

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JUSTIN GERALD CLILLIE

Plaintiff

-and-

JASON MARK BARD and THE COMMISSIONER OF THE NORTHWEST
TERRITORIES

Defendants

MEMORANDUM OF JUDGMENT

OVERVIEW

[1] Justin Clillie and Jason Bard were inmates at the North Slave Correctional Complex (NSCC). While they were both housed in the same general population pod, Mr. Bard randomly attacked Mr. Clillie, causing him serious injuries. Mr. Bard had a history of violent behaviour in custody and minutes before the assault on Mr. Clillie, Mr. Bard told a corrections officer that he was going to randomly attack someone.

[2] Mr. Clillie filed a statement of claim seeking damages against Mr. Bard and the Government of the Northwest Territories (GNWT). Although there are two defendants in this action, Mr. Bard was noted in default and his liability was not addressed at trial. This decision focuses on the liability of the GNWT. Mr. Clillie claims that corrections officials breached their duty of care when they did not take reasonable measures to prevent Mr. Bard's attack.

[3] For the following reasons I find that Mr. Clillie has not met his burden to prove that corrections officials were negligent or that their negligence caused his injuries.

ISSUES IN DISPUTE

[4] The parties agree that corrections officials owe a duty of care to inmates and that they can be found liable for the assault by one inmate on another. They agree the standard is one of reasonable care, not perfection. They also agree that if I find the conduct of the correctional officials fell below this standard of care and their negligence caused Mr. Clillie's damage, the GNWT is vicariously liable for the negligent acts committed by its employees in the execution of their duties. Additionally, they agree on the nature, extent, and impact of Mr. Clillie's injuries.

[5] Where they do not agree is if in this case, the conduct of the correctional officials fell below the standard of care, whether any negligent act caused Mr. Clillie's injuries, and the exact amount of damages I should award if I grant Mr. Clillie's claim.

[6] I will first analyze the issues of breach of standard of care and causation followed by a discussion of the appropriate damages.

ANALYSIS

Standard of Care and Causation

[7] In his statement of claim, Mr. Clille alleges NSCC staff breached the standard of care in several ways, from the gathering of background information about Mr. Bard to the way they responded to Mr. Bard's attack. At trial, Mr. Clillie abandoned several of these claims and focused on two acts or omissions by corrections officials he argues fell below the standard of care and contributed to his injuries 1) their failure to take appropriate steps to obtain Mr. Bard's criminal and institutional history and 2) their failure to isolate Mr. Bard from the other inmates after he made a threat to randomly attack someone. Mr. Clillie submits that had corrections officials conducted themselves in the way reasonably prudent correctional officials must, they would have prevented Mr. Bard's violent attack.

[8] The GNWT takes the position that correctional officials followed all NSCC policies and protocols and acted reasonably in their response to Mr. Bard's threat

and in gathering information about Mr. Bard. The GNWT also argues that even if the NSCC staff obtained background information about Mr. Bard, it would not have changed the reasonable response to the threat.

Corrections Officials' Response to the Threat

Undisputed Facts

[9] Mr. Clillie testified. He described the attack and how it affected him. The GNWT called three witnesses: Officer Purcell, who was the only corrections officer present immediately before and during the attack, John Nahanni, the Warden of NSCC at the time, and Dr. Thomas Gabor, PhD in sociology and retired Professor with the Department of Criminology at the University of Ottawa, who I qualified as an expert in policies, operation, and management of correctional facilities. A video of the NSCC surveillance footage in Pod A showing the period preceding the attack and the attack itself was adduced. The parties also jointly filed several correctional records, including NSCC policies on discipline, use of force and segregation.

