

Federal Court



Cour fédérale

Date: 20180731

Docket: T-315-17

Citation: 2018 FC 802

Vancouver, British Columbia, July 31, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JAMES HOWARD ENRIGHT

Plaintiff

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA**

Defendant

JUDGMENT AND REASONS

[1] The Defendant, Her Majesty the Queen in Right of Canada, who is being sued for damages by the Plaintiff, Mr. James Howard Enright, has brought the within motion in summary judgment on the basis that the Plaintiff's claim has no genuine issue for trial as it is statutorily barred, for one reason or another.

[2] The Plaintiff opposes the motion and submits that his action has merit and requires a full trial to resolve the complex issues in the proceedings.

[3] The Plaintiff is a retired military career professional who served in the Canadian Armed Forces from January 8, 1953 to May 28, 1970. He commenced this action against the Crown on March 3, 2017. The Plaintiff was unrepresented at the time. His original statement of claim was blank with the exception of the handwritten “\$11,000,000” as the relief sought and “Vancouver, BC” as the proposed location for trial. To the Statement of Claim the Plaintiff attached 40 pages consisting of a lengthy narrative and copies of emails the Plaintiff had sent to various Federal departments. On motion in writing by the Defendant, the Plaintiff’s Statement of Claim was struck by Mr. Prothonotary Lafrenière (as he then was), on April 4, 2017. The Plaintiff appealed the order by way of motion. Mr. Justice Zinn allowed the motion and permitted the Plaintiff an opportunity to file a proper Amended Statement of Claim, which he did on May 15, 2017.

[4] In his Amended Statement of Claim, the Plaintiff continues to seek damages of \$11,000,000 against the Crown, all of which arise from an incident of unlawful arrest and detention, unlawful aggravated assault and torture by the Military Police in Lahr, Germany on or around February 11, 1968 [the cause of action]. Following a quarrel and fight he had on the night of February 11, 1968 with another military, Corporal Jim Smith, in a bar situated on the base, the Military Police were called and the Plaintiff was placed into custody, and eventually put into a cell. Upon arrival to the Military Police guard house, he was severely beaten and lost consciousness. After, an officer struck the Plaintiff from behind on the left side of his head with a 2x4 stud, and he lost consciousness again. Later, he was restrained to a medieval type “torture

chair” and an officer proceeded to extinguish his cigar on the back of the Plaintiff’s right and left hands. The officer also kicked the Plaintiff in the groin and choked him until the Plaintiff lost consciousness. Later in his cell, another officer sprayed the Plaintiff with a fire hose. He was left there alone, cold, shivering and awake for the remainder of the night. Sometime during the morning of February 12, 1968, the Plaintiff was released from police custody [the 1968 incident].

[5] As a result of the 1968 incident, the Plaintiff claims he suffers from the following medical issues, *inter alia*:

- (a) A noticeable scar on his left leg from the assault of Corporal Jim Smith;
- (b) A fractured skull, which continues to cause the Plaintiff headaches and other concussion-like symptoms;
- (c) Two noticeable scars from the cigar burns to the back of his hands. Since the incident, the Plaintiff often has lesions appear at the burn site, which is uncomfortable and a constant reminder of the torture he endured;
- (d) Pain and discomfort from the damage done to his left testicle, which has since atrophied;
- (e) A diagnosis with Post-Traumatic Stress Disorder [PTSD] linked to the incident of unlawful arrest and detention, unlawful aggravated assault and torture; and
- (f) Two heart attacks, high blood pressure, erectile dysfunction, nightmares, insomnia, flashbacks, anxiety attacks, bruxism, angst, sadness, and a lifelong inability to maintain personal relationships, which is directly attributed to stress which is attributable to his PTSD.

[6] As a result of the 1968 incident, the Plaintiff also claims he suffered the following additional damages, *inter alia*:

- (a) Early release from the Canadian Forces for medical reasons. This has resulted in loss of career, income, pension and associated benefits; and

- (b) Effects to the Plaintiff's post-military income as his medical issues have hampered his ability to maintain steady and meaningful employment.

[7] A Statement of Defence has been filed by the Defendant on June 13, 2017. While the Defendant is vicariously liable for torts committed by servants of the Crown, the Defendant nevertheless denies all allegations made by the Plaintiff in the Amended Statement of Claim. The Defendant provides a very different version of the incident, stating that the arrest and detention were lawful and that the use of force was reasonable and justified by law. As a result of the fight he had in the bar with Corporal Jim Smith, the Plaintiff was charged with an act to the prejudice of good character and discipline contrary to section 118 of the *National Defence Act*, RSC 1950, c 43 [the National Defence Act 1950], and cautioned. The Defendant also refers to an investigation made in February 1968 following the grievance made by the Plaintiff concerning the incident. In addition, as a matter of law, the Defendant pleads that the claim is statute barred for one reason or another.

