

Federal Court



Cour fédérale

Date: 20050614

Docket: T-2049-00

Citation: 2005 FC 812

BETWEEN:

ROGER AUBIN

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

LEMIEUX J.

INTRODUCTION

[1] Toward 6:41 p.m. on the night of October 27, 1999, Roger Aubin (the plaintiff), then an inmate in the Donnacona maximum security penitentiary (the penitentiary), was wounded by a fellow inmate armed with a home-made pick manufactured from the stem of a kitchen ladle. The attack occurred in the outer yard of sector 240 of the penitentiary and lasted about two minutes.

[2] Mr. Aubin managed to free himself from his attacker and, running to the gymnasium entrance, got inside; he was given succour by some penitentiary officers (the Service) who took

him to the infirmary, where he was admitted at 6:45 p.m. by nurse Denis Côté, who administered first aid to him.

[3] The plaintiff's injuries required emergency surgery in a Quebec City hospital. An ambulance was called at 6:50 p.m., arrived quickly at the infirmary at 7:02 p.m. and left the penitentiary at 7:25 p.m. for the St-François d'Assise hospital (HSFA). However, apparently for reasons of medical accommodation, it was the Enfant-Jésus hospital that admitted him and where he was operated at around 10:45 p.m.

[4] Mr. Aubin, representing himself, contends that the Service failed to protect him, did not intervene to assist him or stop the assault and was negligent in his medical care. Through an action against Her Majesty the Queen in right of Canada brought on November 3, 2000, he is claiming damages and costs of more than \$1,000,000 broken down as follows:

- (i) \$100,000 as compensation for the assault he suffered while under the Service's custody and protection;
- (ii) \$100,000 for pain, suffering and inconvenience suffered as a result of the injuries he sustained;
- (iii) \$350,000 for the physical aftereffects attributable to the Service owing to its refusal to treat him adequately;

- (iv) \$500,000 in exemplary, punitive and deterrent damages as well as for the anguish, disturbances, inconvenience, suffering and other physical and psychological traumas the Service has systematically inflicted on him.

[5] Mr. Aubin alleges the following faults against the Service:

- (a) The Service could and should have prevented the assault if the Service had acted prudently. In support of this allegation, the plaintiff cites the following circumstances:
 - (i) the Service was aware that, during the summer and fall of 1999, there was a war raging in sector 240 of the penitentiary between the inmates in unit H (the Hells Angels affiliates) and those in unit E (the members of the Plamondon Clan);
 - (ii) the Service knew that, in 1995, the Hells Angels had contracted with an individual to eliminate Roger Aubin;
 - (iii) on October 13, 1999, the penitentiary's preventive security had been warned by a coded source that a contract had been given to an inmate in cell range F of unit E to kill an inmate in cell range 2K of unit H (where the plaintiff was incarcerated) on a commissary canteen night;

- (iv) in mid-October 1999, a correctional officer had told him to watch his back, after hearing three inmate leaders plotting against him;
 - (v) on October 20 and 21, 1999, he had spoken about his fear to two correctional officers of the penitentiary.
- (b) some correctional officers on duty at Donnacona on October 27, 1999 did not see the assault through inattention. The Service could and should have intervened to stop the assault;
- (c) his departure by ambulance from the penitentiary infirmary was delayed because of a lack of staff to escort him, and, in addition, his transportation was not made efficiently; and
- (d) the Service did not administer him the medical care that was necessary for his rehabilitation.

[6] Sections 3 and 10 of the *Crown Liability and Proceedings Act* provide:

Liability

3. The Crown is liable for the damages for which, if it were a person, it would be liable

(a) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

Responsabilité

3. En matière de responsabilité, l'État est assimilé à une personne pour :

a) dans la province de Québec :

(i) le dommage causé par la faute de ses préposés,

(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

b) dans les autres provinces :

(b) in any other province, in respect of
(i) a tort committed by a servant of the Crown, or
(ii) a breach of duty attaching to the ownership,
occupation, possession or control of property.
R.S., 1985, c. C-50, s. 3; 2001, c. 4, s. 36.

Liability for acts of servants

10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.
R.S., 1985, c. C-50, s. 10; 2001, c. 4, s. 40.
[Emphasis added]

(i) les délits civils commis par ses préposés,
(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.
L.R. (1985), ch. C-50, art. 3; 2001, ch. 4, art.36.

Responsabilité quant aux actes de préposés

10. L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3a)(i) ou b)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.
L.R. (1985), ch. C-50, art. 10; 2001, ch. 4, art. 40. [Je souligne.]

[7] The applicable legal rules for determining the liability of the federal Crown are those of the province in which the damage was suffered. In this case, it is article 1457 of the *Civil Code of Québec* (C.C.Q.), as interpreted by the courts, which applies (see *Baird v. The Queen* (1984), 49 N.R. 276 (C.A.)). Article 1457 of the C.C.Q., dealing with non-contractual liability, reads:

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody. [1991, c. 64, art. 1457]

EVIDENCE

[8] The evidence of record comprises the following:

- (i) the testimony of persons subpoenaed by the plaintiff to testify in this Court pursuant to rule 41(2) of the *Federal Court Rules, 1998*;
- (ii) the testimony of Mr. Aubin;
- (iii) the sole witness for Her Majesty the Queen (HMQ);
- (iv) documentary evidence filed by each of the parties, including a number of videocassettes and more particularly a video of the assault and a video of the inside of the observation tower facing the outer yard of sector 240; and
- (v) the written examination for discovery of the plaintiff addressed to Robert Veilleux, coordinator of correctional operations of the Donnacona institution, and the latter's answers.

[9] I note that no medical doctor testified.

(1) Plaintiff's witnesses

[10] I will not dwell long on the testimony of Denis Alain, Jean Langevin and Alain Giguère. Their testimony is but a prelude to the events at the heart of Mr. Aubin's claim, which occurred during the summer and fall of 1999 and more particularly from mid-October of that year.

[11] Denis Alain is a retired police officer of the Sûreté du Québec (SQ); he came to the penitentiary on April 13, 1995 to inform Mr. Aubin that a certain Serge Quesnel, now an informer, had received a contract from the Hells Angels in Trois-Rivières granted by their lawyer to kill twelve individuals, including the plaintiff. Mr. Alain outlined the violence that prevailed in Quebec during the years 1995 to 2002, fanned by the conflict between the Rock Machines and Hells Angels motorcycle gangs, and which permeated the penitentiary where both groups were incarcerated: the Rock Machines in sector 119 and the Hells Angels and the Plamondon Clan in sector 240.

[12] Jean Langevin is the SQ member who led the police investigation relating to the assault of October 27, 1999.

[13] It was at his request that the Service produced a video that showed the assault which had been filmed by various cameras including one situated outside the fences surrounding sector 240. Mr. Langevin described the assault to us based on images of this edited video that the Court and the parties viewed.

[14] Here is how the assault progressed:

- (i) Mr. Aubin can be seen walking on the north side of the track of the outer yard of sector 240;

- (ii) then, at 18:41:15, his assailant can be seen hitting him and inflicting blows with a pick in his back, an assault that occurs at the foot of the observation tower beside the first of the three fences separating the tower from the outer yard of sector 240; this part of the assault episode lasts about 27 seconds;
- (iii) it can be seen that the plaintiff defends himself vigorously; at 18:41:42, the fight moves into the garden beside the track and continues in that location for about another minute and a half; and
- (iv) at 18:43:10, Mr. Aubin is seen getting the upper hand on his assailant and managing to flee, running toward the sector 240 gymnasium and going into it.

[15] Mr. Langevin testifies that the motive for the assault remained obscure because neither Mr. Aubin nor his attacker gave their version of the facts to the SQ investigators. He said possible motives related to vengeance, gang warfare or drug trafficking.

[16] During the relevant period, Mr. Giguère was the preventive security officer in the penitentiary. He corroborated the bulk of Denis Alain's testimony.

[17] He remembers that on October 1, 1997, Mr. Aubin had requested voluntary administrative segregation, thinking that his safety was in jeopardy. At the time, Mr. Aubin's cell

had been in unit H of sector 240, linked to the Hells Angels, for a year since he had asked in 1996 to be transferred to sector 119, dominated by the Rock Machines.

