

# Tort Claims and Canadian Prisoners

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*Prisoners can be tragically wronged by the prison system, as highlighted by the recent Ashley Smith case, and tort actions have proven to be a problematic form of recourse for prisoners. Negligence claims made by prisoners face obstacles at every stage of the analysis: duty of care, standard of care, breach and causation. The authors first offer an overview of the tort litigation that has come out of Canadian prisons, with a focus on health care-based negligence claims, on risks arising from other prisoners and on the risk of self-harm. They find that these claims have been unevenly resolved when the plaintiff is a prisoner. Secondly, the paper considers whether negligence actions for prisoners can be expanded by using “conditions of confinement” standards to furnish a novel duty of care. The authors outline several impediments to the imposition of such a duty. They note that Canadian courts are reluctant to impose duties on public actors, particularly when the conduct in question walks the line between operational and policy-oriented action. Because imposing a duty of care with regard to conditions of confinement would require the courts to make orders with heavy funding implications, courts would in the authors’ view be unlikely to adopt such a duty. Nonetheless, if tort litigation can be made more accessible to prisoners, the end result may be the improved enforcement of their entitlements and the betterment of internal prison conditions.*

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## Introduction

Prisoners live in an environment totally controlled by perimeter architecture, internal security and surveillance, disciplinary rules and official discretion. Inevitably, there will be conflicts, disagreements, grievances, assaults and injuries. The past fifty years of Canadian prison law can be characterized more by the pursuit of appropriate remedies than by the development of substantive law and legal norms. This story of remedies has had its ups and downs. Positive steps have included the broadening of the availability of *certiorari* and the acceptance of a general duty of fairness in *Martineau v Matsqui Institution (No 2)* in 1979,<sup>1</sup> the entrenchment of the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> the modernization of *habeas corpus* in the *Miller* trilogy,<sup>3</sup> the new *Corrections and Conditional Release Act (CCRA)*,<sup>4</sup> the provision of legal aid for prisoners in most Canadian jurisdictions, and the evolution of the role of the Correctional Investigator. On the downside, we have seen continuing challenges to the scope of *habeas corpus*, a persistently dysfunctional internal grievance system and a general reduction in the availability of legal aid.

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1. (1979), [1980] 1 SCR 602, 15 CR (3d) 1.

2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3. *R v Miller*, [1985] 2 SCR 613, 52 OR (2d) 585; *Cardinal v Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44; *Morin v Canada (National Special Handling Unit Review Committee)*, [1985] 2 SCR 662, 24 DLR (4th) 71. The trilogy formed the basis for more recent clarification of the role of *habeas corpus*. See *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809.

4. SC 1992, c 20 [CCRA].

Significantly, this remedy story has occurred within a national context in which only a small prison law bar has experience with prison issues. Although both prison monitoring mechanisms and remedial avenues have improved in recent decades, legitimate grievances and cases of mistreatment still go unresolved and unaddressed. One reason might simply be that only a tiny portion of the bar has had any experience with prison matters. Another reason might be the high threshold of review that courts regularly apply to legal challenges brought by prisoners. The limited role of “cruel and unusual punishment claims” under section 12 of the *Charter* is an example of this,<sup>5</sup> as is the degree of deference that Canadian administrative law affords to official decision makers.<sup>6</sup> Even constitutional challenges have been exempted from a correctness standard, forcing courts to defer even more to administrative decisions.<sup>7</sup>

Prisoners rarely use private law to bring civil claims. Such claims, when made, often settle without judicial scrutiny. When cases go to trial, they are typically fact-driven, usually with little analytical attention paid to the elements of the substantive claims. Prisoners have brought some successful claims for intentional torts such as battery,<sup>8</sup> assault<sup>9</sup> and false imprisonment.<sup>10</sup> Actions in negligence are expanding in number but are still largely unsuccessful.

The purpose of this paper is to ascertain the utility of tort law as a remedy for prisoners. We focus on negligence, which provides a remedy for unintended harm or harm caused by careless conduct. The plaintiff must show that there was a duty of care owed to him or her, and that the

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5. *Supra* note 2, s 12. See Allan Manson “Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences” (2012) 57 Sup Ct L Rev 173 at 174–86.

6. See *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

7. See *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

8. See *Abbott v Canada* (1993), 64 FTR 81, 41 ACWS (3d) 753; *Proctor v Canada (Attorney General)* (2002), 111 ACWS (3d) 713, [2002] OTR 79 (Sup Ct) (motion for summary judgment dismissed, case settled outside court).

9. See *Abbott v Canada*, *supra* note 8 (assault); *British Columbia v Zastowny*, 2008 SCC 4, [2008] 1 SCR 27 (sexual assault).

10. See *Hermiz v Canada*, 2013 FC 288, 228 ACWS (3d) 585 (Prothonotary), rev'd 2013 FC 764, 230 ACWS (3d) 292 (detaining prisoners past their release date or unjustly holding a person in segregation); *Abbott v Canada*, *supra* note 8; *R v Hill* (1997), 148 DLR (4th) 337, 36 BCLR (3d) 211 (CA); *Brandon v Canada (Correctional Service)* (1996), 131 DLR (4th) 761, 105 FTR 243; *Canada (Attorney General) v McArthur*, 2010 SCC 63, [2010] 3 SCR 626.

defendant breached the standard of care by failing to do what a reasonable person of “ordinary intelligence and prudence”<sup>11</sup> would have done in those particular circumstances. The plaintiff must then prove causation by showing that “but for” the defendant’s negligence, his or her injury would not have occurred<sup>12</sup> and that this injury was not too remote. If there is no loss, then there is no tort—negligence is not actionable per se.<sup>13</sup>

We approach the task of surveying private law tort actions for prisoners via a cross-jurisdictional review of the Canadian case law. We begin by reviewing the nature of the duty owed by corrections authorities and their staff to prisoners. We consider whether the requisite standard of care is being met in prisons regarding medical treatment, the prevention of self-harm and the risk posed to prisoners by other prisoners. Finally, we consider whether negligence liability could be expanded to improve conditions of confinement more generally and we observe that there are substantial obstacles to the creation of a novel duty of care toward prisoners in the Canadian correctional system.

## I. The Duty of Care Owed to Prisoners

To impose tort liability, a court must first find that the defendant owed a general duty of care to a class of persons of which the plaintiff is a member, and that the defendant therefore owed a duty toward the individual plaintiff. In the prison context, negligence actions typically focus on the duty owed by a public authority and its employees to an individual plaintiff, the prisoner. The authoritative test for the duty of care was established by the Supreme Court of Canada in *Cooper v Hobart*,<sup>14</sup> following the House of Lords decision in *Anns v Merton London Borough*

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11. *Arland v Taylor*, [1955] OR 131 at para 29, 3 DLR 358 (CA).

12. *Clements v Clements*, 2012 SCC 32, [2012] 2 SCR 181, rev’g (2010), 327 DLR (4th) 1, 298 BCAC 56.

13. The final step of negligence analysis requires the plaintiff to prove that the loss was not too remote. This element is not fully addressed in this paper, but it is worth noting that remoteness may bar recovery when prisoners engage in self-injurious behaviour—courts have found that suicide is by definition “too remote” a consequence. See *Wright v Davidson* (1992), 64 BCLR (2d) 113, 88 DLR (4th) 698 (CA).

14. 2001 SCC 79, [2001] 3 SCR 537. See also *Childs v Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643.

