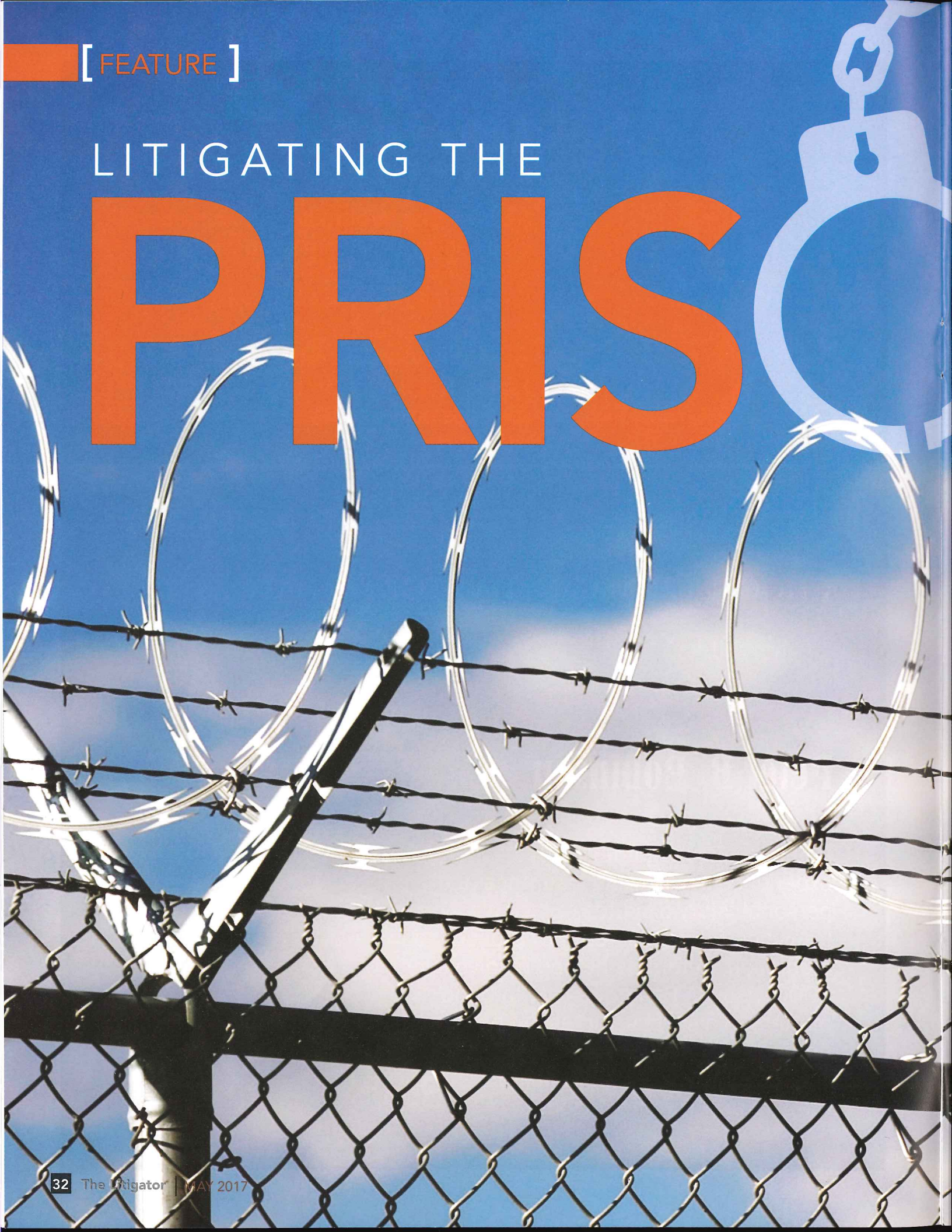