[18] He says that this transfer request seemed strange to him because in 1996 a war was raging between the Rock Machines in sector 119 and the Hells Angels in sector 240.

[19] He told us that when he was in administrative segregation, Mr. Aubin asked to return to the general population but that the penitentiary authorities refused, wanting to make some additional checks; Mr. Aubin's segregation became an involuntary administrative segregation. Mr. Aubin subsequently returned to unit H.

[20] According to his assessment, and the assessments of the Service, the Hells Angels did not pose a danger to Mr. Aubin. After all, he was the one who had joined the Hells Angels in 1996 following his transfer from sector 119. Moreover, in 1997, Mr. Aubin was working in the sector 240 canteen, a privileged position requiring the general trust of the population of that sector.

(a) Testimony of Nancy Lévesque

[21] Nancy Lévesque is a parole officer whose main task is to conduct follow-ups of the correctional plan of the inmates assigned to her. She was transferred to Donnacona on August 30, 1999, and was Mr. Aubin's case management officer from August 30, 1999 to January 2000, when Mr. Aubin was transferred to the Drummondville medium security penitentiary.

[22] She acknowledged that, in August 1999, Mr. Aubin asked to be transferred from the penitentiary.

[23] She confirmed (transcript at p.253) that his transfer to the Leclerc medium security penitentiary had been approved but that Mr. Aubin had refused to go there because that penitentiary was affiliated with the Hells Angels and Mr. Aubin wanted to take his distance from these bikers.

[24] In her report dated October 20, 1999, she writes (evidence book, at p.186):

[TRANSLATION]

Delivery of CPPR [Correctional Plan Progress Report] for his transfer to medium.

Tells me he will withdraw his request for Leclerc and make another one for Drummond. Seems to be in a bad mood. Disputes his affiliation. I explain to him that this info comes from the region, which receives its info from the SQ. Assures us that he has no affiliation and that it is exactly what he wants, to dissociate himself.

Reneges on his request for transfer and tells us that he will make one for La Macaza from every angle because, as he puts it, we do not appear to understand his reasons.

Aubin seems nervous, tense and in a hurry to leave Donnacona. I show him my clinical impression and he tells me that a long time ago there were some problems and that we (the workers) know it. (info sent to the PSO [preventive security officer]) [Emphasis added]

[25] During her testimony, Nancy Lévesque described the report of correctional officer Sophie Noël dated October 21, 1999, which is addressed to Mr. Aubin's attitude and his institutional adaptation. Sophie Noël wrote that Mr. Aubin always has a good behaviour and a good attitude

with both staff and his fellow inmates. She notes that Mr. Aubin holds the position of chair of the inmate committee and appears to be performing his duties adequately, although recently he has made a request to return to school full-time. She concludes (evidence book, at p.188):

[TRANSLATION] We note that when we met with the subject concerning his transfer, he confided to us that he was afraid and wanted to leave, and to go anywhere that there would not be any HA [Hells Angels]. I asked him, first, if he was experiencing any problem to tell me about [word removed] was just beside him at that point, but he told me no that there was nothing, the subject tells us that he is afraid, not of what, and it is clear that he is not asking us in any way for protection. [Emphasis added]

(b) Testimony of Benoît Morais

[26] Benoît Morais has worked at the penitentiary since 1986 and is a senior correctional officer. On the night of the October 27, 1999 assault, Mr. Morais was the assistant to Nicolas Dion, the institution's relief warden.

[27] Around 5:45 p.m. on the night of the assault, he received a call from Mario Goulet, a preventive security officer at the penitentiary [TRANSLATION] "who informed me that he had an anonymous telephone tip telling me there might be someone who would be assaulted in the gymnasium or in the yard or the canteen" (transcript, October 18, at p.364). He informed Mr. Dion, but the activities were beginning in 15 minutes. He adds [TRANSLATION] "but it must be said, My Lord, also, that information like that, we have a lot of it. And then we received information of that kind, how could I put it, virtually on every shift, he was telling us." Following this telephone call, Mr. Morais, around 6:00 p.m., went up on the gangway surrounding the interior of the sector 240 gymnasium [TRANSLATION] "to verify the telephone call that I had got

and to notify the people who were there. But this was not the first time I had done that, and in any case the officers were well informed of the situation prevailing at Donnacona at that time, that it was necessary to be on the alert at all times in any event.” (*ibid.*, at p.369).

[28] He told us that the information received from Mario Goulet [TRANSLATION] “was information we had received by telephone quite simply, which said that it was possible that something would happen at the canteen that night... I did not know where, when, how... because it was possible that something might happen, or that it might not... often nothing happened, but that night, something did happen” (*ibid.*, at pp.369 and 370). As we will find out, this information dated from October 13, 1999.

[29] Mr. Morais states that the lack of details in the information received did not allow the penitentiary to end the inmates’ activities that night. He says it would have been unreasonable in the circumstances to force all the inmates to remain in their cell, which would have aggravated things and penalized them unnecessarily.

[30] According to him, he did not see the assault and it was around 6:45 p.m. that he saw Mr. Aubin shaking the gate of the gymnasium.

[31] On examination by Mr. Aubin, Benoît Morais denied telling him to watch his back in mid-October 1999 (Transcript of October 19, 2004, at pp.58 to 63).

(c) Testimony of Pierre Lafond

[32] Pierre Lafond is a correctional officer with more than 16 years of seniority in the correctional system. On the night of October 27, 1999, he was posted in the 240 observation tower.

[33] Asked [TRANSLATION] “What did you see, what do you know about this incident?”, he answered [TRANSLATION] “All right. What I saw of the incident; the incident itself I did not see, unfortunately, I did not see it.” (transcript, at p.139, October 19, 2004). He added, [TRANSLATION] “I saw an inmate heading toward the 240 door to go inside, as I recall, he had come from my blind spot in order to go there.” (*ibid.*, at p.140).

[34] According to his testimony, the blind spots in the tower dominating the 240 outer yard are created by the metal bars and beams that hold up the roof of the tower and help to frame its windows. The effect of a blind spot is to [TRANSLATION] “deprive you of visibility” (*ibid.*, at p.145). The blind spot depends on where the officer is situated and where he moves about in the tower. He says the tower allows an overall view of the outer yard of sector 240 including the garden: [TRANSLATION] “I see it very clearly but again, it depends what side you are on... It’s like the track, if I back up, I no longer see the track from that side, I see it less there. If I am there, I see a little less there.” (*ibid.*, at pp.148 and 149).

[35] Pierre Lafond acknowledges that he has to be in the best possible place in order to oversee the inmates.

[36] Asked [TRANSLATION] “You were not situated to see all of the inmates?”, he answers [TRANSLATION] “... where I was situated, I had a complete view of the yard, on the scale of the yard. But if I moved further, I would lose it. If I moved — you can’t be everywhere at the same time, it is impossible.” (*ibid.*, at p.147).

[37] It is clear from Pierre Lafond’s testimony that he suffered greatly from not having seen the incident: [TRANSLATION] “I can tell you that it was harder for me that night to go home, having done nothing, seen nothing, than to have intervened in another case.” (*ibid.*, at p.155).

[38] Pierre Lafond said that it was while watching the video that he understood why he did not see the assault. He was seated during the assault, which means that the metal frame surrounding the tower windows obstructed his view of the track — where the assault began — and a major part of the garden — where the fight took place.

[39] He explained that his surveillance method was to walk from left to right throughout the tower but that after 20-25 minutes he sat down in the seat opposite the telephone. [TRANSLATION] “I sit down for a couple of minutes, it may be five minutes, to rest my legs, then I get up again.” (*ibid.*, at p.176).

[40] After watching the video, he concluded that during the two minutes in which the assault occurred, he was sitting down to rest his legs and that it was not until Mr. Aubin emerged from his blind spot that he saw him running toward the gymnasium entrance.

[41] [TRANSLATION] “If I had simply shifted two feet over, I would have seen it but where the telephone table was, it was — in that spot,” he says (*ibid.*, at p.188). He summed up with the statement, [TRANSLATION] “I was actually at my post, I was in the wrong place at the wrong time, you might say.” (*ibid.*, at p.195).