*Council*.<sup>15</sup> A duty is owed where the harm was the reasonably foreseeable consequence of the defendant's act, where there was a sufficient relationship of proximity between the parties and where there are no residual policy considerations that negate the imposition of a duty. Courts are reluctant to impose a duty of care on public authorities, and tort actions will often founder where there is insufficient proximity between the government and an individual, or on policy grounds where the imposition of a private law duty will interfere with the public authority's obligation to provide good governance to the general public. A further limit is that governments will only be held liable for operational decisions and are immune from suit for policy decisions at a higher level of governmental authority.<sup>16</sup> Public authorities will, however, owe a duty to private parties where there is a special relationship of proximity between the government and a particular individual.<sup>17</sup>

These potential limits present no problem where there is an established duty of care, but might prevent the recognition of a novel duty. As such, they will be explored in more detail at the end of this paper, where we propose that conditions of confinement might form the basis for a new claim in negligence.

A prison's duty to provide a safe environment is well established in the case law. Both legislation and internal directives confirm that Correctional Service Canada (CSC) must provide federal prisoners with safe premises. For instance, section 70 from the *CCRA* establishes that: "The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of prisoners and the working conditions of staff members are safe, healthful and free of

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15. (1977), [1978] AC 728 HL (Eng).

16. The policy/operational distinction was authoritatively set out by the Supreme Court of Canada. See *Just v British Columbia*, [1989] 2 SCR 1228, 64 DLR (4th) 689 [cited to SCR]. This test was later incorporated into the *Anns/Cooper* test as part of the broader residual policy concerns that might negate the duty of care. See *Cooper v Hobart*, *supra* note 14.

17. Courts will more likely find a special relationship when certain conditions are met. See *Fallowka v Pinkerton's of Canada*, 2010 SCC 5, [2010] 1 SCR 132 [*Fallowka*] (known risk to a group of people); *Heaslip Estate v Mansfield Ski Club*, 2009 ONCA 594, 96 OR (3d) 401 (direct communication between plaintiff and defendant).

practices that undermine a person's sense of personal dignity."<sup>18</sup> Prisoners are under the physical control and legal responsibility of correctional systems and they are dependent on them for the necessities of life. There have only been a few reported decisions based on a failure to provide safe premises, probably because such claims are often settled out of court. In *Chilton v Canada*, CSC admitted its liability for the physical harm suffered by a prisoner working in an industrial woodworking shop in the penitentiary, and the plaintiff was awarded \$2,500 in damages.<sup>19</sup> Such cases are rarely matters of establishing liability, but rather focus on the damages award.<sup>20</sup>

Undoubtedly, prisons can be dangerous places. Prison officials exercise control, and it is within their power to make decisions and take steps to protect prisoners from each other and from themselves.<sup>21</sup> Federally, the *CCRA* clearly enforces the common law and statutory duty to control the behaviour of prisoners and to protect them against harm.<sup>22</sup> In New Brunswick, a duty to control behaviour was found when twenty-one

18. *Supra* note 4, s 70. See *Corrections and Conditional Release Regulations*, SOR/92-602 (“[t]he Service shall, to ensure a safe and healthful penitentiary environment, ensure that all applicable federal health, safety, sanitation and fire laws are complied with in each penitentiary and that every penitentiary is inspected regularly by the persons responsible for enforcing those laws”, s 83(1)).

19. 2008 FC 1047, [2008] 336 FTR 308, leave to appeal to SCC refused, 33705 (September 16, 2010).

20. See also *Sarvanis v Canada* (1998), 156 FTR 265, 82 ACWS (3d) 897 (CSC denied liability for an injury suffered by the plaintiff while working in the penitentiary's hay barn, but the Court dismissed the government's motion for summary judgment). This decision was appealed to the SCC on a related question of whether the plaintiff's suit in tort should be barred by the concurrent recovery of disability benefits under the Canada Pension Plan. For the Court, Iacobucci J once again denied the motion for summary judgment, finding that this was not double recovery and that the tort law claim could proceed. See *Sarvanis v Canada*, 2002 SCC 28, [2002] 1 SCR 921. There is only one case where a claim in negligence for an accident sustained by a prisoner while working in a penitentiary's garage was dismissed as “manifestly without foundation”. *Beauchemin v Canada*, [1979] FCJ No 901 (QL) at para 6 (TD).

21. See *CCRA*, *supra* note 4, ss 5, 69, 70, 76, 86.

22. See *Home Office v Dorset Yacht Co*, [1970] AC 1004 HL (Eng) (first case to institute a duty to control the behaviour of prisoners in order to not harm third parties). The effect of a statutory duty on a finding of a common law duty of care is an interesting question and currently beyond the scope of this paper. In Canada, there is no tort of statutory breach, but courts are increasingly willing to ground a common law duty of public authorities on the presence of a co-existent statutory duty.

prisoners were killed in a fire set by another prisoner.<sup>23</sup> *Funk Estate v Clapp* similarly held that there was a duty to control a prisoner in order to protect him from himself.<sup>24</sup> More recently, *Wiebe v Canada (Attorney General)* held that there was a duty to supervise a prisoner who assaulted Wiebe, the plaintiff.<sup>25</sup> Wiebe was incarcerated in a minimum-security federal facility and was living in a house with the prisoner who eventually assaulted him. He told several correctional officers that tensions were building between himself and the other prisoner but they did not report his concerns. Ultimately, the other prisoner beat Wiebe severely. The trial judge found CSC liable in negligence for failing to supervise, but this decision was reversed in the somewhat cryptic Manitoba Court of Appeal decision. For a unanimous court, Monnin JA held that, notwithstanding the trial judge's finding that there was a well-established duty of care owed, CSC was not liable because the occurrence was not foreseeable.<sup>26</sup> Monnin JA did not indicate whether this lack of foreseeability precluded a duty or whether this was a matter of causation.<sup>27</sup>

In other cases, the duty to protect prisoners from harm has been framed as an "obligation to take reasonable steps to intervene and protect the at-risk inmate",<sup>28</sup> a "duty to keep [the prisoner] safe and . . . to promptly come to his rescue",<sup>29</sup> a duty to "attend to the safety of the inmates",<sup>30</sup> a "duty to take reasonable care of inmates",<sup>31</sup> an "obligation

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23. See *Williams et al v Saint John, New Brunswick and Chubb Industries Ltd* (1985), 34 CCLT 299, 66 NBR (2d) 10 (CA).

24. 54 DLR (4th) 512 at 519, [1989] BCWLD 102 (CA).

25. 2006 MBCA 159, [2007] 2 WWR 598 [*Wiebe*], rev'g 2006 MBQB 5 (available on QL), leave to appeal to SCC refused, 31860 (10 May 2007).

26. *Ibid.*

27. *Ibid.* Justice Monnin also found that the prisoner's suit failed on causation, on the grounds that no action by the prison officials or guards could have prevented the attack. He further held that the trial judge erred in applying the material contribution test rather than the "but for" test. *Ibid.*

28. *Carr v Canada*, 2008 FC 1416 at para 23, 339 FTR 50.

29. *Guitare v Canada* (2002), 224 FTR 272 at para 1, 118 ACWS (3d) 310.

30. *Chilton v Canada*, *supra* note 19 at para 55. See *Miclash v Canada*, 2003 FCT 113, 227 FTR 116.