[8] The various grounds for dismissing the claim as statute barred are reasserted by the Defendant in the present motion for summary judgment. The Defendant's evidence primarily focuses on the application made in 2013 to Veteran Affairs Canada [VAC] and subsequent disability benefits received by the Plaintiff. See the Affidavit of Nancy Weeks, sworn on March 26, 2018, and appended documentation. The evidence submitted by the Defendant in support of the present motion for summary judgment does not deal with the merit of the allegations made by the Plaintiff with respect to the 1968 incident. That being said, the Defendant submits that the Plaintiff's own evidence in his responding Motion record supports a finding that the Plaintiff's claim was clearly discoverable at the time of the 1968 incident.

[9] In his affidavit, sworn on June 10, 2018, filed with the Plaintiff's Motion Record, the Plaintiff provides his version of the circumstances surrounding the 1968 incident, as a result of which he has a valid cause of action in tort and damages against the Crown. He also relates his subsequent and unsuccessful attempts to deal with and alert his superiors to the incident. He explains that he has suffered from PTSD since the incident. He tried to make the best of what had happened to him and when he did gather the courage to tell psychiatrists and counsellors about the beating and torture, he was apparently told to erase the incident from his memory or they would prescribe medication which made matters worse. He notably addresses issues of fact raised by the Defendant in the Statement of Defence filed – he outright denies signing the documentation on which the Defendant relies and states these are forgeries. He briefly explains why he applied in 2013 to VAC for compensation for injuries and describes the nature of the disability benefits received since then.

[10] Pursuant to Rule 215(1) of the *Federal Courts Rules*, “[i]f on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly” [Rules]. The sole question on this motion is whether the Plaintiff's action is statute barred for one reason or another, as submitted by the Defendant.

[11] It is not necessary to repeat each and all arguments made by the parties in their respective Memorandum of Fact and Law, and which, for the most part, were reasserted by counsel in their oral submissions, except for the fact that counsel for the Defendant has abandoned the argument that pursuant to section 215 of the National Defence Act, 1950, c 43, or section 269 of the

current *National Defence Act*, RSC 1985, c N-5, the claim is statutorily barred because the Plaintiff did not take action against tortfeasors in the six-month limitation period provided in those provisions.

[12] In particular, the Defendant submits that the Plaintiff's ability to bring his claim expired on or around February 12, 1974, which is six years after the cause of action arose. Pursuant to section 19 of the *Crown Liability Act*, SC 1952-53, c 30 [Crown Liability Act 1952] or section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50 [CLPA], an action against the Crown "shall be taken within and not after six years after the cause of action arose". The limitation period applies to any tort, including assault and torture. Thus, the present claim comes within the ambit of the legislative provision. The discoverability principle – a judge made rule - may not extend the six-year limitation period. In any event, the Plaintiff's claim was clearly discoverable at the time of the 1968 incident, or ought to have been discovered by the Plaintiff with the exercise of reasonable diligence. As asserted by the Plaintiff, the assault or torture left physical marks. Although the Plaintiff may not have known the full extent of the possible development of the alleged injuries, he undoubtedly knew that damage had occurred. He also admits readily having suffered from PTSD after the incident. He was also aware of the identity of the tortfeasors. In the alternative, the Defendant submits that the Plaintiff's claim is also statute barred pursuant to section 9 of the CLPA since he is receiving disability benefits from VAC under the *Canadian Forces Members and Veterans Re-Establishment and Compensation Act*, SC 2005, c 21 [Compensation Act] for the injuries arising from the 1968 incident.

[13] The Plaintiff submits that the statutory six-year time limitation does not apply to victims of torture, and the fact that he has been suffering from PTSD since the 1968 incident is a valid justification for not having taken this action much earlier. The principle of discoverability applies to all statutory limitation provisions unless there is clear legislative language in place to displace the rule. The discoverability must be tied specifically to the emotional and psychological trauma the Plaintiff has suffered. Complicated questions regarding discoverability should not be resolved in a summary fashion or without a full trial. To the extent that the Defendant relies on certain documentation in the Statement of Defence purporting to show awareness by the Plaintiff of his claims much earlier, the Plaintiff submits that the documentation is either forged or his signature was obtained under duress. With respect to the alternative proposition made by the Defendant that the action should be dismissed (or stayed) because the Plaintiff has already received or is in a position to receive benefits under the Compensation Act, the Plaintiff submits that the Defendant has not demonstrated that it is plain and obvious that the disability benefits awarded are in respect to the same injury for which the present action is being brought.