[42] He asserts he was not warned by the penitentiary authorities that an incident might occur that night.

(d) Testimony of Linda Leclerc

[43] Linda Leclerc is a correctional officer with sixteen and a half years of experience in the penitentiary. On the night of the assault, she was on duty in observation tower 21, an observation post integrated with the 240 gymnasium from which activities in the outer yard of that sector can be watched.

[44] Her job, that night, was to oversee the outer yard. She says there were about ten inmates in the yard. She testified that she saw nothing of the assault.

[45] She stated that, from observation tower 21, she did not see the garden because it is located about 500 feet away, and the view of the garden is obstructed by a number of fences surrounding the playing fields. She said she had a clear view of the place where the inmates work out and the tennis court. According to her, surveillance of the ball court was left by unwritten custom to the officer in the observation tower and the motorized patrols.

[46] She stated that, even using binoculars and the lighting in the yard, she could not have seen Mr. Aubin being attacked because the track in front of the tower was too remote. It was the evening, so the garden was dark, and the fight in the garden took place on the ground.

[47] She testified that she had worked in the sector 240 observation tower. Asked [TRANSLATION] "Can you tell us whether you see the garden clearly from the observation tower?", she answered, [TRANSLATION] "It depends where you are." She acknowledged that [TRANSLATION] "the blind spot is different if you move, but there is one elsewhere." (At pp.19 and 20 of the transcript of October 20, 2004).

[48] She said she had not been informed that an incident might occur on the night of October 27, 1999, but she was told to watch closely (*ibid.*, at p.23).

[49] She answered "yes" when asked [TRANSLATION] "When you are conducting surveillance in the 240 tower do you occasionally sit down?" Asked [TRANSLATION] "How often, more or

less?", she answered [TRANSLATION] "It depends." She acknowledged that always working standing up becomes tiring over time and that, if you work standing up for too long, it could diminish your ability to do your surveillance work. She thinks that being seated is effective for conducting surveillance [TRANSLATION] "except that, instead of watching more in front of me, I am going to watch more in the back and on the side." (*ibid.*, at pp.43 to 45).

[50] Asked [TRANSLATION] "If you lose sight of the inmate for a minute or two...", she answered [TRANSLATION] "It is because leaning over, it is hard to lean over when you are seated. It is better to get up than to lean over the desk. That's how I see it." (*ibid.*, at p.46).

(e) **Testimony of Steve Coulombe**

[51] Steve Coulombe is a senior correctional officer who has worked in the penitentiary since 1992. On the night of October 27, 1999, he was stationed at the penitentiary's Main Communications and Control Post (MCCP) from 7:30 p.m. on, thus after the assault on Mr. Aubin. He was the one who took out the six cassettes from his recording devices (one for each of the four fixed perimeter cameras, one for the SID camera that an officer can handle and one for the multi-camera).

[52] He explained to us the function of the various cameras and the choice of pictures that the officer on duty at the MCCP can select.

(f) Testimony of Pierre Côté

[53] Pierre Côté has been a correctional officer in the penitentiary since 1984. He was in charge of the M CCP on the night of the incident. He testified that [TRANSLATION] “I saw absolutely nothing of the incident, nothing.” (*ibid.*, at p.118). He told us that the first time he was aware that an incident had occurred was when Mr. Aubin was inside the penitentiary and the assault was announced on the radio.

[54] He acknowledged having been notified that there might be some fights on the night of the assault (*ibid.*, at p.124), but says he was nevertheless concerned with watching what was going on in the gymnasium [TRANSLATION] “because our bosses had told us that, between the inmates and the Hells Angels, for some time it has been fairly hot.” (*ibid.*, at p.119).

[55] Since the assault was picked up on a cassette, he acknowledged that the images of the assault appeared on a monitor screen at the M CCP but maintained that he saw nothing because he was watching the screen of the 15 multi-cameras that are recording all the time and that are located in the gymnasium (*ibid.*, at p.135).

[56] He also acknowledged that he wanted to view sector 7 of the 240 yard where Mr. Aubin was assaulted because [TRANSLATION] “I have had the guard position I now have for 17 years, I always have my cameras on sector 7 during working time because I personally consider that it is

a hot spot outside.” (*ibid.*, at p.138). [TRANSLATION] “Moreover, that was the second assault I have filmed like that, because of that.” he added (*ibid.*, at p.138).

(f) Testimony of Nicolas Dion

[57] Nicolas Dion is a correctional supervisor with 18 years of seniority in the penitentiary; he was the one in charge of the penitentiary on the night of October 27, 1999, in the absence of the warden. He testified to the following facts:

- (1) After consulting the Care Centre and going to the site at 6:46 p.m., he asked Pierre Côté to call an ambulance immediately because in his view the situation was serious;
- (2) As he was required to do, he notified the preventive security officer Mario Goulet of the incident and, at 7:10 p.m., Robert Veilleux, coordinator of security at the penitentiary, called him to demand an additional escort to accompany Mr. Aubin to the hospital;
- (3) He does not remember receiving a request to take the injured man out, as the ambulances were ready to leave at 7:05 p.m., but he does not deny the possibility of such a call having been made. At the time, he was preparing the exit code. Using the staff on site, he had found the necessary escorts so they could leave as soon as possible;

- (4) He is convinced that all of the necessary procedures to enable the ambulance to leave could not be completed in the 20 minutes following the call for the ambulance (*ibid.*, at p.222). In addition to making the arrangements for Mr. Aubin's departure, he also had to take care of the situation within the penitentiary: the search of those who were taking part in activities (45 inmates) and the return of the inmates to their cells;
- (5) He had to recall some members of the staff to replace those who were accompanying Mr. Aubin and does not think this was a cause of delay, as priority was given to getting the ambulance off and then recalling staff (*ibid.*, at p.263);
- (6) His report notes the departure of the ambulance at 7:20 p.m. from the Care Centre (*ibid.*, at p.251) and in his opinion 40 minutes is a reasonable period (*ibid.*, at p.233);
- (7) In the two weeks preceding October 27, 1999, he had not been informed that an incident could occur in the outer yard of sector 240 or in the gymnasium. No particular inmate had been identified. [TRANSLATION] "We were often told... there was some tension, the activities were separated" (*ibid.*, at p.267);
- (8) There was a lot of tension at the time in the penitentiary, which had thus led to the separation of the activities between unit H and unit E of sector 240;

- (9) The separation of activities was a measure designed to monitor or manage a risk of assault but in a maximum security institution the complete elimination of the risk was impossible; there was permanent tension;
- (10) He corroborated that Mr. Aubin was a member of the 240 detention committee, which represents the inmates before the administration, a privileged position that requires the approval of the influential members of the institution or of sector 240, including the Hells Angels, with whom he thinks Mr. Aubin was mixing.

(g) Testimony of Denis Côté

[58] Denis Côté, who has worked in the penitentiary for five and a half years, is the nurse who administered first aid to Mr. Aubin on the night of October 27, 1999. His report of the event reveals the following:

- (1) The inmate's arrival at the penitentiary's Care Centre at 6:45 p.m. Lacerations x 6 on the body, profuse bleeding, deep lacerations left side, deep lacerations left ribs, superficial lacerations x 4 on the back, deep to medium lacerations x 3 on the left-hand;
- (2) Ambulance called at 6:50 p.m., emergency transfer HSFA;
- (3) 7:02 p.m., arrival of ambulance at Care Centre (transcript, October 21, 2004, at pp.11-12);

- (4) 7:05 p.m., administration of a lactal solute (to replace liquid losses);
- (5) 7:05 p.m., we await the OK of the keeper and the staff for the transfer;
- (6) 7:13 p.m., emergency transfer, pallor of inmate, who is still conscious, wide awake, well oriented;
- (7) 7:25 p.m., departure of ambulance. HSFA notified of immediate arrival of inmate;
- (8) 10:45 p.m., Hôpital de l'Enfant-Jésus contacted. Inmate is now in operating room... .