31. *Scott v Canada*, [1985] FCJ No 35 (QL) (TD).

to take reasonable steps to protect an inmate from fellow inmates”,<sup>32</sup> a “duty to ensure the safety of the inmates”,<sup>33</sup> an obligation “not to act in a fashion that put the [prisoner] at risk of harm that was reasonably foreseeable”,<sup>34</sup> and a duty to “protect . . . from foreseeable risks”.<sup>35</sup> A statutory duty exists to ensure that the penitentiary is “safe, healthful and free of practices that undermine a person’s sense of personal dignity”.<sup>36</sup> In *Maljkovich v Canada*, the Federal Court held that there are statutory and common law duties of care to “incarcerate [the prisoner] in conditions that are healthful and do not cause [the prisoner] to suffer physical discomfort and upset”.<sup>37</sup> Other duties recognized by the case law relate to the conduct of investigations and mandated reviews, to record keeping and to the providing of information. For example, courts have held that there is a duty of care owed when investigating a disciplinary offence<sup>38</sup> and that there is a duty to review a segregation order on a timely basis.<sup>39</sup> Conversely, it has been held that there is no duty “to advise [the prisoner] that he should not tell other inmates about his transfer”.<sup>40</sup> Similarly, in *Farrows-Shelley v Canada*, the Court held that there was no duty to warn a prisoner that his double-bunked cellmate was prone to violence and infected with HIV and hepatitis C, as there was “no foreseeable danger to him”.<sup>41</sup>

To summarize, the duty of care owed by prisons to prisoners is a recognized category in private law, particularly in relation to the safety of

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32. *Coumont v Canada (Correctional Services)* (1994), 77 FTR 253 at para 38, 47 ACWS (3d) 1196 [Coumont]. See *Hodgin v Canada (Solicitor General)* (1998), 201 NBR (2d) 279, 514 APR 279 (TD) [Hodgin].

33. *Légère v Canada* (1999), 159 FTR 87 at para 5, 87 ACWS (3d) 603.

34. *Carlson v Canada* (1998), 80 ACWS (3d) 316 at para 23 (available on QL) (FCTD). See *Wild v Canada (Correctional Services)*, 2004 FC 942, 256 FTR 240; *Bastarache v Canada*, 2003 FC 1463, 243 FTR 274; *Timm v Canada* (1964), [1965] 1 Ex CR 174 (available on QL); *Iwanicki v Ontario (Minister of Correctional Services)*, 45 WCB (2d) 600, [2000] OTR 181 (Sup Ct) [Iwanicki].

35. *Pete v Axworthy*, 2004 BCSC 1337 at para 62, 34 BCLR (4th) 146. See *Russell v Canada*, 2000 BCSC 650 at para 6 (available on QL).

36. *CCRA*, *supra* note 4, s 70. See *Curry v Canada*, 2006 FC 63, 145 ACWS (3d) 620.

37. 2005 FC 1398 at para 19, 281 FTR 227. See *CCRA*, *supra* note 4, s 70.

38. See *Hermiz v Canada*, *supra* note 10.

39. See *R v Hill*, *supra* note 10 at para 17.

40. *Batty v Logan*, [2000] OTC 53 at para 17, 94 ACWS (3d) 657 (Sup Ct).

41. 2003 FCT 415 at para 31, 232 FTR 77.



physical premises and the provision of the necessities of life. A common law duty has also frequently been imposed to protect prisoners from self-harm and from harm by other prisoners. As we will see below, tort claims for such harm frequently fail at the standard of care and causation stages.

## II. Medical Care in Prisons

Health care in federal penitentiaries is provided by CSC and the health of prisoners is its responsibility. Federally, the *CCRA* states that CSC “shall provide every inmate with essential health care” and “shall conform to professionally accepted standards”.<sup>42</sup> Three sets of defendants could potentially be held responsible for negligence in prison medical care: the correctional system, prison staff and contract health professionals not employed by CSC. We will discuss each in turn.

### A. The Correctional System

Courts have found a “duty to provide medical care,”<sup>43</sup> a duty to provide “adequate medical care and attention for . . . health and well-being during . . . detention,”<sup>44</sup> and a duty to inquire about the inmate’s health.<sup>45</sup> In *Lavoie v Canada*, the Court stated that “the duty to provide medical care is a requirement placed on correctional services as part of their general duty of care”, but that this did not include a “duty to consult in such matters as hiring medical services”.<sup>46</sup> In the federal penitentiary system, health care is also thoroughly regulated by directives that set out the obligations CSC owes prisoners and that establish the standard of care

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42. *Supra* note 4, s 86.

43. *Sutherland v Canada*, 2003 FC 1516 at para 67, [2003] 243 FTR 297; *Levasseur v Canada*, 2004 FC 976 (available on WL Can).

44. *Steele v Ontario*, 1993 CarswellOnt 2686 (WL Can) at para 3 (Ct J (Gen Div)). See also *Swayze v Dajoe*, [2002] OTC 699, 116 ACWS (3d) 781 (Sup Ct).

45. *Lipcsei v Central Saanich (District)*, [1995] 7 WWR 582, 8 BCLR (3d) 325 (SC) [*Lipcsei*].

46. [2008] OJ No 4564 (QL) at para 13 (Sup Ct).

for physical and mental illness.<sup>47</sup> These duties were also recognized in case law prior to the enactment of the *CCRA*.<sup>48</sup>

While most negligence claims will assert carelessness on the part of prison staff (addressed in Part II-B), a prison system may be held liable for failing to ensure that effective medical services are in place. Effective medical services include timely access to health care, adequate record keeping, reporting requirements and supervision of medical staff. A useful comparator is a hospital's responsibility to provide proper instruction and supervision, and to ensure that all contract physicians are qualified and have access to proper facilities, equipment and resources.<sup>49</sup> In other words, these cases involve systems negligence, i.e., systems that are negligently designed or operated, or are unreasonably unsafe.

An obstacle to prison liability is posed by the potential finding that the physicians are independent contractors and the prison is therefore not liable for any negligence on their part.<sup>50</sup> However, we would argue that the existence of a contractual relationship with physicians should not alter the primary duty owed by the correctional system to prisoners. In *Braun Estate v Vaughan*, the Manitoba Court of Appeal held that a hospital's duty is not displaced or altered by the fact that its doctors are independent contractors:

[W]hether the physician is a private physician holding hospital privileges or a salaried employee is of little consequence. In terms of the negligence of the institution, the question is whether there was a duty of care on the hospital, and if so, whether it was breached. The status of the doctor in such circumstances should not matter.<sup>51</sup>

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47. See Correctional Service Canada, Commissioner's Directives, *CD 259: Exposure to Second Hand Smoke*; *CD 800: Health Services*; *CD 803: Consent to Assessment, Treatment and Release of Information*; *CD 821: Management of Infectious Diseases*; *CD 840: Psychological Services*; *CD 843: Management of Prisoner Self-Injurious and Suicidal Behavior*; *CD 850: Mental Health Services* (Ottawa: Corrections Service Canada, 2009–2013) available online: <<http://www.csc-scc.gc.ca>>.

48. See *British Columbia (Attorney General) v Astaforoff* (1983), 6 CCC (3d) 498, 54 BCLR 309 (CA); *R v Hall* (1996), 45 Alta LR (3d) 166, [1997] 4 WWR 390.

49. Ellen I Picard & Gerald B Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3d ed (Toronto: Carswell, 1997) at 367.

50. See *Oswald v Canada* (1997), 126 FTR 281, 69 ACWS (3d) 854 [cited to FTR]; *Hickey v Canada*, 2007 FC 246, 309 FTR 202.

51. (2000), 145 Man R (2d) 35 at para 44, 94 ACWS (3d) 579 (CA).

Similar reasoning should apply to prisons: even in the absence of primary negligence on the part of the correctional system, in our view, prisons ought to be vicariously liable for the torts of health professionals, whether they are employees or contractors. In 1997, in *Oswald v Canada*, the Federal Court rejected this view, holding that even though a surgeon was liable for failing to exercise appropriate professional judgment, CSC had nonetheless fulfilled its duty “by arranging for services of qualified members of the medical and dental professions”.<sup>52</sup> This holding seems inconsistent with the fact that the actual relationship between CSC and physicians more closely resembles an employer-employee relationship in light of the degree of control and supervision that prisons have over many aspects of medical care, including nursing, medication, appointments, follow-up and prison visits. Recent case law in other contexts indicates that vicarious liability will ordinarily be imposed where a worker is subject to employer direction and control, and where the employer is in a better position than the worker to guard against risk, allocate costs and insure against loss.<sup>53</sup> There is no reason why this approach should not apply to prisons as well.