[10] The evidence reveals that just after the inmates finished having supper, Jason Bard approached Corrections Officer Michael Purcell, who was the only Corrections Officer in Pod A at the time. Mr. Bard was frustrated because he had not been assigned a job in the institution yet. Officer Purcell discussed the issue with Mr. Bard for a few minutes. After this discussion, Officer Purcell called his supervisor to try to get answers for Mr. Bard. Following this phone call, Officer Purcell gestured for Mr. Bard to approach his desk and gave Mr. Bard an update on the steps taken to address his issue. At that moment, Mr. Bard became agitated, told Officer Purcell he was getting angry, that he did not care about the consequences and made the following threat: "I'm just going to pick someone, and fucking go for them". Officer Purcell responded to this threat by telling Mr. Bard to go outside to the yard adjacent to Pod A and get some fresh air. Mr. Bard complied with Officer Purcell's request and went to the yard.

[11] Approximately 3 minutes later, Mr. Bard re-entered Pod A. He walked straight towards the location where Justin Clillie was quietly watching television, seated at a table by himself. Mr. Bard attacked Mr. Clillie, striking him on the head with a plastic cup and punching him repeatedly. Mr. Bard and Mr. Clillie wrestled until Mr. Clillie managed to get rid of Mr. Bard's hold approximately 20 seconds later. Officer Purcell and several of his colleagues took action to stop the attack and to protect Mr. Clillie from any further violence.

[12] The threatening words Mr. Bard uttered are not in dispute. The way this attack unfolded is also not contentious.

Evidentiary Findings

[13] Mr. Clillie takes issue with the evidence of defence witnesses on several points. He argues that the court should not accept Officer Purcell's description of Mr. Bard's demeanour during their interactions. He also argues that Officer Purcell and Warden Nahanni mischaracterized the nature of the threat when they called it a "veiled threat". Additionally, Mr. Clillie invites the court to disregard or place very little weight on the evidence of Dr. Gabor.

Mr. Bard's demeanour during his interaction with Officer Purcell

[14] Officer Purcell testified that during his discussion with Mr. Bard, Mr. Bard was agitated but not angry. In cross-examination, counsel for Mr. Clillie suggested that Mr. Bard was in fact angry and showing signs of anger. Officer Purcell agreed that Mr. Bard told him he "was getting angry".

[15] Officer Purcell explained why he described Mr. Bard as agitated and not angry. He indicated that he did not, at any time, feel he was at risk of being attacked. He also said that when Mr. Bard uttered the threat, Officer Purcell did not see usual signs of anger in Mr. Bard's body language such as a clenched fist or a clenched jaw. Mr. Bard did not yell at Officer Purcell, and he did not display threatening gestures. In Officer Purcell's assessment, Mr. Bard was able to be calm in the presence of others.

[16] Surveillance footage of Pod A was adduced during Officer Purcell's evidence. Although there is no audio recording, the video footage generally supports Officer Purcell's account of his interaction with Bard. Mr. Bard is seen making gestures with his arms and hands, but he does not take a threatening stance. Inmates walk in proximity to them without any notable reaction as one would expect if Mr. Bard had been displaying overt signs of anger.

[17] I accept Officer Purcell's description of Mr. Bard's state of agitation during their interactions.

The nature of the threat

[18] Mr. Clillie suggests that I should consider Officer Purcell's evidence with caution with respect to the nature of the threat because of inconsistencies between his testimony at trial and his report. More specifically, he argues that I should be worried about the fact that Officer Purcell indicated during his examination-in-chief that the threat was a "veiled threat", a qualification that does not appear in the report he wrote on the evening of the attack.

[19] Officer Purcell did not write the word "veiled" in his report. Officer Purcell's report of his interactions with Mr. Bard that afternoon and of the attack is limited to one paragraph. His evidence in court was more detailed. In this context, it is understandable that he provided nuances during his testimony that do not appear in his report. I see no basis to question his credibility for this reason.

[20] Additionally, Mr. Clillie points out that the threat was not veiled at all. I agree. When Mr. Bard said: "I'm just going to pick someone, and fucking go for them", there was no ambiguity. The threat was not implied or disguised in innocent language. Mr. Bard was threatening to commit a random attack on a member of the staff or another inmate. But this does not mean that Officer Purcell was trying to mislead the court.