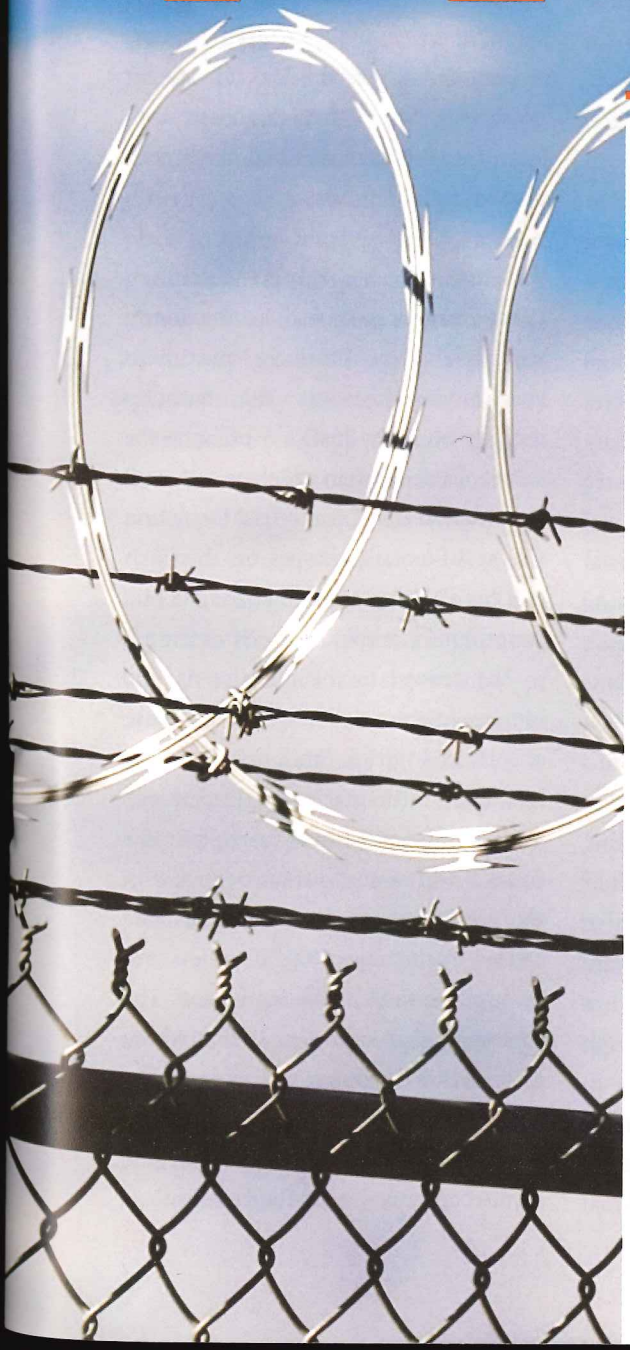
[ FEATURE ]