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52. *Supra* note 50 at para 60.

53. See *Douglas v Kinger*, 2008 ONCA 452, [2008] 57 CCLT (3d) 15, leave to appeal to SCC refused, 32787 (11 December 2008). One could also argue that the prison’s obligation to provide health care to prisoners is a non-delegable duty, so that it is not open to them to avoid liability by pointing to the negligence of its subcontractors. See *Lewis (Guardian ad litem of) v British Columbia*, [1997] 3 SCR 1145, [1998] 5 WWR 732, McLachlin J, concurring (the Ministry of Transportation could not escape liability by hiring an independent contractor because they owed a non-delegable duty). This is

a duty not only to take care, but to ensure that care is taken. It is not strict liability, since it requires someone (the independent contractor) to have been negligent. But if it applies, it is no answer for the employer to say, “I was not negligent in hiring or supervising the independent contractor”. The employer is liable for the contractor’s negligence. The employer already has a personal duty at common law or by statute to take reasonable care. The non-delegable duty doctrine adds another obligation—the duty to ensure that the independent contractor also takes reasonable care.

*Ibid* at para 50.

## B. Prison Staff

A prison service will be vicariously liable for the torts of its employees so long as those acts are sufficiently connected to their employment, in the sense that the job creates or enhances the potential risk of tortious conduct.<sup>54</sup> This is particularly likely to be true in prisons where friction and confrontation, coupled with the opportunity for abuse of power, are inherent in the enterprise.<sup>55</sup> There are numerous cases in which prison staff members have been found negligent and the correctional institution found to be vicariously liable.<sup>56</sup> In at least two cases, a breach of the standard of care was found when prison guards failed to send a prisoner whose condition had visibly deteriorated to a doctor.<sup>57</sup> A breach was also found when a prisoner who had been shot by a guard failed to receive medical treatment.<sup>58</sup> In other cases, however, no breach of the duty to provide medical care was found where medical assistance was delayed to the point that the prisoner suffered serious consequences, which have included death or a serious injury.<sup>59</sup>

Failure to respond to medical emergencies is a well-documented problem in prisons. In 2007, the Office of the Correctional Investigator (OCI) stated that two-thirds of medical emergencies in the federal system were not responded to properly<sup>60</sup> and there has been little or no

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54. See *Bazley v Curry*, [1999] 2 SCR 534, 174 DLR (4th) 145.

55. See *ibid.*

56. See *Benard v Canada*, 2003 FCT 41, 2003 CFPI 41; *Lavoie v Canada*, *supra* note 46; *Lipcsei*, *supra* note 45; *Geary v Alberta (Edmonton Remand Centre)*, 2004 ABQB 19, 25 Alta LR (4th) 231.

57. *Steele v Ontario*, *supra* note 44; *Lipcsei*, *supra* note 45.

58. See *Abbott v Canada*, *supra* note 8.

59. See *Swayze v Dajoe*, *supra* note 44 (Swayze ingested drugs and choked on his vomit. The officers met delays in transporting him from his cell to the hospital because they required additional guards, as he was a very large individual, and he died en route); *Corner v Canada* (2002), 119 ACWS (3d) 502 (available on QL) (Ont Sup Ct J) (the prisoner was attacked in the yard of a maximum security facility and stabbed from behind, and he alleged that he did not receive medical care immediately); *Bastarache v Canada*, *supra* note 34 (the prisoner was hit over the head by another prisoner with a metal bar and he did not receive medical attention until the following day, when the correctional officer sent him for medical treatment after noticing blood on his bedding).

60. Office of the Correctional Investigator, *Deaths in Custody: Final Report* by Thomas Gabor (Ottawa: Office of the Correctional Investigator, 2007), online: <<http://www.oci-bec.gc.ca>>.

improvement since then.<sup>61</sup> The 2011–2012 OCI report<sup>62</sup> focused on deaths in custody, and the Correctional Investigator remarked once again on the deficiencies, both systemic and case-specific, that prevented an effective response to emergencies.<sup>63</sup> The recent events involving Kinew James reinforces these conclusions.<sup>64</sup> James pressed the emergency button in her cell at the Regional Psychiatric Centre in Saskatoon repeatedly for over

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61. Office of the Correctional Investigator, *Final Assessment of the Correction Service of Canada's Response to Deaths In Custody* by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2009–11), online: <<http://www.oci-bec.gc.ca>> .

62. Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2011–2012* by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2012) online: <<http://www.oci-bec.gc.ca>> .

63. *Ibid* at n 19. The OCI noted:

These reviews continue to point to recurring compliance problems, repeated mistakes and structural weaknesses previously identified by this Office:

1. Responses to medical emergencies that are either inappropriate or inadequate.
2. Critical information-sharing failures between clinical and front-line staff.
3. Recurring pattern of deficiencies in monitoring suicide pre-indicators.
4. Compliance issues related to the quality and frequency of security patrols, rounds and counts.
5. Management of mentally ill offenders too often driven by security responses rather than appropriate health care and treatment.
6. CSC investigative reports and processes require consistency and improvement.

In the reporting period, the following individual failures were identified via the Office's section 19 review procedures:

- Failure to verify a living, breathing body consistent with life-preservation principles during security rounds and patrols.
- Failure to initiate life-saving procedures (CPR) without delay.
- Failure to apply automatic external defibrillator (AED) as part of a mandatory resuscitation process.
- Problems in recording and communicating a history of significant self-harm and suicide attempts in a transfer of an inmate from one institution to another.
- Failure to "reset" the segregation clock for cases involving prisoner transfer.
- Failure to comply with emergency response protocols and preservation of evidence following an inmate murder.

*Ibid* at n 20.

64. See Kim Mackrael, "Corrections Canada changes rules for medical emergencies after inmate's death", *The Globe and Mail* (11 April 2013) online: *The Globe and Mail* <<http://www.theglobeandmail.com>> .

an hour and other prisoners pushed the buttons in their cells in an effort to trigger a response, but to no avail. James died of a heart attack before help arrived. This sort of situation has arisen in provincial custody as well. In one instance, a prisoner named Julie Bilotta gave birth in her segregation cell. The infant was born prematurely and in breech position because guards refused to believe that Bilotta was going into labour and threatened her with isolation if she did not stop screaming. As a result, the baby had to be put on a respirator in a hospital and Bilotta needed a blood transfusion.<sup>65</sup> Taken together, these instances demonstrate the unacceptably low de facto standard of care in prisons in response to medical emergencies.

### C. Contract Health Professionals

The duty owed by CSC does not change the doctor-patient relationship; physicians still owe prisoners the same duty of care that they owe to other patients.<sup>66</sup> The relationship is an asymmetrical one, characterized by the patient's reliance and dependence on the physician's knowledge, skill and control.<sup>67</sup> Physicians must adhere to a standard of reasonable care in all the circumstances,<sup>68</sup> so the assessment of what is negligent should be no different in prisons than it is in the broader community. However, a number of cases involving prisoners have concluded, without explaining

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65. See "Guards inside Ottawa-Carleton Detention Centre should have listened to pregnant prisoner", Editorial, *The Globe and Mail* (15 October 2012) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

66. See *Ewert v Marshall*, 2009 BCSC 762, 187 ACWS (3d) 1052 [*Ewert*].

67. The doctor-patient relationship has been characterized as a fiduciary relationship. See *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449, McLachlin J ("it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship—trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests" at 272). This power imbalance would clearly be present in the prison context, given the vulnerability of the prisoner population to the unilateral exercise of authority.