[21] Officer Purcell was unequivocal about the words that Mr. Bard uttered. It does not matter how he qualifies this threat because I can draw my own conclusions from the words used. I find that the witness was mistaken about the meaning of the expression "veiled threat". What he was trying to convey was that the threat was a general one, without a specific target, which was important in assessing the risk of harm that this threat presented.

The evidence of Dr. Thomas Gabor

[22] Dr. Thomas Gabor was qualified as an expert in criminology, the operation and management of correctional facilities, policies and procedure followed for the management of inmates, interpersonal violence prediction, prevention of interpersonal violence and criminal behaviour. Mr. Clillie did not challenge Dr. Gabor's qualification. An expert report was filed as an exhibit, and Dr. Gabor testified.

[23] Dr. Gabor provided evidence on the following points:

- Threat assessments and factors that come into play in these assessments.

- The options available to an officer in Officer Purcell’s position in dealing with a threat such as Mr. Bard’s in this case.
- The circumstances in which an institutional lockdown is appropriate or not.
- The de-escalation method.
- The adequacy of NSCC’s policies on discipline, use of force and segregation.
- The adverse effects of segregation and punitive approaches on inmates.
- The humane philosophy behind these policies and how they accord with the policies and practices in Canada and throughout North America and Western Europe.

[24] Dr. Gabor also expressed opinions on the foreseeability of this specific attack and on the appropriateness of Officer Purcell’s specific response to Mr. Bard’s threat.

[25] Mr. Clillie invites me to approach Dr. Gabor’s evidence with caution.

[26] Mr. Clillie points out that Dr. Gabor qualified the threat in this case as “vague” during his testimony while not mentioning this in his report. He also claims that this qualification is incorrect as the threat was random but concrete. It is true that Dr. Gabor did not mention it was a vague threat in his report. But Dr. Gabor, because of his status of expert witness and with the consent of the parties, attended the testimonies of Officer Purcell and Warden Nahanni. Dr. Gabor heard them both refer to a “veiled threat”. As I pointed out earlier, when the witnesses used this expression, they were clearly mistaken. In my view, Dr. Gabor offered his opinion on the nature of the threat as an attempt to assist the court following the extensive cross-examinations of Officer Purcell and Warden Nahanni on the meaning of “veiled threat”. Dr. Gabor explained that by vague he meant the threat lacked particulars, such as who would be targeted, when the attack would take place and how the attack was to be carried out, which are important factors in a threat assessment. Dr. Gabor’s explanations make sense and I accept them.

[27] Mr. Clillie also argues that Dr. Gabor was careless with his use of language at times, more specifically when he drew a parallel between threats in correctional facilities and threats of mass shooting in schools in the United States, to illustrate how threat assessments are done. Dr. Gabor said that if all threats of mass shootings were considered valid, half of American high school students would be suspended. In cross-examination, Dr. Gabor acknowledged that the proportion of students he mentioned was not based on facts. I agree that Dr. Gabor could have been more cautious before mentioning a specific proportion of students who have made threats,

which was in fact inaccurate. However, I accept his explanation that he did not mean to mislead the court but simply to illustrate the scale of this phenomenon.

[28] Mr. Clillie points out that Dr. Gabor made comments on the potential impact of my decision on the future conduct of correctional officials, suggesting it could lead to the adoption of harsher practices towards inmates in this jurisdiction. Mr. Clillie argues that these comments were inappropriate and that they show Dr. Gabor has a bias in favour of the GNWT. I agree with Mr. Clillie that Dr. Gabor inviting the court to consider the adverse impact of this decision on the future treatment of inmates was not appropriate because it could give the impression that he was taking the role of an advocate.

[29] However, in his expert report Dr. Gabor indicated that he understood his role was to assist the court by providing impartial opinion and testimony. During the expert qualification *voir dire*, Dr. Gabor was questioned on his understanding of his role as an expert witness. He explained in length how he saw his role to be independent and objective. He provided an example of putting these principles in practice in the past when he submitted to a client an expert report that did not support the client's position. I am satisfied that Dr. Gabor understood his obligation to provide impartial opinion. Dr. Gabor's comments about the impact of my decision on correctional practices are not relevant to the issues at play in this trial and I have not considered them in reaching my decision.