[59] During his testimony, Mr. Côté noted the following:

- (1) At 7:13 p.m., Mr. Aubin's condition was deteriorating but he still remained conscious and wide awake and, to his knowledge, his life was never in danger, his condition was not critical and was even stable after the administration of the lactal solute (*ibid.*, at pp.16, 44, 47 and 49);
- (2) He does not remember saying that the departure for HSFA was too long (*ibid.*, at p.16) but it is possible that he did say it (*ibid.*, at p.88);

- (3) He cared for Mr. Aubin after his return from the Hôpital l'Enfant-Jésus. Mr. Aubin remained in the penitentiary infirmary from November 1 to 9 or 10, 1999;
- (4) He did the follow-up on Mr. Aubin's medical file during his detention by the CSC; he did not make any diagnosis but simply observed:
- (a) that in 1986, Mr. Aubin, following an attempted escape, suffered a contusion to the hand and rib cage and was treated at the Cité de la Santé in Laval, and had a weakness in the left arm.
 - (b) in 1990, Mr. Aubin was injured in the neck and shoulder as a result of a motorcycle accident.
- (5) In the security context inherent to penitentiary life, he thinks that after an ambulance arrives at the penitentiary, an inmate's departure within 20 minutes is possible and a departure within 25 minutes is normal (*ibid.*, at pp.20 and 78 to 82).

(h) **Testimony of Mario Goulet**

[60] Mario Goulet has been a preventive security officer since 1997 at the penitentiary, with which he has been associated since 1985. His major duties consist in collecting information,

assessing any threat within the penitentiary and investigating within the penitentiary the introduction of drugs, assaults, murders and attempted escapes.

[61] He describes Mr. Aubin as a known inmate, a bigshot and a security concern because of his attempts to escape, the last of which occurred in 1991, his drug possession record, his position as canteen keeper and his membership in the inmate committee.

[62] He corroborates the testimony of Alain Giguère concerning Mr. Aubin's transfer in 1996 from sector 119 to sector 240 and the circumstances surrounding Mr. Aubin's administrative segregation in 1997.

[63] It was Mr. Goulet who coordinated the investigation of the incident of October 27, 1999 conducted by the SQ and it was he who directed the internal investigation.

[64] On November 25, 1999, he wrote a report on the security information entitled [TRANSLATION] "Attempted murder of Roger Aubin", from which I quote the following extracts (Evidence Book, at p.174):

[TRANSLATION]

On 1999 10 13 the information source coded 321-11 informs the security department that there is some tension among the inmates in units E and H and that a contract had been given to eliminate an inmate, the incident ought to occur on a canteen night (Wednesday) and the order had been given to assault the inmate with the goal of killing him... . The source states that he does not know the name of the inmate in question but he explains that the event would involve one or more inmates in range 2K of unit H with those in ranges F of unit E.

...

On 1999 11 05, I met with Roger Aubin at the institution's Care Centre. He informed me that he did not recognize his attacker and he did not want to lay a complaint with the Sûreté du Québec. He acknowledges having had a conflict with ... but he thought that was settled. Moreover, he says there was an agreement between the clan ... to eliminate him. He admits having said openly that he wanted to take his distance from individuals linked with the Hells Angels and that he had had some verbal confrontations with the inmates... . Furthermore, he informed me that a member of the staff had informed him several days before the incident that he would be attacked. According to him, he was much more in conflict with the individuals close to ... than those of the He thinks there was collusion between the two groups to eliminate him.

On 1999 11 22, the information source coded 321-16 informed the security department that the inmates ... are indeed those who put out the order to assault Roger Aubin... . When a number of inmates linked with the organization ... were placed in segregation as a result of their involvement in some illegal activities in the institution ... , the inmate Aubin was not placed in segregation and it was allegedly for that reason that he According to the source, ... suspected Aubin simply because he was identified with the Hells Angels and that the placement in segregation of a number of inmates identified with ... would allow H.A. to take control over the sale of drugs in the institution. [Emphasis added]

[65] He describes the homemade pick as being manufactured from a ladle from the penitentiary's central kitchen. He did not know when or how it would have been stolen since these questions pertained to the police investigation. However, he acknowledged that ladles frequently disappear from the kitchen and explained the control and search system.

[66] Concerning the observation tower, he acknowledges the existence of blind spots but denies that the place where Mr. Aubin was assaulted was a more dangerous corner; according to Mr. Goulet, it was a corner like the others (*ibid.*, at pp.171 and 172).

[67] He does not deny having been contacted by Nancy Lévesque and Sophie Noël following their meetings on October 20 and 21, 1999 with Mr. Aubin during which he had expressed his

fear. In his view, the important thing is that Mr. Aubin had met with someone who had given him the assistance he wanted (*ibid.*, at p.177).

[68] Questioned about his report of November 25, 1999 entitled [TRANSLATION] “Attempted murder of Roger Aubin”, Mr. Goulet confirmed that the information received on October 13, 1999 came from a coded source but emphasized that this information did not specify that it was a person in range 2K who would be assaulted or the name of the inmate in question. He did testify that Roger Aubin was housed in 2K in which 20 inmates resided while there were 40 inmates in the F ranges of unit A.

[69] Mr Goulet said that there was a follow-up from the time when Nancy Lévesque thought she had conveyed to him the information on October 20. [TRANSLATION] “There was a follow-up. It was brought to my attention that Mr. Roger Aubin was not feeling well, was under pressure. Mr. Aubin held the position of chair of the inmate committee. Mr. Aubin was in a hurry to leave...” (*ibid.*, at p.229).

[70] For Mr. Aubin, [TRANSLATION] “there was no problem, there was a conflict resolution, we talked about it” (*ibid.*, at p.230). He added, [TRANSLATION] “In my view, the reasons why Mr. Aubin does not feel well, the prison is so bad, that it is normal that he would want — that he be able to leave... . When there is tension among the inmates, there are several inmates who want to leave.” (*ibid.*, at p.230). Moreover, he noted that Sophie Noël offered protection to Mr. Aubin and that he replied he did not want any (*ibid.*, at p.231).

[71] Mr. Aubin had several options given his fear of the Hells Angels. He could have met with the warden or Mr. Goulet. He had already spent about 10 years in the penitentiary; he sat on the inmate committee; he could have changed his range and be housed where there were no Hells Angels; he could have gone to another unit; he could have returned to sector 119. Nevertheless, Mr. Aubin [TRANSLATION] “decided to confront the ordeals that he knew, he alone knew.” (*ibid.*, at p.236).

[72] He testified that he had not been given any information indicating that Roger Aubin was in danger. [TRANSLATION] “That Roger Aubin would want to leave, I can understand that he was fed up, it is hard to be chair of the inmate committee. I can understand that he was fed up with the Hells Angels, I can understand that, but I had no information that Roger Aubin’s life was — I made no connection there, no.” (*ibid.*, at pp.260-61).

[73] He explained that the purpose of his report of November 25, 1999 was to understand why Mr. Aubin had been assaulted. According to his sources, there were a number of possibilities including: (i) he may have been suspected of being an informer, being the only member of the inmate committee who had not been placed in segregation in July 1999 as a result of a drug bust; and (ii) an escape plot through the underground channels in sector 119. However, Mr. Goulet thought the real motive for the assault was the conflict between units E and H.

[74] Since October 27, 1999 was a canteen night when many inmates come out for the activities, Mr. Goulet acknowledged having telephoned the penitentiary's operations office between 5:00 p.m. and 6:00 p.m. asking that [TRANSLATION] "the people above be advised to watch out, be vigilant" (*ibid.*, at p.288). He adds, [TRANSLATION] "I called the operations office, I said: "Guys, it's a canteen night, by way of prevention, the prison is locked down, notify — notify the guys above to be vigilant about the canteen, it's possible that something will happen." (*ibid.*, at p.289).

[75] Mr. Goulet tells us that his concern was derived from information received on October 13, 1999 and later (*ibid.*, at p.292), says he does not recall the exact words but testifies [TRANSLATION] "on the telephone I said: 'Benoît, it's a canteen night, notify the catwalks to be vigilant, anything can happen,' something like that, I imagine."

[76] There was [TRANSLATION] "a big risk of assault" since in the previous week there had been some fights. He adds, [TRANSLATION] "the penitentiary context, on the 20th or 21st, there was an assault, people were beaten up in the gymnasium, outside." (*ibid.*, at pp.281 to 287).

[77] Keeping the inmates in their cell to prevent an assault would not have been an appropriate measure, in his opinion, since he had had the information for two weeks and nothing had happened.