68. See *ter Neuzen v Korn*, [1995] 3 SCR 674, 127 DLR (4th) 577; *White v Turner* (1981), 31 OR (2d) 773, 120 DLR (3d) 269 (H Ct J), aff'd (1982), 47 OR (2d) 764, 12 DLR (4th) 319 (CA).

the established standard of care, that there was no evidence the medical worker had failed to act in accordance with the standard of practice.<sup>69</sup>

Causation may also pose a hurdle in the prison medical context. In one controversial case, *Hickey v Canada*,<sup>70</sup> an HIV-positive prisoner claimed damages for the negligence of a prison doctor when he was given an overdose of medication and developed a peripheral neuropathy, a condition not inherent in HIV-positive people. The Court held that the plaintiff could not prove a causal relationship, as HIV itself might also cause the condition in question. There was conflicting medical evidence on this point and to make the causal connection the prisoner would have had to bring additional expert evidence that was not readily available. Arguably, this burden was too heavy—calling for scientific proof that went well beyond the “robust and pragmatic” approach to the “but for” test, as set out in *Snell v Farrell*<sup>71</sup> and endorsed in *Clements*.<sup>72</sup> The Court in *Sutherland v Canada* imposed a similarly high threshold, finding that causation was not established because the prisoner was unable to prove that the delay in providing medical care was linked to the deterioration of his ulcer condition.<sup>73</sup>

Judging by the few cases that have made it to court, there is an obvious difference between the standards of care imposed on health professionals within the prison context and the standard applied within the community. It is unclear why courts have been inconsistent in finding negligence in situations of delayed response to medical emergencies, or in cases where skill, resources or proper supervision were lacking. The tendency to impose a higher standard of proof of causation is worrisome, as it can require medical evidence that the plaintiff cannot reasonably be expected to produce. Finally, it seems contrary to public policy and to the law of vicarious liability to hold that the correctional system cannot be held

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69. See *Pete v Axworthy*, *supra* note 35; *Vittis v Younger* (1990), 22 ACWS (3d) 1083 (available on WL Can) (BCSC); *Ewert*, *supra* note 66; *Gawich v Klar*, 2010 ONSC 4972, 192 ACWS (3d) 409.

70. *Supra* note 50.

71. [1990] 2 SCR 311, 107 NBR (2d) 94.

72. For different concerns raised by this case, see Sandra Ka Hon Chu, “Federal Court Says Crown Not Liable for HIV-Positive Prisoner’s Illness” (2007) 12:2–3 HIV/AIDS Policy & Law Review 43.

73. *Supra* note 43.

liable for the malpractice of its subcontractors.<sup>74</sup> As long as medical staff is working for the correctional system, even as contractor or subcontractor, there is no legal reason not to apply principles of vicarious liability. This point is reinforced by the fact that prisoners cannot freely contract with the health professionals of their choice, and are completely dependent on the decisions made by CSC in that regard. Future court decisions in this area should enforce the principles of the *CCRA* and the obligation to apply the same standard of care equally to all patients, whoever and wherever they may be.

### III. Risks from Other Prisoners and the Risk of Self-Harm

#### *A. Risks from Other Prisoners*

The duty to protect prisoners from other prisoners has been clearly recognized by Canadian courts and is probably the most frequent basis for negligence claims in prison litigation. However, such actions frequently fail to establish a breach of the standard of care. It seems that Canadian courts, like their British counterparts, believe that prison violence is inherent. The courts purport to apply the ordinary test for determining the standard of care, but often conclude that a reasonable person would not have done a better job at monitoring the prisoners and find no breach without offering a sustained analysis.<sup>75</sup> In *Pete v Axworthy*, for example, the trial judge found that transferring dangerous offenders to a minimum-security facility constituted a breach of the standard of care and held officials liable for the harm suffered by another prisoner at the hands of a violent offender.<sup>76</sup> The BC Court of Appeal overturned this decision, finding that the standard imposed by the trial judge was too high. To

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74. This is arguably a situation where a non-delegable duty should be found. See *Ewert*, *supra* note 66. Prisons should ensure that care is taken by doctors, regardless of their contractual status.

75. *Scott v Canada*, *supra* note 31; *Légère v Canada*, *supra* note 33; *Coumont*, *supra* note 32; *Russell v Canada*, *supra* note 35; *Neeson v Canada*, 2012 FC 77, 403 FTR 296.

76. *Supra* note 35.



discharge their duty, the Court of Appeal held, officers only had to watch the violent offender closely, which they did to the best of their ability.<sup>77</sup>

In some cases, the courts have found a breach of duty where officials had failed to act on repeated signs that a prisoner was likely to be assaulted by another prisoner.<sup>78</sup> Courts have also been more likely to find negligence when the harm was caused by the breach of an established rule. For example, prematurely opening the door to a cell (resulting in an assault by another prisoner) was considered to be a breach of existing policy rules, and thus to constitute a breach of the standard of care.<sup>79</sup> Nonetheless, there are plenty of rules that leave room for interpretation. There is clearly an obligation to supervise prisoners while in the prison yard, but courts have often been excessively lenient in enforcing that obligation. For example, *Hamilton v Canada* held that the standard of care was met even though the part of the yard where a violent act occurred was not monitored by cameras.<sup>80</sup> There were guards around who could have seen the area in question but did not because they did not mingle with prisoners. Similarly, where there have been sudden attacks with no prior indications courts have found no breach on the part of guards.<sup>81</sup>

The causation requirement poses another potential obstacle to a finding of negligence in these cases. Where the immediate cause of harm was the wrongful actions of a third party (i.e., another prisoner), a breach of the duty of care by guards is often found not to have been a sufficient cause to warrant liability. *Coumont v Canada* held that even if there was a history of stabbings in a certain part of an institution, the officials' failure to supervise that place did not amount to a breach and was not ultimately the cause of the plaintiff's stabbing.<sup>82</sup> Similarly, *Iwanicki v Canada* held that even if the prison had fallen below the standard of care by giving razors to prisoners, the breach was not found to be causally linked to the stabbing of the plaintiff with a razor.<sup>83</sup> By requiring the plaintiff to

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77. *Pete v British Columbia (Attorney General)*, 2005 BCCA 449, 258 DLR (4th) 657, leave to appeal to SCC refused, 31208 (9 February 2006).

78. See *Carr v Canada*, *supra* note 28; *Miclash v Canada*, *supra* note 30; *Squires v Canada (Attorney General)*, 2002 NBQB 309, 253 NBR (2d) 326.

79. See *Guitare v Canada*, *supra* note 29.

80. [2001] OTC 617 (available on QL) (Sup Ct J).

81. *Supra* note 25; *Hodgin*, *supra* note 32.

82. *Coumont*, *supra* note 32.

83. *Iwanicki*, *supra* note 34.

show a clear connection between the breach of the standard of care and the attack, the Court arguably went beyond the robust and pragmatic approach endorsed in *Clements*—an approach which would obviously have led to a finding of liability on these facts, as the injury would not have occurred “but for” the prison’s negligence in providing razors.<sup>84</sup> In the same vein, the Manitoba Court of Appeal in *Wiebe* held that the “but for” test had not been met because nothing that the guards could have done would have prevented the “violent and unforeseen outburst” in question.<sup>85</sup> Thus, currently, the main obstacle to satisfying the causation requirement in cases where prison officers have failed to control a third party is the view on the part of the courts that these are random acts of violence which cannot be predicted or prevented.