[30] Finally, Mr. Clillie takes the position that I am just as well positioned as Dr. Gabor to assess whether there was an escalation in Mr. Bard's behaviour and what was a reasonable response. As I indicated to counsel during oral submissions, in my view, Dr. Gabor offered opinions on the ultimate issues that I must decide: the foreseeability of the attack and the reasonableness of Officer Purcell's response. This exceeds the scope of admissible expert evidence and I have not relied on his conclusions to reach my decision.

[31] Where I accept Dr. Gabor's evidence and find it helpful is on the following topics. I accept his evidence on the importance of corrections officers resorting to de-escalation tactics in dealing with inmates' behaviour. I also accept his evidence on the utilitarian reasons that justify the adoption of policies founded on the principles of restraint. Overly punitive approaches do not work. They create the opposite of what is intended by leading to more non-compliance and violence. I accept that the policies and practices in place at NSCC are in line with the standards of correctional facilities in Canada, the USA and Europe.

The Adequacy of Officer Purcell's Response

[32] As indicated above, the parties agree that the applicable standard of care in this case is one of reasonable care, not perfection. “What is required is that those who operate prisons exercise reasonable care to protect their inmates from foreseeable risks” (*Row v HMTQ*, 2006 BCSC 199, at par. 17). The question is whether Officer Purcell's response in this case fell below the standard of conduct of a reasonable corrections officer placed in the same circumstances (*Russell v HMQ & Matsqui*, 2000 BCSC 650 at para 6).

[33] One focus of precedents dealing with the liability of corrections officials in a case of an attack of one inmate on another inmate, is the foreseeability of the attack (see for example *Flunk v Clapp*, 1986 CanLII 1119 (BC CA), *Carr v Canada*, 2008 FC 1416, *Le v British Columbia* 2016 BCSC 966). Here, there were no indicators that Justin Clillie would be the target of an attack by Jason Bard. Mr. Clillie and Mr. Bard were not “incompatibles”, meaning that they had not disclosed to corrections officials that they needed to be separate from each other for their own safety and they had no history of animosity or conflict. What Mr. Clillie argues is that the threat Mr. Bard conveyed to Officer Purcell made the attack foreseeable and required Officer Purcell to isolate Mr. Bard from the other inmates to adequately protect them, including Mr. Clillie, against a random attack.

[34] Officer Purcell explained why he dealt with Mr. Bard's behaviour the way he did. Officer Purcell described that inmates often make threats, which can be a way for them to manipulate officers. Officer Purcell is trained and expected to respond to these threats by attempting to de-escalate the situation as mandated by NSCC's policies on discipline, use of force and segregation. These policies favour de-escalation and the adoption of the least restrictive measures possible. Physical restraints and segregation are last resort options. When Mr. Bard complied with his request to go to the yard, the immediacy of the threat went down. Having these NSCC policies in mind, Officer Purcell did not believe that adopting a more restrictive approach, such as isolating Mr. Bard from the other inmates, was appropriate.

[35] Mr. Clillie argues that I should have concerns about Officer Purcell's explanation of his conduct because many of his answers were evasive. I recognize that during his evidence, Officer Purcell appeared nervous, and he was hesitant when asked to justify his actions, particularly in cross-examination. Mr. Clillie submits that it affects Officer Purcell's credibility, especially because he is not a party to these proceedings and has no interest in the outcome. However, the appropriateness

of Officer Purcell's conduct is at the heart of these proceedings. He was vigorously challenged on the justification of his actions. Understandably, he might have felt nervous and under scrutiny. In this context, his guarded attitude does not affect his overall credibility.