[78] He came back to what he had said to Mr. Benoît Morais. He testified he had never explained to Mr. Morais the nature of the source of the information [TRANSLATION] “and I gave some security orders to Mr. Morais to notify the people who were working on outside activities to be vigilant. There could be an assault tonight, a canteen night.” (*ibid.*, at p.304).

[79] On cross examination, he admitted that [TRANSLATION] “depending on where the custodial control officer is situated, he may be in blind spots” and that the fences, for example those close to the tennis court, [TRANSLATION] “[can] in a way obstruct the vision of the person who is doing surveillance in the observation tower”. According to Mr. Goulet, the sector 240 yard is secure notwithstanding the blind spots in the observation tower because [TRANSLATION] “the officer can move about... yes, we agree there are some blind spots, that’s for sure, but when you move, when you walk about, you change position on a four-hour shift... you have to move about, you squeeze up, you cover the job completely. There’s a part at some point that you don’t see, but there is a window you see through, you see clearly.” (*ibid.*, at pp.312-15). In response to a question from the Service’s counsel suggesting that there is always a certain risk in the prison context, he answered [TRANSLATION] “That is correct.”

[80] He also admitted that [TRANSLATION] “it can happen that you can expect that on occasion it could be the MCCP officers who might notice an incident while using the SID but that it would be almost an accident” (*ibid.*, at pp.321 and 322). He added that it was the officers on the catwalks especially who see things and who [TRANSLATION] “feed the MCCP”. The officers posted outside, he said, are the first to intervene, they are there with their eyes. [TRANSLATION]

“The eyes are a lot better than a camera. They experience what is happening, they see the number of inmates, they see the atmosphere, they are there.” (*ibid.*, at p.323).

[81] Mr. Goulet said that Mr. Aubin’s attacker was incarcerated in range 1F of unit E and we already know that Mr. Aubin was inhabiting range 2K of unit H. He explained to us that Mr. Aubin, as chair of the inmate committee, had all the necessary latitude to leave when he wanted and it was Mr. Aubin who made the decision to go to the yard that day (at pp.4 to 6 of the transcript of October 22, 2004). He also explained that on the night of October 27, 1999, unit E were in the exercise yard at the beginning of the evening, that is from 6 p.m. to 8 p.m.

[82] Mr. Goulet testified that he had asked Mr. Aubin the name of the person who warned him in mid-October to watch his back but Mr. Aubin had refused to disclose his name to him. Also, no member of the staff had made a report to him to that effect.

[83] On re-examination by Mr. Aubin, Mr. Goulet acknowledged that as chair of the inmate committee, part of his work required that he be in the yard when they went out (*ibid.*, at p.21).

(i) **Testimony of Robert Veilleux**

[84] At the time of the assault, Robert Veilleux was responsible for security in the penitentiary as coordinator of correctional operations, a position he had held since 1987. He was not in the

penitentiary on the night of October 27, 1999; it was Mr. Goulet or Mr. Dion who told him about the assault.

[85] He testified that he had demanded that a fourth escort accompany the ambulance that was taking Roger Aubin to the hospital, for security reasons related to his knowledge of the inmate, his past and the fact that an assault on a chair of the inmate committee was not something usual.

[86] Mr. Aubin based his examination of Mr. Veilleux on the written answers that the latter had provided in the context of the examination for discovery.

[87] Mr. Veilleux, taking into consideration all of the necessary requirements to authorize an inmate's emergency trip to the hospital and the arrangements that are necessary in order to secure the penitentiary following an assault, asserted that the delay before the ambulance left with Mr. Aubin was reasonable. There were enough staff in place, he said, to fill the penitentiary's needs but he admitted that it was necessary to replace the escorts with staff coming from outside.

[88] From the observation tower, he said, one has a view of the whole of the outer yard of 240 and you can see the garden and the track at night. Asked [TRANSLATION] "And do you see the place where the assault occurred?", he answered [TRANSLATION] "Oh yes, you see – from the observation tower, you see the whole yard, you see it" (*ibid.*, at p.40) "even at night". The inside fences would not obstruct the view, but he admitted [TRANSLATION] "that you don't have as good a view through the fences".

[89] He knew that a contract had been put out on Mr. Aubin in 1995 and he was stunned to learn that in 1996, Mr. Aubin had requested a transfer from 119 to 240 where the Hells Angels predominated. Later, Mr. Aubin seemed to be well settled in. [TRANSLATION] "It meant that we stopped thinking that there might be a Hells Angels contract on you, naturally, you were quite well settled in with the Hells Angels" (*ibid.*, at p.44), which explains his reply to question 46 because [TRANSLATION] "to my mind, you have no problems with the Hells Angels, you've even become a faithful servant of the Hells Angels, in my book." (*ibid.*, at p.44).

[90] On the other hand, he corroborated the nature of the problems that existed in sector 240, that is, the conflict between unit E and unit H. The inmate committee did not have much clout in this context. He criticized Mr. Aubin for having indeed expressed a certain anxiety but never having explained his problem (*ibid.*, at p.83).

[91] He was aware of the information received by Mr. Goulet on October 13, 1999, that a contract had been put out to eliminate an inmate whose identity was unknown to those responsible for security. He testified that he and the four preventive security officers had different ideas concerning the identity of the inmate in question but that the name of Roger Aubin was not among them.

[92] One of the written questions in the examination for discovery referred to the defendant's defence record, which indicated at paragraph 21 [TRANSLATION] "If there is fault, that fault can

lie only with the plaintiff who acted recklessly.” Mr. Aubin asked how he had acted recklessly, therefore. Mr. Veilleux answered at the hearing:

[TRANSLATION]

[Transcript, at p.126] Well, as I recall – as I recall I say – the activities were separated that night and it was not at the time that you were – that you were in the yard, it was not the time for your side to be there.

Of course you were on the inmate committee, you could be there. But if you say that things were not going well and you were afraid and you were still taking advantage of something there. And that’s what I’m saying: why were you there when you did not need to be there, it was not necessary that you be there.

That is why I tell myself that, because the outing there at that time was not your side.

(j) Testimony of Roger Aubin

[93] Mr. Aubin began by explaining why the Hell’s Angels would have asked Serge Quesnel to kill him. The motive arose from the conflict between him and Mr. Tremblay, the lawyer who was representing him at his preliminary inquiry when he was charged with murder. Dissatisfied with Mr. Tremblay’s representation, Mr. Aubin discharged him and harshly criticized him in front of some inmates at Donnacona, including Serge Quesnel, likewise represented by Mr. Tremblay, the same lawyer who was defending the Hells Angels in Trois-Rivières.

[94] He corroborated the testimony of Denis Aubin.

[95] He explained why, in 1996, he transferred from sector 119 to sector 240, controlled by the Hells Angels. Mr. Aubin, in March 1996, had testified in favour of a member of the Hells Angels

during a voir dire; upon his return to the penitentiary, this earned him the gratitude of the Hells Angels and the distrust of the Rock Machines.

[96] He testified that between 1996 and October 1997, he did not fear for his safety and that as a result of Mr. Plamondon's intervention, he had even obtained a position of trust, as a canteen operator. He was tolerated by the inmates in 240, he said.

[97] He corroborated the fact that in September-October, 1997, he requested administrative segregation because he feared for his safety as the Hells Angels' trials had been concluded and he felt his position was more precarious. Mr. Aubin remained in administrative segregation for 43 days and explained why he had decided to return to sector 240. He said he had received several visits, all to the effect that he had no reason to worry about the inmates in 240.

Mr. Tremblay even wrote a letter to the penitentiary administration (exhibit D-24) notifying the warden that it was the Sûreté du Québec and the informer Serge Quesnel who had created a fictitious imbroglio between him and Mr. Aubin and that following some discussions with Mr. Aubin, he confirmed that there was no animosity or problem between the two of them.

[98] Mr. Aubin related that, from the end of 1997 to the summer of 1999, everything seemed to be in order in sector 240.

[99] He became chief canteen manager of 240, a position he lost after the authorities discovered that he was selling hashish, but not, he says, on behalf of the Hells Angels but on his

own account. He admits he was close to the Hells Angels but claims he was not working for them (transcript, October 25, 2004, at p.210).