### *B. Duty to Prevent Self-Harm*

The duty to protect prisoners from harm includes harm done to oneself.<sup>86</sup> Liability has been imposed in cases of self-harm where supervision has been found to be inadequate. In particular, a breach of the standard of care has generally been found where a guard has not followed an established protocol. In *Funk v Clapp*, a breach was found when the prisoner committed suicide with his belt, which was not confiscated because the guard did not properly check him for such objects as the protocol required.<sup>87</sup> Similarly, in *Dix v Canada*, the plaintiff was subjected to a mentally abusive interrogation, and the prison was found liable when he subsequently attempted suicide in custody.<sup>88</sup>

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84. *Supra* note 12.

85. *Supra* note 25 at para 45. In reaching this finding, the Court of Appeal in *Wiebe* relied on the Bonnie Mooney case, where the BC Court of Appeal found that the RCMP were not liable for failing to prevent a violent attack by Ms. Mooney’s ex-partner because police and governments cannot prevent domestic violence. See *BM v British Columbia (Attorney General)*, 2004 BCCA 402, [2004] 10 WWR 286.

86. See *Funk Estate v Clapp*, *supra* note 24; *Dix v Canada (Attorney General)*, 2002 ABQB 580, 7 Alta LR (4th) 205 [*Dix*].

87. *Funk Estate v Clapp*, *supra* note 24.

88. *Dix*, *supra* note 86. After being arrested, Dix was subjected to eleven hours of interrogation without any food or drinks, after which police had him drive to the crime scene. At bail hearings, police used a letter that they knew was false to try to show that Dix was a dangerous offender. He was kept in custody as a result, and during that time he attempted suicide. *Ibid*.

Claims where protocols are less clear often fail to establish that the standard of care was breached. In *Rhora v Ontario*, the plaintiff was known to be mentally disturbed.<sup>89</sup> He had killed one of his cellmates during his first night in custody. Although the police later claimed there was no indication that Rhora was violent or suicidal,<sup>90</sup> the following day he injured his head by banging it on a cell wall. Rhora's suit in negligence was dismissed, and this finding was upheld by the Ontario Court of Appeal two years later.<sup>91</sup> The Court found that, while the police should have provided more information to prison authorities on Rhora's psychiatric history, the rest of the police officer's decisions were appropriate because there was no evidence that the detention centre would have acted differently with more information. Failure to establish a breach of the standard of care and causation prevented a finding of negligence. Similarly, in *Gerstel v Penticton (City)*, no negligence was found in the supervision of a schizophrenic prisoner who, on the basis of delusions, dove headfirst onto the floor of his cell, rendering him a quadriplegic.<sup>92</sup> He had been under no special supervision, even though his medical history showed that his illness was intractable and that he had not responded to treatment.

The Ashley Smith case provides tragic evidence of the problems with the federal correctional system's management of self-injurious prisoners. The OCI investigator has published a number of reports on this issue and has requested immediate changes.<sup>93</sup> Smith was a mentally ill teenager who spent most of her sentence in segregation. She went through a number of transfers, undergoing a new assessment process in each institution. As a consequence, there was no continuity in her medical treatment, and she repeatedly engaged in self-injurious behaviour. At Grand Valley Institution for Women, guards were told not to remove ligatures from around her neck or to intervene in any way. Senior staff did not take her suicidal attempts seriously, dismissing them as mere cries for attention. The order not to intervene was supported by a CSC psychiatrist who concluded that Smith was not an imminent danger to herself or to others,

89. [2004] OTC 651, 132 ACWS (3d) 1180 (Sup Ct J).

90. *Ibid.*

91. *Rhora v Ontario* (2006), 43 CCLT (3d) 78, 217 OAC 307 (CA).

92. (1995), 9 BCLR (3d) 49, 57 ACWS (3d) 118 (SC).

93. See Office of Correctional Investigator, *A Preventable Death* by Howard Sapers (Ottawa: Office of Correctional Investigator, 2008) online: <<http://www.oci-bec.gc.ca>>.

despite frequent self-injurious acts. Eventually she succeeded in strangling herself while guards watched from her cell door.<sup>94</sup> Subsequent investigation showed that Smith's medical files did not accompany her transfers in a timely way and that certain psychologists had recommended Ms. Smith be transferred to a hospital because segregation was not a proper response to her illness. Smith herself had filed several grievances, which were never answered.<sup>95</sup> They came to light only at the coroner's inquest that started five years after her death.<sup>96</sup> The coroner's jury rejected the argument that the death was a suicide and returned a verdict of homicide.<sup>97</sup>

In light of the obligations arising from the common law, legislation and directives,<sup>98</sup> the courts would appear to be more lenient to the correctional system than they should be. This system is failing to meet established medical standards in dealing with suicidal prisoners, who are instead placed in segregation apparently for their safety, with little or no treatment. This approach provides no therapeutic benefit, and there is good evidence to suggest that the rigours of segregation actually exacerbate symptoms of mental illness.<sup>99</sup>

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94. See e.g. Colin Perkel, "Corrections actions 'unacceptable' in Ashley Smith case, Harper says", *The Globe and Mail* (1 November 2012), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

95. See *ibid.*

96. See e.g. Donovan Vincent, "Ashley Smith not psychotic, psychologist testifies at inquest", *Toronto Star* (4 March 2013) online: The Star <<http://www.thestar.com>>; Donovan Vincent, "Ashley Smith's ex-psychologist tells inquest he felt 'undermined' by decision to transfer her to Saskatoon", *Toronto Star* (5 March 2013) online: The Star <<http://www.thestar.com>>; Donovan Vincent, "Ashley Smith turned down right to apply for full parole, inquest told", *Toronto Star* (26 March 2013) online: The Star <<http://www.thestar.com>>.

97. Colin Perkel, "Ashley Smith's death should be ruled homicide, lawyer argues", *The Globe and Mail* (26 November 2013), A8.

98. See e.g. CSC, *CD 843 Management of Prisoner Self-Injurious and Suicidal Behaviour*, *supra* note 47.

99. See Ivan Zinger, Cheryn Wichman & DA Andrews, "The Psychological Effects of 60 Days in Administrative Segregation" (2001) 43:1 Can J Crim 50; Ronald Aday, *Aging Prisoners: Crisis in American Corrections* (Westport, Conn: Greenwood Publishing Group, 2003) at 101-05; House of Commons, Standing Committee on Public Safety and National Security, *Mental Health and Drug and Alcohol Addiction in the Federal Correctional System* (December 2010) at 13 (Chair: Kevin Sorensen); Correctional Service Canada, *Federally Sentenced Offenders with Mental Disorders: Correctional Outcomes and Correctional Response*

## IV. Conditions of Confinement

We observed at the outset that the correctional system has a well-established duty to provide prisoners with a safe environment. In Part IV, when we speak of conditions of confinement, we are referring to broader systemic concerns about the general quality of the prison environment and prisoners' entitlement to a certain standard of living. There is no clear boundary between safe premises and safe conditions of confinement. Generally, "premises" refers strictly to the physical environment and to operations that must accord with certain standards—for example, the requirement that tools work properly and that hazards such as fire and floods be minimized. In contrast, "conditions of confinement" can include the perils caused by double-bunking, the exposure to certain physical hazards such as infectious illness, or the amenities necessary for a decent standard of life in prison. From a tort perspective, cases about conditions of confinement rarely make it to court, likely because the plaintiff would have a hard time establishing that a duty of care is owed on the part of the authorities.

The current test for a duty of care, as articulated in *Cooper v Hobart*, raises a number of obstacles to the imposition of liability on government authorities.<sup>100</sup> The first line of inquiry is whether the duty falls within a judicially recognized category.<sup>101</sup> If it does, then it is not necessary to proceed with the *Anns/Cooper* test. In the prison context, the argument could be made that the duty to provide safe conditions of confinement falls within the already existing category of the duty to provide a safe environment, as the two are co-extensive and, at times, indistinguishable. There is some uncertainty, however, about how strictly to construe these pre-established categories, and courts will frequently interpret earlier cases so narrowly that any new fact situation is characterized as requiring

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by Lynn Stewart, Geoff Wilton & Colette Cousineau, Research Report R-268 (Ottawa: Correctional Service of Canada, 2012).