[36] Officer Purcell did not immediately take action to record what was a clear disciplinary offence. In cross-examination, it was suggested that this shows he did not perceive the appropriate level of risk that resulted from the threat or that he was careless in dealing with the situation. Officer Purcell explained that although he did not remember when he intended to report the incident on this specific occasion, he usually takes 20 to 30 minutes to reflect on an event before starting to write a report. Here, the assault occurred only minutes after his discussion with Mr. Bard, which did not give him time to record his interaction. The fact that Officer Purcell did not immediately document Mr. Bard's threat does not mean that he misjudged the situation and the risk of harm to the other inmates. He simply did not have time to do so.

[37] Mr. Clillie points out that Officer Purcell did not know the scope of his authority and that it affects his assessment of the situation and his decision to opt for a less restrictive measure. Officer Purcell testified that he asked Mr. Bard to go outside. He specified that it was a request and not an order because in his view, it would be "an unlawful order". Officer Purcell is clearly wrong about this. Mr. Bard had just committed a disciplinary offence by uttering a threat. Mr. Nahanni confirmed the officer had the authority to make such an order. I agree that Officer Purcell was mistaken about the scope of his authority. However, I am not convinced that it made any difference in the way he interacted with Mr. Bard. Because Mr. Bard complied with Officer Purcell's request to go to the yard, it does not matter if he conveyed it as a request or as an order to Mr. Bard.

[38] Mr. Clillie submits that Officer Purcell had the option to isolate Mr. Bard from the other inmates and, in the circumstances, it was the only reasonable option. The GNWT argues that Officer Purcell followed NSCC's policies and practices. Both Warden Nahanni and Dr. Gabor confirmed that Officer Purcell's action was in line with the applicable policies and consistent with the conduct expected from corrections officers. The GNWT takes the position that these policies and practices guarantee that all inmates are treated with dignity and with respect for their rights. The GNWT points out that these policies are in line with the standards of the industry. The GNWT also argues that findings of negligence are exceptional when a person engaged in work in a technical area follows the standards of professional conduct.

[39] The GNWT refers to *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, to support their position that a professional who follows all the steps of the accepted practice in their area of expertise is generally shielded from a finding of negligence. However, in the present case, the NSCC policies are drafted in general terms. They do not dictate how to act in any specific situation. I find Warden Nahanni's evidence particularly important when he stated several times that every situation requires a case-by-case analysis. I am not persuaded that this argument is decisive in this case.

[40] The question remains whether the de-escalation tactic used by Officer Purcell was consistent with the conduct of a reasonably prudent corrections officer. I find that it was.

[41] Mr. Bard was frustrated and agitated but he was not aggressive towards Officer Purcell. Mr. Bard expressed to Officer Purcell that he was displeased and getting angry with the way NSCC was dealing with his request for a job. Officer Purcell took steps to address Mr. Bard's request. Officer Purcell provided Mr. Bard with an update of his efforts. It is during this discussion Mr. Bard made a general threat that he was going to pick someone and "go for them". Officer Purcell perceived the threat as an attempt by Mr. Bard to manipulate correctional officials to get what he wanted. In compliance with his training and NSCC's policies and practices, Officer Purcell tried to de-escalate the situation by asking Mr. Bard to go outside and take a breath of fresh air. Importantly, Mr. Bard complied.

[42] Mr. Bard committed a vicious attack on Mr. Clillie that caused him significant injuries and could have been even more serious considering the violence of the assault. Mr. Clillie was targeted randomly, understandably leaving him in a state of perplexity and apprehension.

[43] With the benefit of hindsight, one might conclude that the officer needed to do more. But I am satisfied that when Mr. Bard complied with Officer Purcell's request to go outside, Officer Purcell reasonably believed the risk of a random attack diminished. When Mr. Bard complied with the request, it was reasonable for Officer Purcell to believe he was successful in de-escalating the situation.

Jason Bard's Criminal and Institutional History

[44] Jason Bard has an extensive violent criminal record. He also has a history of violent behaviour in custody, including a violent attack committed on another inmate approximately 2 years before he assaulted Mr. Clillie. Two weeks before the attack, Mr. Bard threatened corrections officers at NSCC and claimed that he had hidden a weapon he intended to use against the officers. Mr. Bard was considered a High-Risk Offender in Alberta. Calgary Police Service were in possession of psychological reports that concluded Mr. Bard is a dangerous violent offender with anti-social personality disorder.