# LITIGATING THE PRISO



BY NEIL WILSON

# N INJURY CASE



Prison is obviously not a place anyone wants to be. Aside from the deprivation of liberty and poor living conditions, prisons are dangerous. But we should not accept that inmates will be unsafe as a fact of life. The security of Canadian prisons is to a large extent determined by the steps prisons, and those who work in them, take to create a safe environment. Tort law does and should recognize this by holding prisons accountable where they have fallen short.

It is now well-established that prisons owe a duty of care to persons in their custody to take reasonable care for their safety.[1] While courts have recognized that this duty must be considered in the correctional context where violence is often a fact of life, this does mean that the test is elevated to excuse negligent institutional conduct. The duty is a duty to protect from foreseeable danger.[2]

The ways this duty plays out in practice are manifold. Claims for prison injuries can arise in any number of ways: assault by a fellow inmate, injuries from faulty facilities, or damages incurred as a result of a wrongful imprisonment. Claims also arise against a wide range of institutions: provincial jails holding accused persons awaiting trial; federal penitentiaries

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housing persons serving sentences over two years; police forces holding persons following arrest; or immigration holding facilities for immigration detainees. This article aims to serve as a practical guide and review of the law on prison injury claims.

## Limitation and Notice Periods

If you are suing a provincial institution, prior to issuing a claim the plaintiff must provide 60 days notice pursuant to s. 7(1) of the *Proceedings Against the Crown Act (PACA)* by serving notice on the Crown Law Office (Civil). If this notice is not provided, the claim will be a nullity and will be dismissed. If you are faced with an upcoming limitation period that will expire during the notice period, the limitation period will be extended until seven days following the end of the notice period under s. 7(2) of *PACA*.

Under s. 5 of *PACA*, if your claim involves the breach of duties relating to "ownership, occupation, possession or control of property," the notice under s. 7(1) must be served within 10 days after the claim arises. The Court of Appeal has held that an Accident/Injury Report filed with the prison by an inmate and containing the particulars of the incident is sufficient to fulfill the notice requirement.[3]

## Policy Versus Operational Decisions

As a general rule, public authorities cannot be held liable in negligence for policy decisions but can be liable for operational decisions. Policy decisions are those that involve social, political and economic factors whereas operational decisions involve the implementation of policies or are made based on administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[4] In the context of correctional institutions, the policy goals that must be balanced include rehabilitation, security, allocation of resources and labour relations.

Understanding the interplay between policy and operational decisions in the context of a prison is essential to understanding what parts, if any, of a defendant's conduct are justiciable in a tort action. Generally, policy decisions will be those made by the Correctional Service of Canada (CSC), (for federal inmates serving a sentence of two years or more), or by the Ontario Ministry of Community Safety and Correctional Services (MCSCS), (for provincial inmates awaiting trial or serving a sentence of less than two years). Local decisions made by institutions themselves are more likely to be operational in nature.

Both CSC and MCSCS have detailed written policies governing correctional institutions under their control. CSC's policies take the form of Commissioner's Directives and are available online. MCSCS polices are not public but should be requested through the documentary discovery process. In addition, institutions may have local policies or "standing orders" applicable only to that institution. Correctional policies have been recognized as relevant and important evidence in determining the appropriate standard of care.[5]

In the context of correctional institutions, decisions such as camera surveillance and staffing levels have been recognized as non-justiciable policy decisions (facility layout has recently been described as "arguably" a question of policy by the Ontario Court of Appeal).[6] Conversely, decisions such as inmate transfers, supervision in a particular case, and classification have been held to be operational decisions.[7] The absence of set policies or practices can itself amount to a breach of the standard of care, as occurred in *Carr v. Canada*,[8] where the lack of any set policy for phone use, combined with lack of surveillance, resulted in a breach of the standard of care.

## Inmate-on-Inmate Assaults

What happens when a maximum security facility produces maximum insecurity? This was the question recently posed by Justice Morgan at the outset of a decision in which he acquitted an inmate at the Toronto East Detention Centre of assault charges on the basis that his stabbing of another inmate in a prison brawl amounted to self-defence.[9]

The answer to the question is that inmates get hurt. A significant cause of prison injuries (and prison injury lawsuits) in Ontario is inmate-on-inmate violence. In these cases plaintiff's counsel will almost always be met with the argument that the injuries are caused by the acts of the assaulters and through no fault of the institution. The answer to that argument is that where a correctional institution is able to, but fails to, prevent such acts, it is right that it should be held responsible for the severe consequences to the victims.

Inmate assault cases generally fall into two intersecting categories: cases involving (1) negligent classification and housing decisions for dangerous or incompatible inmates, and (2) failure to supervise. Plaintiffs have had much greater success with the first. As a general proposition, the focus of the first category is often standard of care while the focus of the second is causation.

### *Admission, Classifications and Transfers*

Many of the liability issues that arise in inmate assault cases relate to decisions regarding; where in the correctional system, or in a specific institution, an inmate will be housed. This issue arises both with respect to compatibility of specific individuals as well as more generally in determining the appropriate place to house inmates based on their profiles and factors such as vulnerability, history of violence, gang affiliations and correctional records. The appropriateness of placement decisions should be considered from the perspective of both the placement of the plaintiff and the placement of the assailant.