[100] He asserted that Benoît Morais misunderstood his dissatisfaction with Mr. Lajoie-Smith and said it is the bikers who asked him to sit on the inmate committee, a position that he obtained without having been elected by the inmates, which reduced the influence he might have with either the penitentiary administration or the inmates.

[101] He became interim chair of the inmate committee after the chair was placed in segregation in the summer of 1999.

[102] He said that his problems began during the summer of 1999, at the beginning of the separation of the activities between the inmates in unit H and those in unit E. He sensed a campaign of intimidation against him.

[103] During the summer of 1999, Roger Aubin asked to be transferred to a medium security penitentiary. The Leclerc penitentiary was offered to him but he refused, telling Nancy Lévesque that Leclerc was linked to the bikers. Also, during this period, he wanted to leave the inmate committee on the ground that he had not succeeded in convincing the hostile leader of the Hells Angels that a certain amount of calm was needed so that the activities among the inmates would no longer be separated.

[104] His fear for his safety increased substantially following a warning that Benoît Morais had given him in mid-October, he claims. Mr. Aubin testified that Mr. Morais told him

[TRANSLATION] “Watch your back” after overhearing a conversation between Mr. Lajoie-Smith, a member of the Rowdy Crew, and the former chair or chief of unit E (*ibid.*, at p.239).

[105] He admitted that, during his meeting with Nancy Lévesque on October 20, 1999, he had not informed her that Mr. Morais had warned him to watch his back. “I simply told her that I had to leave, I had some problems.” (*ibid.*, at p.240).

[106] He admitted that he could have asked for voluntary administrative segregation:

[TRANSLATION] “It’s always a solution to go to the hole but from the time I notified the staff, I thought that someone would come to meet with me.” (*ibid.*, at p.242).

[107] He testified that he telephoned his sister and told her [TRANSLATION] “I was a bit anxious about my safety.” (*ibid.*, at p.243).

[108] He described the assault on October 27, 1999, saying he was participating in the activities of the inmates in unit E because he was still chair of the committee and [TRANSLATION] “I had to be available at all times for the inmates, whether block E or block H.” (*ibid.*, at p.243).

[TRANSLATION] “I went out because I had to go out. It was my job, I had to be present because

the inmates who are in the block cannot meet with you if you are in your cell” (*ibid.*, at p.246) and that it was his turn that night to be among the inmates of unit E.

[109] He also described his stay in the infirmary, saying he overheard Mr. Côté say [TRANSLATION] “it’s long, it’s too long, he’ll have to leave.” He also remembers that the infirmary contacted the keeper, asking [TRANSLATION] “What’s happening with the escort?”

[110] Finally, he talked about his medical consultations: an initial one with a physiotherapist who requested a follow-up by a neurologist who turned out to be Dr. Bouchard of the Hôpital L’Enfant-Jésus. In January 2000, Dr. Bouchard recommended an electromyographic examination and a physiological examination. The physiological examination took place at La Macaza in November 2000 and the EMG was administered by Dr. Côté in July 2001, and a further examination was conducted in April 2002 by Dr. Granger, an otorhinolaryngologist.

(2) Defendant’s evidence – Testimony of Pierre Laplante

[111] Pierre Laplante was the sole witness for the defendant. He has been at Donnacona since 1995, he is now the warden of the penitentiary and was the deputy warden of the institution at the time of the assault on October 27, 1999.

[112] As deputy warden of the penitentiary, he was managing the correctional operations involving inmate management, security operations and information analysis; in this capacity, he

chaired daily meetings of the penitentiary executive composed of the warden of the institution, some correctional supervisors, some unit managers and some security chiefs such as Mr. Veilleux.

[113] At the time, there was an atmosphere of conflict between the Hells Angels and the Plamondon clan. In his opinion, the information that Mr. Goulet had received on October 13, 1999 did not justify shutting the activities down completely, as this information was not sufficiently clear, straightforward and specific to warrant a freeze on activities, which represent the only residual freedom for inmates within the penitentiary.

[114] He testified to the importance of the inmate committee in the validation of certain information received by the penitentiary's security officers.

[115] On cross-examination, Mr. Aubin asked Mr. Laplante what the penitentiary policy is when it is discovered that an individual is in possession of picks. Mr. Laplante answered that checks are conducted and the security officers attempt to discover whether the motive for possession of such a pick is defensive or aggressive and, ultimately, if there is any doubt, the inmate is placed in segregation.

[116] Mr. Aubin asked him at what point the ladle that was used in his assault had disappeared from the kitchen. Mr. Laplante replied that he did not remember but that the procedure is to count

the kitchen utensils and that in principle, the Service became aware of its disappearance soon afterward.

Analysis

(1) A few principles

[117] The law and the cases have long recognized the Crown's liability toward the inmates of penal institutions. This liability is vicarious since the Crown is answerable for the acts of its officials, the correctional officers.

[118] In *R. v. MacLean*, [1973] S.C.R. 2, Mr. Justice Hall, on behalf of the Supreme Court of Canada, adopted the statement of Cattanach J. of this Court in *Timm v. The Queen*, [1965] 1 Ex.C.R. 174:

¶9 The responsibility of the Crown towards inmates of penal institutions was correctly stated by Cattanach J. in *Timm v. The Queen* [[1965] 1 Ex. C.R. 174.], at p. 178, as follows: Section 3(1)(a) of the *Crown Liability Act* S.C. 1952-53, c. 30 provides as follows:

“3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(a) in respect of a tort committed by a servant of the Crown, ...”
and section 4(2) provides,

“4. (2) No proceedings lie against the Crown by virtue of paragraph (a) of subsection (1) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.”

The liability imposed upon the Crown under this Act is vicarious. Vide *The King v. Anthony and Thompson*, [1946] S.C.R. 569. For the Crown to be liable the suppliant must establish that an officer of the penitentiary, acting in the course of his employment, as I find the guard in this instance was acting, did something which a reasonable man in his position would not have done thereby creating a foreseeable risk of harm to an inmate and drew upon himself a personal liability to the suppliant.

The duty that the prison authorities owe to the suppliant is to take reasonable care for his safety as a person in their custody and it is only if the prison employees failed to do so that the Crown may be held liable, vide *Ellis v. Home Office*, [1953] 2 All E.R. 149. [Emphasis added]

[119] In Quebec law (see Baudouin, *La responsabilité civile*, 6th ed., Éditions Yvon Blais), three essential conditions must be fulfilled to give rise to delictual civil liability: (1) fault; (2) harm; (3) a causal relationship between fault and harm.

[120] In Baudouin, *supra*, it is explained at paragraph 88 that in Québec law, liability is based on fault, i.e. [TRANSLATION] “conduct that is inconsistent with the standards generally accepted by the courts or, as article 1457 C.C. now states, with the rules of conduct that lie upon a person according to the circumstances, usages or law.”

[121] More particularly, they describe delictual civil fault as being [TRANSLATION] “constituted by the deficiency between the agent’s conduct from that of the abstract and objective type of the reasonable, prudent and diligent person” placed in the same circumstances.

[122] At paragraph 89 of Baudouin, *supra*, it is explained that, since the essential purpose of civil liability is the redress of the damage caused to the victim, the second element is the

existence of harm: [TRANSLATION] “negligent conduct does not suffice in itself to give rise to civil liability if it does not materialize in harm caused to another. For example, the perpetrator of a reckless act that nevertheless causes no damage does not incur civil liability. The harm may be bodily (injuries, death), moral or material.”

[123] The third requirement is the causal relationship, that is, the [TRANSLATION] “causal relationship between the fault and the damage: the fault must have been the proximate cause of the damage, or the damage the immediate effect of conduct that is considered negligent.”

[124] The causal relationship is a question of fact and must be proved by a preponderance of evidence. As the Supreme Court recently held, *per* Gonthier J., in *St-Jean v. Mercier*, [2002] 1 S.C.R. 491,

¶ 104 In the determination of fault one applies norms of behaviour required by law to a set of facts. This obviously makes the question one of mixed law and fact. In contrast, in the determination of causation one is inquiring into whether something happened between the fault and the damage suffered so as to link the two. That link must be legally significant in an evidentiary sense, but it is rendered no less a question of fact.