100. *Supra* note 14.

101. *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27, [2008] 2 SCR 114 [*Mustapha*].

the imposition of a novel duty.<sup>102</sup> Indeed, the Supreme Court has shown a growing reluctance to impose a duty of care on government, as is evidenced by the use of the *Anns/Cooper* test to negate such a duty in a number of cases.<sup>103</sup>

If a novel duty is alleged, one then proceeds to the first stage of the *Anns/Cooper* test, which requires the plaintiff to establish sufficient relational proximity to justify the imposition of a duty. This might require the government body to have had actual knowledge of a plaintiff's concerns or to have been aware of a grave risk.<sup>104</sup> This would not ordinarily be a problem in the prison context, given that the individual plaintiff is clearly known to the defendant but proximity could be negated on policy grounds, where a duty to an individual plaintiff would conflict with a duty of the government to the public as a whole. In *Cooper v Hobart*, for example, the Supreme Court refused to find that the Ontario Registrar of Mortgage Brokers had been under a duty of care to investors who lost money when the Registrar failed to revoke a broker's licence in a timely manner on the basis that there was not sufficient proximity between the Registrar and investors.<sup>105</sup> The Court held that policy concerns negated the recognition of a duty of care in that context because the Registrar owed a duty to the public at large that would conflict with any duty to individual investors. The prospect of conflicting duties could just as easily negate a finding of proximity in the prison context where the plaintiff's claim focuses on inadequate conditions of confinement. The issue of public safety comes into play here, as correctional systems have to protect

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102. The Court concluded that a doctor's duty to an unborn child (once born alive) was novel, in spite of a substantial body of prior case law that had imposed a duty in similar circumstances. See *Paxton v Ramji*, 2008 ONCA 697, 299 DLR (4th) 614, Feldman J, leave to appeal to SCC refused, 32929 (23 April 2009). A BC trial court declined to follow Feldman J's decision in *Paxton*, stating that "[w]ith what appears to be a long history of judicial recognition of a physician's duty of care to a fetus, a duty which crystallizes upon the live birth, an *Anns* analysis appears unnecessary." See *Ediger v Johnston*, 2009 BCSC 386 at para 206 (available on QL) (this finding of a duty was accepted by both the BC Court of Appeal and the Supreme Court of Canada).

103. Robert M Solomon et al, *Cases and Materials on the Law of Torts*, 8th ed (Toronto: Carswell, 2011) at 774. See also *Childs v Desormeaux*, *supra* note 14 (social host liability); *Design Services Ltd v Canada*, 2008 SCC 22, [2008] 1 SCR 737 (contract); *Mustapha*, *supra* note 101 (products liability).

104. See *Fullowka*, *supra* note 17.

105. *Supra* note 14.

the public and serve other social goals. In such circumstances, courts tend to defer to governmental discretion and are generally loath to interfere with the government's balancing of competing concerns. Foremost among such concerns would likely be the extremely high financial cost of across-the-board improvements that would be needed to improve the conditions of confinement.

Deference of courts to government discretion is especially likely when the allocation of resources is involved. In *Just v British Columbia*, the Supreme Court held that budgetary allocations are true policy decisions and are immune from tort liability.<sup>106</sup> This approach was followed in the medical context, when parents of a baby who died in an emergency ward sued the Ontario government for providing inadequate funding for medical care.<sup>107</sup> The Ontario Court of Appeal found that this was a novel duty of care and refused to recognize it, holding that the Ministry of Health's duty to society as a whole negated a finding of proximity to the individual plaintiffs.<sup>108</sup> The Court also confirmed that such decisions were immune from suit as bona fide policy decisions about funding and hospital restructuring.<sup>109</sup> Similarly, in *Imperial Tobacco*, the Supreme Court indicated that decisions made at the highest level of government about social and economic considerations were "true or core" policy decisions that will be immune from suit.<sup>110</sup> In light of these decisions, it might be difficult to persuade a court to impose liability where the claim goes beyond a concern for safety and asserts a prisoner's entitlement to a better standard of living. Such a claim would require the allocation of more funds to living conditions generally.

We would argue, however, that many matters related to conditions of confinement could be characterized as operational insofar as they involve the practical application of the basic policy decision to establish and operate prisons. Decisions about conditions of confinement could be seen as "manifestations of the implementation of the policy decision", and would therefore be subject to review as operational choices about how to implement the policy choices in favour of prisoners.<sup>111</sup> This is the

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106. *Supra* note 16.

107. *Mitchell v Ontario* (2004), 71 OR (3d) 571, 188 OAC 385.

108. *Ibid.*

109. *Ibid.*

110. *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 95, [2011] 3 SCR 45.

111. See *Just v British Columbia*, *supra* note 16 at 1246.

route that the British courts have taken, stating that prisoners subjected to improper conditions of confinement could have both a public remedy and a private action in negligence.<sup>112</sup> This position is to some extent borne out in the Canadian case law on environmental factors within prisons. In *Curry v Canada*, the plaintiff was strip searched and placed in a dry cell for over twenty four hours despite having already undergone x-ray and cavity searches.<sup>113</sup> The Court stated that they were operational decisions and procedures that amounted to negligence and were incompatible with the duty of care imposed on the correctional system by the *CCRA* to ensure that the penitentiary was safe, healthful and free of practices that undermine a person's sense of personal dignity.<sup>114</sup> Similarly, in *Maljkovich*, the Court stated that by exposing the plaintiff to second-hand cigarette smoke while incarcerated, the government "fails in its statutory and common-law duties of care".<sup>115</sup>

An interesting question is raised by the issue of double-bunking, that is, whether negligence liability could be used to require better living conditions in prison generally. *Savard v Canada* held that the double-bunking in question was legal and justified based on its "temporary character",<sup>116</sup> perhaps suggesting that if it were implemented on a more permanent basis it might be open to challenge. This position is supported both by *CCRA* regulations and by international prison guidelines, which state:

[W]here sleeping accommodation is in individual cells or rooms, each inmate shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception from this rule, it is not desirable to have two inmates in a cell or a room.<sup>117</sup>

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112. See *R v Deputy Governor of Parkhurst Prison*, [1992] 1 AC 58, [1991] All ER 733 HL (Eng); *Weldon v Home Office*, [1991] 3 WLR 340 HL (Eng).

113. *Curry v Canada*, *supra* note 36.

114. *Ibid* at para 29.

115. *Maljkovich v Canada*, *supra* note 37 at para 2.

116. 2003 FCT 683 at para 21, 235 FTR 168.

117. First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/611, ESC Res 663 C (XXIV), UNESCOR, 1957, Supp No 1 UN Doc E/3048, amended ESC Res 2076 (LXII), UNESCOR, 1977, Supp No 1, UN Doc E/5988, ss 9–10 [*Standard Minimum Rules*].



Commissioner's Directive 550 Inmate Accommodation states that "population management strategies must include single occupancy when feasible and ensure that double-bunking remains a temporary accommodation measure".<sup>118</sup> The international prison guidelines also indicate that prisoners should not be hosted in the same dormitory if they are unsuitable roommates and state that "all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating, and ventilation".<sup>119</sup>

Notwithstanding the clear imposition of an internal duty by the Commissioner's Directive, in *Piche v Canada (Solicitor General)* it was nonetheless held that double-bunking was a policy decision and thus "not open to question".<sup>120</sup> In *Williams v Canada (Commissioner of Corrections)*, another case from the same era, the Court found that "there was no evidence that there would be irreparable harm to the plaintiffs as a result of an increase in double bunking in the institution" and held that the administrative decision of the warden was reasonable.<sup>121</sup> Although *Williams* did not treat the issue of double-bunking as being beyond judicial scrutiny as a policy decision, it offered nothing more on the duty of care issue.