[14] The Court has reviewed the arguments made by the parties in light of the applicable legislation and legal principles, the evidence on record and the relevant case law. I am satisfied, that the motion can be decided on the basis that the present claim comes within the ambit of section 9 of the CLPA which establishes an absolute bar in the following case:

9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of

9. Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme

the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

mandataire de l'État.

[15] In particular, it is not challenged that the Plaintiff has applied for and been awarded disability benefits for injuries arising from the 1968 incident which occurred in the course of his military service. Subsection 2(1) of the Compensation Act defines a “service-related injury or disease” to mean “an injury or disease that (a) was attributable to or was incurred during special duty service; or (b) arose out of or was directly connected with service in the Canadian Forces”.

[emphasis added]

[16] Section 45 and 46 of the Compensation Act set out the basic entitlement for disability benefits for Forces members:

45 (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from

(a) a service-related injury or disease; or

(b) a non-service-related injury or disease that was aggravated by service.

(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease

45 (1) Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :

a) soit par une blessure ou maladie liée au service;

b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.

(2) Pour l'application de l'alinéa (1)b), seule la fraction — calculée en cinquièmes — du degré d'invalidité qui représente l'aggravation due au service donne droit à une

was aggravated by service.	indemnité d'invalidité.
46 (1) For the purposes of subsection 45(1), an injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of	46 (1) Pour l'application du paragraphe 45(1), est réputée être une blessure ou maladie liée au service la blessure ou maladie qui, en tout ou en partie, est la conséquence :
(a) a service-related injury or disease;	a) d'une blessure ou maladie liée au service;
(b) a non-service-related injury or disease that was aggravated by service;	b) d'une blessure ou maladie non liée au service dont l'aggravation est due au service;
(c) an injury or a disease that is itself a consequence of an injury or a disease described in paragraph (a) or (b); or	c) d'une blessure ou maladie qui est elle-même la conséquence d'une blessure ou maladie visée par les alinéas a) ou b);
(d) an injury or a disease that is a consequence of an injury or a disease described in paragraph (c).	d) d'une blessure ou maladie qui est la conséquence d'une blessure ou maladie visée par l'alinéa c).

[17] In the case at bar, since 2013, the Plaintiff has notably received disability benefits for PTSD and the scar to his right hand, and has also received disability benefits for erectile dysfunction and bruxism in relation to PTSD, all of which were awarded under sections 45 and 46 of the Compensation Act as a result of the 1968 incident described in the statutory declaration made by the Plaintiff on March 30, 2013 (Exhibit B to the Affidavit of Nancy Weeks).

[18] Indeed, on June 21, 2013, the Plaintiff's application for a disability award was granted pursuant to section 45 of the Compensation Act, assessed at an initial amount of 10%, resulting in a lump sum of \$29, 858.80. In the reasons provided, the Adjudicator notes in particular:

We have reviewed your detailed account of your alleged detention and mistreatment by military policemen in 1968.

A Medical Attendance Record of February 11, 1968 details your account of a cigarette burn on your hand while being in detention the night before. On examination, the physician indicates that you do have a lesion on your hand and have complaints of jaw pain.

The submitted Medical Questionnaire of May 2013 establishes a diagnosis of chronic post traumatic stress disorder and details your account of the incident from 1968. This report details that your current symptoms and psychological disability are all due to the mistreatment by military policemen in 1968.

Conclusion:

Based on the above evidence we resolve all doubt in your favour and conclude that you suffered a service-related trauma in 1968 which caused your claimed condition.

(Exhibit D to the Affidavit of Nancy Weeks)

[19] In September 2013, the Plaintiff was granted a disability award for Scar Dorsum on Right Hand (Exhibit H of the Affidavit of Nancy Weeks). On November 27, 2013, the Plaintiff received an increase in his disability assessment for his Scar Dorsum on Right Hand (Exhibit I of the Affidavit of Nancy Weeks). On December 20, 2013, VAC granted the Plaintiff's application for disability benefits for Degenerative Disc Disease Lumbar Spine, but denied his applications for Hypertension, Bruxism, Post-Traumatic Left Testicular Pain (Exhibit J of the Affidavit of Nancy Weeks). On June 12, 2014, VAC granted the Plaintiff's application for disability benefits for Erectile Dysfunction as a consequence of his previously entitled condition of PTSD, resulting in an award of \$15,063.76 (Exhibit K of the Affidavit of Nancy Weeks). In July 2014, VAC increased the disability assessment of the Plaintiff's PTSD, resulting in a disability award of \$75,318.82 (Exhibit L of the Affidavit of Nancy Weeks). On December 1, 2014, VAC amended its entitlement decision dated December 20, 2013 and granted the Plaintiff a disability award for