(2) Was the Service negligent?

(a) The fault

[125] Mr Aubin alleges that the Service officers

(a) should have prevented the assault perpetrated on him;

(b) failed to act to stop the assault as soon as possible;

(c) unduly delayed his transportation to the hospital and/or failed to give him the medical care reasonably needed in his state of health.

[126] It is the plaintiff who has the burden of establishing, on the balance of probabilities, the existence of a fault giving rise to damages and liability.

[127] In the case at bar, defendant's counsel does not dispute that the Service had a duty of care with respect to Mr. Aubin. The penitentiary authorities had an obligation to take reasonable measures to ensure the safety of Mr. Aubin.

[128] However, he stated in the same breath that, on the one hand, the evidence adduced by Mr. Aubin in no way shows that the Service employees failed to respect the standard of care set by law in the prison context and that, on the other hand, their conduct was consistent with that of a reasonable correctional officer in the exercise of his duties.

[129] I must therefore assess whether, in view of the circumstances prevailing in the prison environment, the correctional officers failed to meet their duty of care to the extent that they committed a fault.

[130] In *Gilles E. Néron Communication Marketing Inc. v. Chambre des Notaires du Québec*, [2004] 3 S.C.R. 95, Mr. Justice LeBel reminds us at paragraph 56 that, in an action for defamation based on art. 1457 of the *Civil Code of Québec*,

The starting point is not the common law but the *Civil Code of Québec*, which is the basic general law in Québec, as provided for in the preliminary provision of the Civil Code. Courts should avoid needlessly importing or applying common law rules in a matter which, subject to the principles of Charter law, is governed by the procedure, methods and principles of the civil law. This point was made, in the context of the law of defamation, by J.-L. Baudouin and P. Deslauriers in *La responsabilité civile* (6th ed. 2003), at p. 193:

[TRANSLATION] It can be seen from the leading cases how often the Québec courts have, when dealing with defamation and verbal abuse, borrowed from common law concepts (good faith and justification, qualified privilege), from decisions of English or Canadian courts or from common law commentators, such as Odgers. Borrowing from the common law in this manner is totally unnecessary and unwarranted . . . and it has the effect of greatly complicating a subject that, when examined in light of the Civil Code and the general principles of civil law, has the merit of being relatively straightforward.

[131] Absent any similar warning by the courts or the authorities in negligence matters, I think it is useful and relevant to refer to the jurisprudence of this Court even if it emanates from common law provinces since the duty of care incumbent on correctional officers is the same in both systems of law.

[132] Moreover, that is what Han-Ru Zhou seems to suggest in his article entitled “Le test de la personne raisonnable en responsabilité civile”, (2001) 61 R. du B. 451, which describes at p.519 the [TRANSLATION] “striking conceptual similarities between our [Québec civil] law and tort law”.

[133] *Coumont v. Canada (Correctional Service)*, [1994] F.C.J. No. 655, dealt with the Crown's liability for the actions of its employees as a result of the assault suffered by Mr. Coumont while he was incarcerated in Matsqui Institution. The circumstances of that case are similar to the ones that concern us since Mr. Coumont had been stabbed by a fellow inmate. Mr. Justice Denault of this Court set the Crown's liability by reference to the judgment of Mr. Justice Cullen in *Abbott v. Her Majesty the Queen* (1993), 64 F.T.R. 81, as follows:

Liability for negligence is assessed on the basis of a breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. I agree with counsel for the plaintiff's submission that there is a legal duty of care between guards and inmates. Inmates are closely and directly affected by actions of guards; they are under the care and control of guards while incarcerated. Although I do not dispute that there are limits on this duty of care, the fact that these individuals are incarcerated does not mean there is no duty of care. Further, guards have discretion to act in various circumstances, however, that discretion cannot be exercised carelessly or unreasonably. As such, I would also accept that there is a sufficient relationship in terms of proximity and neighbourhood to the extent that carelessness by a guard through act(s) or omission(s) would likely cause damage that was reasonably foreseeable. . . .

Having established a sufficient relationship between the plaintiff and the defendant's servants, the question becomes was there a breach of the standard of care required to take reasonable care in the circumstances. [Emphasis added]

[134] After analyzing the evidence before him, in *Coumont, supra*, Denault J. concluded:

¶ 39 In my view, in relation to the stabbing incident, the question here is whether correctional officials at Matsqui knew or ought to have known that Coumont might have a problem with an incompatible inmate, Roberts, and whether, having that knowledge, they took the appropriate steps to protect him from a reasonably foreseeable risk of injury. [Footnote omitted] No officials at Matsqui had any actual knowledge of an incompatible prior to the stabbing. It is possible that the plaintiff's parole officer might have had knowledge of the potential problem, but I am not convinced that he did have that knowledge, nor am I prepared to find that he had a duty to pass this information on to federal correctional officials. As mentioned above, I was also unconvinced by Alana Forbes' testimony regarding a phone call to the institution prior to the stabbing. Also, at no time did Coumont identify Roberts as the source of a potential problem.

¶ 40 However, ought correctional officials have known that there was an inmate in the institution incompatible with the plaintiff? I believe that it would be unreasonable to find a breach of the duty of care in the correctional officials failure to take account of an inmate's questions about the incoming inmates. These questions were vague and could have related to any of the inmates. There was some suggestion in the evidence that the officers were given the name of the inmate but neither Officer Hiebert nor Officer Guenette could remember the name. In my view, the correctional officials exercised reasonable care in conducting a security profile on the inmate prior to releasing him into the general population. However, should they have exercised further care and made specific enquiries of the plaintiff upon his arrival? In my opinion, while these questions might have been desirable they were not necessary in the circumstances. The evidence before me indicated that Coumont was both known to officials and familiar with the correctional system. It was reasonable for the correctional officials to assume that had Coumont been aware of a problem and been willing to inform them of it, he would have. Further, it was clearly established during the trial that had correctional officials asked Coumont about potential incompatibles in the institution, he would have denied such incompatibility because, as stated above, he did not know of Roberts' intentions and he would have refused to identify Roberts because of the rules of the "con code". Therefore, I must find that correctional officials did not know and ought not to have known that there was an inmate incompatible to Coumont in Matsqui prior to the stabbing. As such, a duty to protect Coumont from Roberts over and above the general duty of correctional official to protect inmates was not engaged and there was no breach. [Emphasis added]

[135] In *Bastarache v. Canada*, 2003 FC 1463, Madam Justice Layden-Stevenson of this Court summarizes the case law as follows:

[23] The defendant, as earlier stated, concedes the existence of a duty of care. The content of the duty is well established. The prison authorities owe a duty to take reasonable care for the health and safety of the inmate while in custody: *Timm, supra*; *Abbott v. Canada* (1993), 64 F.T.R. 81 (T.D.); *Oswald v. Canada* (1997) 126 F.T.R. 281 (T.D.). In addressing the duty of care, regard must be had to the circumstances surrounding the incident: *Scott v. Canada*, [1985] F.C.J. No. 35 (T.D.). An important consideration in the foreseeability of risk is the likelihood of the occurrence of the event giving rise to the risk. The issue is not whether there is a duty of care, but whether the acts or omissions of the defendant fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances: *Russell v. Canada* 2000 BCSC 650, [2000] B.C.J. No. 848 ; *Hodgin v. Canada (Solicitor General)* (1998), 201 N.B.R. (2d) 279 (Q.B.T.D.), *aff'd.*, [1999] N.B.J. No. 416 (C.A.).

[24] The question, therefore, is whether the standard was met in this case. The plaintiff says that it was not, while the defendant says the opposite. It is necessary to examine first what is normally done by CSC in a medium security

federal institution (particularly between the hours of 10:00 p.m. and 10:00 a.m.) and second, what was done in this case.

[136] In that case, Layden-Stevenson J. concludes, at paragraph 49, as follows:

[49] The corrections officers must take reasonable care with respect to reasonable risks of which they ought to be aware. Perfection or infallibility is not required. Reasonable and adequate measures in the circumstances will suffice. On the above noted facts, I do not find that the acts or omissions fall below the standard of what a reasonable person of ordinary prudence would do in the circumstances.

