. Neeson was attacked by Mr. A. The remaining camera records some of what happened and following the attack, both cameras record the injured Mr. Neeson leaving the area and the remaining inmates mopping up the blood on the floor of the range.

[17] While the actions of the inmates on Lower B in obscuring the camera and cleaning up the blood suggest that there was some kind of conspiracy to attack or even kill Mr. Neeson, the evidence of CSC and that of Mr. Neeson himself clarifies the other inmates' actions. Rather than being part of a plot with Mr. A, the other inmates were complying with the unwritten "code" of conduct amongst inmates to protect the identity of both the attacker and victim, and frustrate the investigation that would be conducted by prison officials into the attack. Mr. Neeson himself testified that during the attack, he was careful not to draw obvious attention to what was happening, but manoeuvred the assault to spill out into camera view in more spontaneous manner. He also did not seek help or immediate medical attention, but went to the showers to wash off the blood and clean his wounds.

[18] In any event, following Mr. A's attack on Mr. Neeson, an investigation was conducted that determined (see Exhibit 1 – Tab 32 Report of Beverly Bruce) that the reason for the attack was that Mr. A suspected Mr. Neeson to be a "box thief" who had stolen items from Mr. A's cell while they were both on Upper G.

[19] There was no evidence that Mr. A had ever reported thefts or that there were some lingering residual hostilities from his time on Upper G prior to being piped by his cellmate. There was also

no evidence that the attack by Mr. A was some act of retaliation or outburst against Mr. Neeson for him having been a controlling and influential member of the Upper G unit. Although Mr. A was regarded as “weird” and was incarcerated for a brutal and vicious index offence (stabbing a friend to death with numerous stab wounds to the head), there were no pre-indicators that he would commit a similar attack on another inmate while in Kingston Penitentiary, particularly not on a high status inmate such as Mr. Neeson. While Mr. A had a violent past and had been found on occasion with some concealed weapons, this was not unusual among the population at Kingston Penitentiary.

### Law

[20] It has been well established in the case-law that the CSC owes a duty of care to the inmates in its custody. Reasonable steps must be taken to safeguard their health and safety from known or foreseeable risks. This is not an absolute guarantee or to say that incidents will not occur. The issue is whether the acts or omissions of the CSC fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances, (see: *Coumont v Canada (Correctional Service)*, 77 F.T.R. 253; *Miclash v Canada*, 2003 FCT 113; *Bastarache v Canada*, 2003 FC 1463; *Carr v Canada*, 2008 FC 1416, aff'd 2009 FC 576). For the matter presently before the Court, the question is whether in the circumstances, the attack on Mr. Neeson by Mr. A was reasonably foreseeable or whether CSC knew or ought to have known that Mr. Neeson was in danger, or that there was a risk Mr. A would attack Mr. Neeson (or anyone else). As noted in *Carr* (at para.16-17):

16. The requirement of reasonable foreseeability is satisfied if there are pre-indicators of violence, that is events or circumstances that make more likely the possibility of violence. Animosity among inmates or threats of violence are examples of pre-indicators of violence. An inmate who feels his or her safety is threatened by such animosity may notify prison officials by filing an incompatibility report. The definition of "incompatible" is set out in Commissioner's Directive 568-07, which states that incompatibles are "offenders



who, for whatever reason or situation, pose a threat to the safety and well-being of each other and hence may pose a safety risk to the institution and to others." A pre-indicator of violence may, however, be established in other ways.

17. While the case law cited by CSC indicates there is no breach of duty for failure to prevent a "quick, planned and violent attack" ...if pre-indicators of violence exist or if violence is otherwise predictable, then it is the obligation of the CSC to take reasonable steps to ensure the safety of the at risk inmate, (*Coumont, ... Miclash*). Given that prisons have an inherent potential for violence and that CSC cannot be guarantors of the safety of inmates, security measures need not be perfect nor infallible....They must, however, be adequate and reasonable....The circumstances of the institution and the inmates as well as the existence of pre-indicators are all relevant in determining the adequacy of supervision and whether the CSC have fulfilled their obligation...

[21] In the case of Mr. Neeson, the focus was his safety following the prison yard fight and swarming of Mr. B. Mr. Neeson was taken into and kept in segregation for his safety from July 25, 2006 to September 12, 2006. CSC staff gathered intelligence, generated reports, conducted offender segregation reviews (on July 27, July 31 and August 31, 2006) and remained of the view that Mr. Neeson should be kept in segregation until sufficient information permitted the conclusion that it would be safe for him to be released into the general population. CSC was thorough in its review, and not hasty in releasing Mr. Neeson from segregation. Although Mr. Neeson protested his continuing segregation, CSC did not release him until satisfied that the incident involving Mr. B would not pose a danger to his personal safety. CSC acted prudently and cautiously.

[22] During much of this time, Mr. A was himself in segregation for his own protection (from April 17<sup>th</sup> to August 24, 2006), after being assaulted by his own cellmate. Mr. A was thus not present for the prison yard fight between Mr. Neeson and Mr. B, or Mr. B's swarming, and there is no evidence of any friendship between them.

[23] Although a violent offender who may have had some mental health issues, Mr. A was not alone or unique in that respect amongst the Kingston Penitentiary population, and there were no pre-indicators or any reasonable basis for CSC to suspect that Mr. A would attack Mr. Neeson or anyone else. There were no disciplinary issues or any other incidents involving Mr. A following his release from segregation on August 24<sup>th</sup> until his attack on Mr. Neeson on September 12<sup>th</sup>. He may have privately harboured ill feeling and suspicion that Mr. Neeson had stolen items from his cell, but this was never communicated or brought to the attention of CSC staff. Neither Mr. Neeson nor Mr. A had listed the other as an incompatible.

[24] Accordingly, and in light of the above, there is no basis to find liability on the part of CSC for the attack on Mr. Neeson or for his injuries. CSC acted reasonably and prudently with the information it had and took reasonable steps to investigate matters into Mr. Neeson's safety. I am not satisfied on the record before me that the CSC knew or could have foreseen the risk to Mr. Neeson posed by Mr. A. The action must therefore be dismissed. This conclusion does not, however, detract from the Court's acknowledgment of the serious nature of the assault and the compelling evidence of Mr. Neeson and that of Dr. DeFreitas regarding its devastating consequences on Mr. Neeson and his well being.

**JUDGMENT**

**THIS COURT ORDERS THAT:**

1. The action be and is hereby dismissed.
2. In the event the parties cannot agree on the matter of costs, written submissions, no longer than three pages in length may be filed within twenty (20) days of the date of this judgment.

“Martha Milczynski”

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Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-307-07

**STYLE OF CAUSE:** STEPHEN NEESON v. HER MAJESTY THE QUEEN

**PLACE OF HEARING:** Bracebridge, Ontario  
Toronto, Ontario

**DATE OF HEARING:** September 7-8, 2011  
November 24-25, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** MILCZYNSKI P.

**DATED:** January 19, 2012

**APPEARANCES:**

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