[45] Mr. Clillie advances two arguments. First, he claims that Officer Purcell should have paid closer attention to the information about Mr. Bard's background available to him. If Officer Purcell did, it would or should have changed the approach he took on that day. Second, Mr. Clillie argues that Mr. Bard's case managers at NSCC were not diligent in gathering materials about his criminal and institutional behaviour. If they had gathered this information and made it accessible to Officer Purcell, it would or should have changed the measures put in place to protect the other inmates from Mr. Bard.

[46] The GNWT responds that NSCC staff were diligent in gathering and accessing this information. In addition, they argue that even if I find that correctional officials' conduct was negligent in gathering and accessing the information, this information would not have changed the response of a reasonably diligent corrections officer. In short, the GNWT argues that Mr. Clillie has not proven that any breach of the standard of care has caused his damage.

The information accessible to Officer Purcell

[47] Officer Purcell stated that he did not know much about Mr. Bard before the day of the attack. Officer Purcell had access to information about Mr. Bard's criminal record and recent allegations of threatening and violent behaviour against the police through the NSCC's Corrections Offender Management System (COMS). COMS is the computer system used by correctional officials to record and share information about inmates.

[48] At the time of his testimony, Officer Purcell had no memory of accessing information about Mr. Bard. He usually does not seek detailed information about inmates' criminal backgrounds to avoid forming a bias against them. In his experience, many inmates who have a violent criminal history behave differently in

custody, for example, because their offending occurs while they are intoxicated by alcohol, a substance that is not available to them in jail. Officer Purcell mainly focuses on an inmate's behaviour at the NSCC. He explained that Mr. Bard's background outside the jail would not have a meaningful impact on his intervention with Mr. Bard.

[49] Officer Purcell also had access to information about the recent incident of threats against the staff at NSCC. In cross-examination, he acknowledged this information was important. He did not recall if he ever accessed it before the attack, but he explained that it would not have changed his conduct in this case. Because Mr. Bard complied with the request to go outside, Officer Purcell did not believe any more restrictive measure was required.

[50] I am not persuaded that Officer Purcell's attitude towards Mr. Bard's background information fell below the standard of care. He explained how he approached this inmates' criminal and institutional history, an approach in line with the policies and practices of NSCC. This explanation makes sense and is consistent with the general humane philosophy of the correctional facility.

[51] In addition, Mr. Clillie has not proven causation. To establish liability, it is not sufficient to prove a duty of care and a breach of the standard of care. The plaintiff must also establish on a balance of probabilities that the breach caused his damage. Causation requires an analysis in two steps (*Nelson (City) v Marchi*, 2021 SCC 41 at paras 96-97 [*Marchi*]). First, the court assesses the factual causation using the "but for" test (*Clements v Clements*, 2012 SCC 32 at paras 8-13). Second, the focus of the legal causation analysis is "whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct" (*Marchi* at para 97). The evidence does not convince me that factual causation has been established.

[52] Even if I had found that Officer Purcell should have been more attentive to intelligence available to him, I am not convinced that a more thorough review of Mr. Bard's background would have an impact on the response of a reasonably prudent corrections officer. In this case, once Mr. Bard complied with the request to go outside, it was reasonable for Officer Purcell to believe he had defused the situation. Mr. Bard's violent criminal record and recent threats to the staff would not have changed that.

The information received after the assault

[53] Records obtained from Alberta after the attack on Mr. Clillie reveal that Mr. Bard is an extremely violent individual, who a psychologist described as dangerous and to suffer from anti-social personality disorder. Less than 2 years before his incarceration at NSCC, while in custody at Calgary Correctional Centre, Mr. Bard stabbed another inmate several times in the face with a pen because Mr. Bard thought the other inmate was talking about him.