The duty to supervise the level of risk inmates may pose to one another is not limited to admission but is a continuous one that extends to supervision of inmate interactions and institution-wide conflicts. For example, in *McLellan v. Canada (Attorney General)*,[10] the prison was found to be negligent in failing to identify pre-indicators of violence including that the two inmates did not get along and that the younger inmate was inappropriately disrespectful of the older in a context where there was known to be tension between older and younger inmates.

A recent example of liability based on inmate incompatibility is *Walters v. Ontario*, a trial decision upheld by the Ontario Court of Appeal.[11] The plaintiff in *Walters* was the victim of a brutal attack which resulted in a lengthy hospital admission and ultimately left him hemiplegic. The basis for liability was not that correctional staff had failed to intervene to prevent the assault (the plaintiff's unconscious body was not found until sometime after the assault) but, rather, the placement of the plaintiff in a unit together with an extremely violent man from a rival gang.

The court in *Walters* concluded that Ontario's practice of attempting to balance the population of rival gang members across the institution to avoid a concentration of gang members – and the focus on this balancing at the expense of other considerations – led to a failure to consider inmate incompatibility in general. Importantly, the fact that neither the victim nor the attacker had "non-association" alerts for each other on their inmate profiles did not relieve the province of liability.

Liability may also flow from the placement of a dangerous inmate in a low security correctional setting. For example, in *Pete v. British Columbia (Attorney General)*,[12] the trial judge held that it was negligent of the jail to accept a violent offender into an institution with low security and supervision. The Court of Appeal agreed.

### *Failure to Supervise or Intervene*

Claims may also arise from a failure to supervise or to intervene during an assault. The essence of this type of claim is well-expressed by Justice Morgan's observations in *R. v. Short*:

> *It is certainly the case that any inmate who is the target of an attack would have to fend for himself; relying on the C.O.'s to intervene appears to be a formula for a trip to the hospital or the morgue.*[13]

The greatest difficulty in this type of case will often be causation rather than standard of care. Establishing liability in cases based on a failure to intervene in an attack is challenging because it will be necessary to show that timely intervention in what may be a very sudden attack was possible. Where an attack is brief, unpredictable and brazen, it will be hard to show that there is anything the institution could reasonably have done to prevent the attack. Many inmate assault cases have failed on this basis.[14]

Correctional officers are, however, expected to use their familiarity with the institution and inmate behaviour to identify the risk of an assault and to take appropriate steps where a risk is identified. For example, in *Squires v. Canada (Attorney General)*,[15] the plaintiff was successful in a case where correctional officers failed to act and decided to simply monitor the situation although they sensed that the plaintiff was at risk of being assaulted.

Tied in to the question of monitoring and intervention is the question whether the physical environment is designed or maintained in a manner that prevents effective supervision of inmates. Assaults frequently occur in areas with decreased visibility or camera coverage. While video cameras are ubiquitous in correctional institutions, they are often not permanently monitored. In *Adams v. Canada (Attorney General)*,[16] the plaintiff unsuccessfully sought to establish liability on the basis that the placement of a bush and poor lighting in the area

where he was assaulted, led to the severe beating he suffered.

Conversely, an attack being planned and executed in a manner specifically designed to exploit shortcomings in supervision may be sufficient to support liability. In *Row v. HMTQ*,[17] a predictable period of unsupervised time during shift changes was found to be negligent and a cause of the injuries suffered by the plaintiff.

### The *"Con-Code" – When Asking for Help Is Not a Possibility*

In cases involving an inmate-on-inmate assault, you may be faced with an argument that the victim of the assault knew or ought to have known of the risk of the assault and should have alerted correctional staff in order that they could take appropriate action. While this reasoning has a certain logical appeal, the reality of prison life is that reporting to correctional staff can be dangerous in and of itself. The so-called "con-code" against reporting to authorities has been explained as follows:

> The "con code" contains a complex set of rules, the most important of which are that an inmate keeps his mouth shut at all times and never steals from fellow inmates. Failure to adhere to the code results in beating or being killed, particularly if you have "ratted", and falling to the bottom of the hierarchy. Most inmates at the bottom of the hierarchy are in protective custody, mainly for their own protection from fellow inmates. Once an inmate is placed in protective custody, he is viewed by fellow inmates as the equivalent to a pedophile or a "rat" and it is highly unlikely that he could return to the general population without incident.[18]

The existence of this code provides an understandable explanation of why an inmate who may be at risk would not want to make it a sure thing by coming forward to correctional officers. This danger has been recognized in a number of decisions and considered when assessing the degree of contributory negligence a victim of an inmate-on-inmate assault will bear as a result of not coming forward with information to correctional officers (for example, contributory negligence was assessed at 15% in *Walters* and 30% in *Squires*). The toxic effect of the "con-code" on witness testimony has also been acknowledged in numerous cases, including most recently by the Ontario Court of Appeal in *Walters*.[19]

## Statutory Liability

Prisons are subject to the provisions of the *Occupiers' Liability Act* and its familiar codified duty to take care that people entering the premises are safe. The occupiers' duty supplements and does not limit other duties that are owed including common law duties related to prison safety, or potentially higher statutory duties.[20]

Potentially higher statutory duties include, for federal institutions, the obligation under s. 70 of the *Corrections and Conditional Release Act* to take all reasonable steps to ensure that penitentiaries are "safe, healthful and free of practices that undermine a person's sense of personal dignity".

Liability has arisen in a broad range of circumstances including unsafe working conditions on a prison farm,[21] slip and falls arising from outdoor winter maintenance,[22] and slip and falls arising from water leaks or tripping hazards.[23]

## Infringement of *Charter* Rights

Damages may be available for breaches of the *Canadian Charter of Rights and Freedoms* in accordance with the Supreme Court's decision in *Ward v. Vancouver*. This head of damages should be carefully considered in cases involving wrongful imprisonment, violations of the right to security of the person under s. 7, or allegations of cruel or unusual treatment or punishment under s. 12. *Charter* violations cannot be excused by citing institutional lack of resources and, accordingly, are likely to be justiciable even if they arise from actions which might in the negligence context be deemed policy decisions.[24]

The four-part test for *Charter* damages in *Ward* requires courts to consider (1) the existence of a *Charter* breach; (2) whether damages serve the functional objectives of the *Charter* (3) any countervailing considerations; and (4) quantum.[25] While in *Ward* the award for an improper strip search of the plaintiff was only $5,000, as the case law in this area develops there is strong potential for more meaningful awards of *Charter* damages in situations where traditional heads of damages are inadequate to sanction state conduct. For example, in *Henry v. British Columbia* a notorious case of wrongful conviction resulted in a *Charter* damages award of $7.5 million.[26] A useful collection of cases in which these claims have failed and succeeded can be found in W.H. Charles' book *Understanding Charter Damages: The Judicial Evolution of a Charter Remedy*.[27]

The availability of significant *Charter* damages for rights violations behind

prison walls recently reached a new high-water mark in *Ogiamien v. Ontario*,[28] a case involving administrative lockdowns at the Maplehurst Correctional Complex. Damages of $60,000 and $25,000 in *Charter* damages were made in favour of prisoners who were subjected to frequent and unpredictable lockdowns caused in large part by staff shortages at Maplehurst. The decision is currently being appealed.

In addition to *Charter* damages, under s. 46.1 of the *Human Rights Code* a claim for the infringement of rights protected under the *Code* may be brought as part of a civil proceedings if brought together with another cause of action.

## Duty of Care to Intoxicated Person

The duty of care of police or correctional officers with custody of an intoxicated person has been described as a duty to exercise "the greatest care"[29] – i.e. a duty to take special care to reflect the person's impaired state of mind. This expanded duty also extends to someone in alcohol or presumably drug withdrawal if the withdrawal is known or ought to have been known to the officer.[30]

## Coroner's Inquests

If a person dies of non-natural causes while in a correctional institution, an inquest is mandatory under s. 10(4.3) of the *Coroners Act*. If you act for the deceased's family members you may want to consider seeking standing at the inquest. A coroners' inquest, conducted by a coroner and a five-person jury, will seek to determine how the deceased died and will make recommendations to prevent deaths under similar circumstances in the future. The evidence and findings of a coroner's inquest are not binding or admissible in any subsequent civil proceedings, but the inquest, and in particular the jury's recommendations, are invaluable in encouraging positive change beyond what a civil action is likely to accomplish.