[137] It is necessary to give some context, and thus to refer to the various events that occurred, starting on October 13, 1999.

[138] On that day, Mario Goulet, a preventive security officer, learned from a coded source that a murder contract had been put out on one or more inmates in range F of unit E (the Plamondon clan's) and on one or more inmates in range 2K of unit H (the plaintiff's). The source had explained that the assault would occur on a canteen night, i.e. on a Wednesday, but did not specify either the identity of the person who would be assaulted or the location of the alleged anticipated assault.

[139] The plaintiff said that on October 15, 1999, Benoît Morais warned him to “watch his back” since some inmates were after him. This warning appears to have created an obvious anxiety in the plaintiff — he testified to this effect more than once — but the evidence shows nevertheless that he never informed the prison authorities of it. Neither Nancy Lévesque, a parole

officer, nor Sophie Noël, a correctional officer, were given any particulars about the anxiety expressed by Mr. Aubin during their meetings. Furthermore, when Ms. Noël asked him if he wanted protection, he declined.

[140] The circumstances in light of which I must assess the correctional officers' conduct include as well Mario Goulet's call to Benoît Morais, a call that could be characterized as "preventive", placed around 5:45 p.m. on the night of the assault. The information conveyed on that occasion was not new; the call was intended instead to remind the officers on duty that night, a canteen night, of the information received on the previous October 13.

[141] I recall that the information received from the coded source did not specify the identity of the person who would be attacked, the identity of the attacker or attackers, or the location of the anticipated attack. This information did not constitute material evidence of the danger being incurred by Mr. Aubin.

[142] The circumstances that I must consider also include the fact that Benoît Morais notified some, but not all, of the correctional officers on duty on October 27, 1999 of the tenor of the call received around 5:45 p.m. The testimony indicates, in fact, that neither Pierre Lafond, the officer who was posted in the observation tower overhanging sector 240, nor Linda Leclerc, the officer who was posted in observation tower 21, were informed of the increased likelihood of an incident that night.

[143] In view of a number of factors — the nebulous nature of the information received from the coded source, the plaintiff's refusal to avail himself of the protection offered by Sophie Noël, the fact that the plaintiff did not request administrative segregation, the fact that the plaintiff refrained from specifying to anyone who and what he feared, the fact that the plaintiff maintains that Benoît Morais had warned him to watch his back but that he did not inform Nancy Lévesque of this, that it was demonstrated that a freeze on activities on the night of the assault would have been excessive in the light of the apprehended danger, the fact that all the penitentiary officers were on the alert during this period and, finally, the fact that the plaintiff assumed the risk by deciding to go outside at that time, I am of the opinion that the prison authorities could not reasonably have prevented the assault of October 27, 1999.

[144] In his submissions, Mr. Aubin treated Benoît Morais as a liar. I do not share his opinion. Mr. Morais seemed to me, on the contrary, honest and competent. In my opinion, had he been in possession of such information, he would have mentioned it in a report to preventive security.

[145] I must now assess whether the correctional officers were negligent in failing to intervene to stop the assault.

[146] The Service argues in its defence that no correctional officer posted on the night of October 27, 1999 saw the assault. Would a prudent and diligent correctional officer placed in the same circumstances have been aware of the assault?

[147] Concerning Pierre Lafond, I do not think it is unreasonable that an officer supervising an exercise yard from his tower should sit down for a few minutes, just to [TRANSLATION] “rest my legs” (testimony of Lafond, at p. 176), after patrolling afoot for 20 to 25 minutes. Moreover, Linda Leclerc corroborated this surveillance method. Nor do I think that such conduct diverges from the [TRANSLATION] “abstract and objective type” of conduct that “the reasonable, prudent and diligent person” situated in similar circumstances, that Baudouin speaks of, would have followed.

[148] I am unable to accept Mr. Aubin’s allegation that Pierre Lafond was sleeping at the time of the assault or that he is [TRANSLATION] “either a liar, or incompetent”. In terms of credibility, I believe Pierre Lafond both because of his demeanour while testifying and because of the highly professional content of his testimony. Let us recall as well that no evidence was adduced that surveillance from a seated position amounts to inattention. Consequently, I am unable to pronounce him at fault.

[149] Furthermore, I have no evidence that the fact they were not informed of the increased likelihood of an incident that night affected the degree of vigilance with which Pierre Lafond or Linda Leclerc performed their surveillance of sector 240.

[150] It should not be forgotten, either, that the blind spots of the observation tower were admitted by all of the witnesses. I have no hesitation in finding that the blind spots explain why Pierre Lafond did not see the incident.

[151] Nor do I consider Linda Leclerc's conduct as being negligent. It is in the order of things, it seems to me, that night surveillance of an outside territory should be done in teams. Accordingly, she cannot be accused of negligence because she was examining the part of the outer yard that was hers in accordance with the informal distribution of duties that night.

[152] Lastly, I am also of the opinion that Pierre Côté's conduct was reasonable in the circumstances and did not diverge from the ordinary conduct of a prudent and diligent correctional officer situated in the same circumstances. It is reasonable that, with about 20 cameras to check, his attention was distracted from the screen covering sector 7 of unit 240 for two minutes, in order to focus on the 15 multi-cameras covering the gymnasium, as advised by his superiors. What happened is unfortunate, to be sure, but it remains that this conduct was not negligent.

[153] Mr. Aubin alleges as well that his transportation by ambulance was unreasonably delayed.

[154] I am unable to accept this allegation, too, in view of the testimony of experienced correctional officers. Messrs. Veilleux and Côté both testified that the 23 minute delay between

the arrival of the ambulance at Donnacona penitentiary and its departure was a normal delay, given the particular context of a maximum security penitentiary.

[155] Furthermore, even if I were to conclude that the delay was unreasonable, I cannot hold the Service liable for it since there is no evidence on the record to indicate that this delay caused any harm to Mr. Aubin.

(b) Damage and proximate cause

[156] The defendant further contends that Mr. Aubin has adduced no evidence of any damage suffered, nor has he established a proximate cause between an alleged fault and the damage.

[157] If perchance I am wrong in my assessment of the fault and the correctional officers were found to be negligent, I do not think it is possible to hold the Service liable since in my opinion Mr. Aubin has not proved his damages.

[158] In fact, the medical and clinical reports that were offered in evidence by Mr. Aubin do not convince me that the alleged damages are the direct result of the negligence of the correctional officers who failed to intervene to stop the attack on him.

[159] In the first place, the notes of nurse Denis Côté entered in Mr. Aubin's file on October 27, 1999 do not indicate in any case that the plaintiff was in a critical state, as he claims. Instead, one can read that the [TRANSLATION] “. . . inmate . . . is still conscious, wide awake, well oriented”.

[160] Secondly, the testimony of Mr. Côté reveals that Mr. Aubin had injured himself during an attempted escape in July 1986.

[161] Thirdly, the report of Dr. Marcel Morand, dated November 22, 2000, indicates that Mr. Aubin had had a motorcycle accident prior to the incident of October 27, 1999.

[162] In addition, no medical expert appeared before me to explain to me the nature of the injuries sustained by Mr. Aubin. I do not know whether the damages he is complaining of now are the direct result of the attack in the penitentiary and not some lingering effect of his motorcycle accident or his attempted escape, since I am unable to interpret any medical reports.

[163] I note, moreover, that no evidence was adduced to prove that Mr. Aubin still suffers from the damage suffered during the assault. Nor was I submitted any assessment of permanent partial disability (P.P.D.).

[164] I note that the onus of proof falls on the plaintiff. In this instance, Mr. Aubin has not proved his damages.

[165] For all of these reasons, the plaintiff's action is dismissed.

[166] At the hearing Mr. Aubin asked me to view the interior of the sector 240 observation tower. I do not see the necessity for this, having viewed again the videocassettes of the event and an additional video filmed recently inside this tower.

[167] The defendant may, within ten business days of the date of this decision, submit to me some observations as to whether costs should be awarded. The plaintiff will have the right to reply within ten business days following the filing of the defendant's observations.

“François Lemieux”

Judge

OTTAWA, Ontario
June 14, 2005

Certified true translation
François Brunet, LLB, BCL

FEDERAL COURT
SOLICITORS OF RECORD

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