[54] Warden Nahanni explained that the NSCC has approximately 600 intakes a year and a staff of 4 case managers. Every inmate is assigned a case manager, whose responsibilities include assisting inmates in accessing programs and services. The case manager is the main point of contact for an inmate to make requests and raise concerns. The usual practice is for the case manager to start gathering information about a new inmate as soon as possible after their admission to the facility. Warden Nahanni testified that the case manager starts making inquiries when they get a new file. For someone like Mr. Bard who has a criminal record and has served multiple custodial sentences, it involves gathering more detailed information about the circumstances of his past convictions and his history of institutional behaviour.

[55] Jason Bard was admitted to NSCC on June 5, 2018, as a remand inmate. At intake, the police provided to NSCC Mr. Bard's criminal record and a summary of the allegations of the pending charges that led to his remand into custody. Mr. Bard's case manager Jennifer Grant met with him for the first time on June 12, 2018, after Mr. Bard refused a first meeting on June 8, 2018.

[56] The parties filed on consent all relevant COMS records related to Mr. Bard. These records show that Case Manager Grant did not take any steps to gather Mr. Bard's criminal and institutional background information until July 24, 2018. On that date, Case Manager Grant received a call from Tammy Calder, a probation officer with the High-Risk Offender Calgary Police/Community Corrections in Alberta. The entry into COMS for July 24, 2018, indicates that Case Manager Grant obtained some information about Mr. Bard during the phone call, but it does not set out any substantive details. An email exchanged between the Case Manager Grant and Probation Officer Calder later that day suggests the probation officer shared a list of Mr. Bard's outstanding charges in Alberta. Case Manager Grant then requested reports related to Mr. Bard's adult convictions and more specifically, those related to his most serious convictions for which he served time in the penitentiary.

[57] The next relevant step taken following the July 24, 2018, exchange of emails was on August 28, 2018, when Probation Officer Calder emailed Case Manager Grant indicating that the collection of relevant records was still in progress explaining that the main person responsible for gathering this information was on vacation. Mr. Bard attacked Mr. Clillie on September 2, 2018, before the NSCC received any additional information about Mr. Bard.

[58] Officer Purcell, Warden Nahanni and Dr. Gabor all testified that the information contained in the Alberta records was valuable to correctional officials. They indicated it was important for correctional officials, entrusted with ensuring the safety of inmates and the staff, to be aware of information such as Mr. Bard violently assaulting another inmate at Calgary Correctional Centre.

[59] Mr. Clillie claims that the case management team failed to meet the standard of care by omitting to set out the details of the information received on July 24, 2018, on COMS. In addition, he argues that they had to be more proactive in seeking the Alberta records. Warden Nahanni explained that NSCC's standard was that a case manager would start making inquiries within 5 business days of an inmate's arrival at NSCC. In this case, no such steps were taken for over 6 additional weeks. The GNWT says that the case management team has limited resources and a heavy caseload and the way they undertook the gathering of information about Mr. Bard was reasonable.

[60] Even if I found that the case management team acted negligently in failing to seek background information about Mr. Bard for weeks after his admissions to NSCC, as noted above, it is not sufficient for a plaintiff to establish a breach of the duty of care, they must also prove causation. Assuming NSCC would have received the information before the attack if the case management team had taken steps earlier, Mr. Clillie needs to prove that a reasonably prudent corrections officer placed in the circumstances of Officer Purcell with the knowledge of the Alberta records would have taken more restrictive measures towards Mr. Bard following the threat. I am not persuaded Mr. Clillie has established this.

[61] Officer Purcell testified that although the information about the Calgary Correctional Centre's incident was important, he would not necessarily have acted differently if he was aware of Mr. Bard's previous attack on another inmate. I accept Officer Purcell's evidence that the primary reason he did not take more restrictive measures towards Mr. Bard is because he felt he had de-escalated the situation. I am

not convinced that Mr. Bard's background would not have changed this reasonable belief.

The Appropriate Damage Award

[62] In the event I am wrong about the liability of the GNWT, I must turn to the issue of damages.