Even where a duty of care is found with respect to conditions of confinement, deference on the standard of care poses an obstacle to a finding of negligence. Courts are mindful of the difficulties that governments may face in providing for the basic needs of all prisoners. As noted earlier, the Federal Court in *Savard* held that because double-bunking may be permissible where it is temporary, the standard of care had been met.<sup>122</sup> This minimal standard of care is also evident in *Allan v Canada (Commissioner of Corrections)*, which held that the failure to provide special orthopedic footwear was not a breach of the duty to provide recreational clothing and footwear.<sup>123</sup> Because the duty was "imprecisely defined by regulations", the Court said, "a reasonable

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118. Corrections Service Canada, *CD 550 Inmate Accommodation* (Ottawa: Corrections Service Canada, 2009–2013) available online: <<http://www.csc-ccc.gc.ca>>.

119. *Standard Minimum Rules*, *supra* note 117, ss 10–11a.

120. (1984), 13 WCB 149, 17 CCC (3d) 1 at 102 (FCTD).

121. [1993] FCJ No 646 (QL) at para 18 (TD).

122. *Supra* note 116.

123. (1990), 38 FTR 176, 23 ACWS (3d) 286 [cited to FTR].

discretion on the part of administrators in meeting their duty must be recognized and the court ought not intervene”.<sup>124</sup> This approach is consistent with Cory J’s statement in *Just v British Columbia* that “the standard of care imposed upon the Crown may not be the same as that owed by an individual” and must be balanced against a number of other factors such as the extent of the risk, budgetary limits and availability of personnel and equipment.<sup>125</sup>

In sum, there are substantial obstacles to a finding that conditions of confinement will give rise to the recognition of a novel duty of care. We have found some jurisprudential support for the claim that the setting of conditions of confinement by CSC should be characterized as operational decisions, given the existence of a statutory duty to provide proper conditions of confinement. While statutory provisions are not determinative of the standard of care and do not provide an independent basis for a finding of liability, they may nonetheless provide useful evidence and guidance as to the standard of care that is expected.<sup>126</sup> This may support the imposition of a stringent standard of care, as it clearly establishes the duty of correctional services to ensure a safe and healthy environment, and to provide appropriate living conditions for prisoners.<sup>127</sup> As a general rule, however, the cases where there is no clear duty owed rarely make it to court. Thus, aside from the above examples, it is difficult to say whether general conditions of confinement could form the basis for a claim in negligence. Moreover, conditions of confinement would likely be viewed as giving rise to a novel duty and could be negated for policy reasons. The concern here is that standards of conditions of confinement are essentially funding decisions, and are therefore matters of policy that are immune from suit.

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124. *Ibid* at 181.

125. *Supra* note 16 at 1244.

126. *Canada v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 228, 143 DLR (3d) 9.

127. These rules in turn form the basis for directives that are being daily put into practice by correctional staff. See e.g. Corrections Service Canada, Commissioner’s Directives, CD 259: *Exposure to Second Hand Smoke* (Ottawa: Corrections Service Canada, 2014) available online: <<http://www.csc-scc.gc.ca>> (forbids smoking inside the perimeters of a prison).

## Conclusion

In this paper we have reviewed those tort claims that made it to trial. We did not have access to what is probably a large number of cases that were settled outside of court. Further, the cases that have been litigated are generally the controversial ones.

Tort claims by prisoners meet many obstacles. First, correctional staff and institutions are held to a lower standard of care than defendants in the general community. Under similar circumstances, a prisoner seems to have a worse chance of succeeding than a plaintiff from the outside. In addition, the causation analysis has been applied more rigorously in prison tort cases and requires more than the robust and pragmatic inference called for in *Snell* and *Clements*. Judges seem to be asking prisoners to produce evidence that is not readily available to them and that lies mostly in the hands of the correctional services.

Second, courts appear to be less receptive to health care-based claims when the plaintiff is a prisoner. Arguably, prison medical staff are held to a lower standard of medical care than medical staff that serve the wider community. This is clearly inconsistent with legislative requirements that the standard of health care in prison is to be equivalent to that in the community as a whole. In addition, by applying the controversial distinction between contractor and sub-contractor, courts are permitting correctional institutions to escape vicarious liability for injuries suffered by prisoners at the hands of some health care workers.

Finally, claims of novel duties are not well received by the courts when the defendant is a government actor engaged in a public role, particularly where there are conflicting duties at stake or where there are resource implications. For this reason, general conditions of confinement are unlikely to ground successful private claims even though we often see infringements of the legal provisions.

Tort-based litigation may nonetheless benefit prisoners. The other remedial avenues currently available to prisoners are only partially effective. The internal grievance system is still highly bureaucratic and

lacks clear remedies.<sup>128</sup> The standard for judicial review of administrative decisions is now higher than ever, with reasonableness replacing correctness even for *Charter*-based claims. Tort claims and compensation may be an effective way of drawing attention to some issues of safety and delivery of care,<sup>129</sup> notwithstanding all of the difficulties we have discussed.

This paper has pointed out some troubling obstacles to tort law claims against prisons; this is amplified by the lack of lawyers specialized in this area, the costs of litigation and the obstacles raised by courts themselves. Tort litigation has the potential to be a tool for the protection of prisoners' rights. This would require a firmer attitude on the part of the courts to discourage authorities from taking a relaxed approach to rules that govern prisoners' entitlements. Governments cannot afford the cost of defending themselves repeatedly against civil actions, or the cost of damages when claims for prisoner injuries, illnesses and death succeed. At some point,

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128. See e.g. Correctional Service Canada, *Report of External Review of Correctional Services of Canada Offender Complaints and Grievances Process* by David Mullan (Ottawa: Correctional Service Canada; 2010). To update the Mullan Review, see Howard Sapers, Correctional Investigator, in Senate, Standing Committee on Justice and Constitutional Affairs, *Evidence of Proceedings of the Standing Committee on Justice and Constitutional Affairs*, 41st Parl, 1st Sess, No 29 (12 December 2012).

Arising from the Mullan review, an alternative dispute resolution pilot project has been implemented at 10 medium and maximum security institutions. The pilot is showing some promising early results, including a high resolution rate, reduction in the number of complaints, and more timely resolution of priority grievances. The pilot affirms that offender complaints are best resolved at their source at the lowest possible level and as informally as possible.

*Ibid.*

129. For the difficulties of prison litigation, see e.g. *Brazeau v Canada*, 2012 FC 1300 (available on QL). In *Brazeau*, the prisoner plaintiffs were self-represented and filed a Statement of Claim challenging the general circumstances of their confinement. The defendant brought a motion to dismiss the Statement of Claim on the basis that it did not meet the formal and substantive requirements of pleadings. The motions judge permitted the filing of an amended Statement of Claim and took the time to indicate what kind of changes would be required to comply with the rules. Given the deprivation, frustration and hopelessness disclosed by the prisoners' document, there might be good reason to expect that the underlying facts could support a justiciable cause of action, at least an arguable one. However, given the pleading deficiencies, one cannot be optimistic that the unrepresented plaintiffs will proceed beyond the interlocutory stage.

it may be prudent to improve internal prison conditions rather than to meet these costs. Our goal in this paper has been to provide guidance and encouragement to lawyers and researchers who might contemplate this use of tort law as a means of enforcing legal norms and protecting prisoners' rights.