Bruxism pursuant to section 45 and 46 of the Compensation Act, as a consequence of PTSD (Exhibit N of the Affidavit of Nancy Weeks). On March 11, 2015, VAC confirmed its December 20, 2013 decision denying the Plaintiff's application for disability benefits for Heart Disease and Hypertension related to his PTSD, and for Post Traumatic Left Testicular Pain (Exhibit O of the Affidavit of Nancy Weeks). On May 5, 2016, VAC granted the Plaintiff a disability award for Loss of Teeth for ten teeth, as a consequence of Bruxism, and denied his application for benefits for the loss of five teeth (Exhibit P of the Affidavit of Nancy Weeks). Finally, on April 2, 2017, VAC informed the Plaintiff that he will receive a lump sum, tax-free payment of \$27,478.99, to account for the coming into effect of an increase in disability awards (Exhibit Q of the Affidavit of Nancy Weeks).

[20] As stated by Justice Iacobucci in *Sarvanis v. Canada*, 2002 SCC 28, at paragraph 38 [Sarvanis]: "Simply put, s.9 of the *Crown Liability and Proceedings Act* establishes Crown immunity where the very event of death, injury, damage or loss that forms the basis of the barred claim is the event that formed the basis of a pension or compensation award." This is the case here. The factual basis upon which the Plaintiff rests his claim for damages in this action is the same factual basis upon which he rested his application for disability awards under section 45 and 46 of the Compensation Act. As also stated in *Sarvanis*, section 9 of the CLPA "reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof" (para 28). For the non-physical damages arising from the physical injuries suffered, the Supreme Court of Canada also made clear in *Sarvanis* that these ancillary heads of damages are also captured in section 9 of the CLPA: "All damages arising out of the incident which entitles the person to a

pension will be subsumed under s.9, as long as the pension or compensation is given 'in respect of, or on the same basis as, the identical death, injury or loss' (para. 29).

[21] In the result, the Plaintiff's claim for damages arising from the 1968 incident is statutorily barred pursuant to section 9 of the CLPA. A similar result has been reached in several cases having applied *Sarvanis*: See *Dumont v. Canada*, 2003 FCA 475; *Prentice v. Canada*, 2005 FCA 395; *Sherbanowski v. Canada*, 2011 ONSC 177; and *Ellery v. Canada (AG)*, 2009 SKQB 166. Accordingly, it is plain and obvious that, on that particular ground alone, the Plaintiff's action must fail and no genuine issue requiring trial therefore exists.

[22] As a final note, while it is not necessary to address the other ground for dismissal raised by the Defendant, since considerable time was devoted to this issue at the hearing of the motion, I would add that the present claim appears to be also time-barred by virtue of the expiry of the six-year limitation period mentioned in section 19 of the Crown Liability Act 1952 or section 32 of the CLPA. With respect to the discoverability of the claim, the Plaintiff has not put his best foot forward and the Court is entitled to draw a negative inference from the lack of conclusive evidence on the issue of the Plaintiff's alleged impossibility to make his claim much earlier. In particular, there is no expert medical evidence demonstrating that because the Plaintiff suffered from PTSD, this condition prevented him from making a claim. At the date of the 1968 incident, he certainly knew the identity of the tortfeasors and that he had suffered damage. Indeed, for years, the Plaintiff stated that he was angry. I cannot accept the suggestion made by Plaintiff's counsel at the hearing that the six-year limitation period should start to run on March 30, 2013, when the Plaintiff made his application to VAC to receive disability benefits under section 45 of

the Compensation Act and signed a statutory declaration referring to the 1968 incident. Absent any constitutional attack, section 19 of the Crown Liability Act 1952 or section 32 of the CLPA which replaced it, constitutes the law in Canada. There is a presumption of compliance of domestic legislation to international instruments prohibiting torture. In this civil proceeding, there is no justification at the present time not to apply the six-year limitation period to this claim.

[23] For these reasons, the Court allows the motion in summary judgment and dismisses the Plaintiff's claim in its entirety on the basis there is no genuine issue for trial. There shall be no costs.

JUDGMENT in T-315-17

THIS COURT'S JUDGMENT is that:

The Court allows the motion in summary judgment in file T-315-17 and dismisses the Plaintiff's claim in its entirety on the basis there is no genuine issue for trial. There shall be no costs.

"Luc Martineau"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-315-17

STYLE OF CAUSE: JAMES HOWARD ENRIGHT v HER MAJESTY THE
QUEEN IN RIGHT OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 26, 2018

JUDGMENT AND REASONS: MARTINEAU J.

DATED: JULY 31, 2018

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