[63] In his statement of claim, Mr. Clillie seeks general, special, and punitive damages. At the conclusion of the trial, his lawyer conceded that he had not established the basis for special and punitive damages. Mr. Clillie takes the position that the court should award \$25,000 in general damages. The GNWT submits the appropriate range of compensation for Mr. Clillie's loss is between \$10,000 and \$25,000.

[64] In the context of personal injury, the assessment of general damages usually takes into consideration the following factors: the age of the plaintiff, the nature of the injury, the severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities and loss of lifestyle (*Stapley v Hejslet*, 2006 BCCA 34, at para 46).

[65] Mr. Clillie is a 44-year-old man. There is no dispute that he suffered injuries. As a result of the attack, he sustained a concussion and two lacerations to the head that required respectively 4 and 5 stitches. The physical effects of the concussion, including dizziness and headaches, lasted approximately 1 to 2 weeks. In the aftermath of the assault, Mr. Clillie experienced fear and apprehension of being the victim of another attack. Since the incident, he has struggled with anxiety, particularly in a custodial setting.

[66] Mr. Clillie filed the following cases related to damages in the context of government liability for an assault on a person in custody.

- In *Carr v Canada*, 2008 FC 1416, Mr. Carr suffered stab wounds and PTSD. The court awarded \$12,000 solely in relation to the PTSD symptoms.
- In *Beauchamp v Canada*, 2022 FC 47, the court found no liability but would have awarded a total of \$20,000 in compensation for a moderately painful broken jaw and minor PTSD symptoms.

- In *Miclash v Canada*, 2003 FCT 113 the plaintiff suffered a broken jaw, with temporary loss of hearing, and was treated for vertigo and tinnitus. He received \$12,000 in general damages.
- In *B.E.S v MacDougall*, 2018 BCSC 2138, a youth in custody was a victim of a brutal sexual assault by adult inmates during a “scared straight” tour of an adult facility in the 1970’s. The court awarded \$150,000 in non-pecuniary damages.
- In *Adams v Canada (Attorney General)*, 2015 ABQB 527, the plaintiff was punched and kicked in the head. He suffered serious traumatic brain injuries. He was in a coma for a month and hospitalized for 5 months. He required several surgeries. He was left with long-term neurologic issues and motor dysfunction. The court found no liability but assessed the appropriate general damage award was \$130,000.

[67] None of these cases involve injuries similar to those suffered by Mr. Clillie. I find the case of *Sweeney v British Columbia*, 2018 BCSC 1832, more helpful. Mr. Sweeney suffered a concussion, a head laceration in addition to the worsening of a shoulder injury. He recovered quickly from the head injuries but was left with permanent damage of the shoulder. The decision reviews damage awards in several cases of head injuries, including concussions. The court awarded \$70,000 in non-pecuniary damages.

[68] Based on these precedents, I agree with the GNWT that the appropriate range of non-pecuniary damages for injuries such as those suffered by Mr. Clillie is between \$10,000 and \$25,000. Had I found the GNWT liable, I would have awarded \$20,000 in general damages.

CONCLUSION

[69] There is no doubt Mr. Clillie suffered damages because of Mr. Bard’s violent assault. However, following Mr. Bard’s threat, the response of reasonably prudent corrections officials would not have prevented this attack. As a result, the GNWT is not liable for Mr. Clillie’s loss.

[70] I make the following orders:

- a. I dismiss the claim against the Commissioner of the Northwest Territories.

- b. The parties asked for an opportunity to address costs in due course. They may contact the Registry to schedule a hearing.

Annie Piché
J.S.C.

Dated at Yellowknife, NT, this
25th day of November 2024

Counsel for Plaintiff: Alan R. Regel, Cooper Regel LLP

Counsel for Defendant the Commissioner of the Northwest Territories:
Peter D. Gibson, Field Law

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

JUSTIN GERALD CLILLIE

Plaintiff

-and-

JASON MARK BARD and THE COMMISSIONER
OF THE NORTHWEST TERRITORIES

Defendants

**MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE ANNIE PICHÉ**