## Conclusion

It is likely that the tension between the view that danger in prison is unavoidable and recognition that correctional institutions play a determinative role in ensuring the safety of the prison environment will continue to define prison injury cases. Despite promising developments in the law, particularly in the standard of care relating to inmate assaults and in *Charter* damages, significant hurdles to liability remain across all classes of prison injuries. For a more comprehensive review of these obstacles and a convincing argument that the bar has been set too high, see Iftene, Hanson and Manson's article *Tort Claims and Canadian Prisoners.*[31]

Whatever their challenges, litigating these cases remains important and helps fulfill the goals of personal injury practice: making our society a safer place by encouraging meaningful institutional change and providing access to justice for those who might otherwise be unable to obtain compensation for their injuries.

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## NOTES

[1] *R. v. MacLean*, [1973] S.C.R. 2.

[2] At least one court has rejected an attempt to "ratchet up" this test by adding additional qualifiers to the nature of the danger which engages the duty: *McLellan v. Canada (Attorney General)*, 2005 ABQB 486, at paras. 35-36.

[3] *Latta v. Ontario*, [2002] O.J. No. 4106 (C.A.).

[4] *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, at para. 38.

[5] *Pete v. British Columbia (Attorney General)*, 2005 BCCA 449, at para. 30. See also, more generally, *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 29.

[6] *Adams v. Canada (Attorney General)*, 2015 ABQB 527, at paras. 57, *Walters v. Ontario*, 2017 ONCA 53, at para. 42.

[7] *Pete v. British Columbia*, 2005 BCCA 449, at para. 12.

[8] [2009] F.C.J. No. 769 (T.D.), at para. 48.

[9] *R v. Short*, 2016 ONSC 4594.

[10] 2005 ABQB 486.

[11] 2015 ONSC 4855, aff'd 2017 ONCA 53.

[12] 2005 BCCA 449.

[13] *R. v. Short*, 2016 ONSC 4594, at para. 22.

[14] See for example *Hamilton v. Canada (Solicitor General)*, [2001] O.J. No. 3262 (S.C.J.), *Demosthenis v Saari*, [1997] BCJ No 53 (S.C.), *Corner v. Canada*, [2002] O.J. No. 4887 (S.C.J.); *Wiebe v. Canada (Attorney General)*, 2006 MBCA 159.

[15] [2002] N.B.J. No. 330 (Q.B.).

[16] 2015 ABQB 527.

[17] 2006 BCSC 199.

[18] *Coumont v. Canada (Correctional Services)*, [1994] S.C.J. No. 655, as cited in *Walters v. Ontario*, 2015 ONSC 4855, at para. 85.

[19] At para. 63.

[20] *Miller v. Canada (Attorney General)*, 2015 ONSC 669, at paras. 23-24.

[21] *R. v. MacLean*, [1973] S.C.R. 2.

[22] *Miller v. Canada (Attorney General)*, 2015 ONSC 669.

[23] *Coulter v. Canada*, [1994] F.C.J. No. 89 (T.D.), *Latta v. Ontario*, [2005] O.J. No. 4736 (C.A.).

[24] *Ogiamien v. Ontario*, 2016 ONSC 3080, at para. 260.

[25] *Ward*, at paras. 23-57.

[26] *Henry v. British Columbia*, 2016 BCSC 1038.

[27] Irwin Law, 2016.

[28] 2016 ONSC 3080.

[29] *Socha (Public Trustee of) v. Millar*, [1994] O.J. No. 1223 (Gen. Div.), at paras. 64-68.

[30] at para. 69.

[31] (2014) 39:2 Queen's Law Journal 655.