Date: 20081014

Docket: T-1761-05

Citation: 2008 FC 1158

Toronto, Ontario, October 14, 2008

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

GREGORY J. MCMASTER

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

I. Introduction

[1] "If the shoes fit - wear them" or so goes the old adage. In this case, the new running shoes provided by the Defendant did not fit. Thus, the Plaintiff, an inmate at the Fenbrook Institution ("Fenbrook"), did not wear them.

[2] The shoes were not size 13-4E width. As an inmate he is entitled to receive a new pair of shoes each year. The new running shoes which were ordered for him did not fit and so he continued

wearing his old running shoes. One day when the Plaintiff was in the middle of his regular exercise regime his feet went out from under him, he fell on his right knee and tore his medial meniscus ligament. He was wearing his old running shoes which were significantly worn down. As a result, he suffered pain in his knee and a lack of mobility. The injury which he suffered also caused him to fall in the shower and further exacerbate the injury. For these injuries he claims damages.

[3] The cause of action is founded in misfeasance in public office. The facts of this case also raise issues of contributory negligence, quantification of damages and adverse inferences arising from the failure of the Defendant to call an available key witness.

[4] This is a simplified action. Four witnesses gave evidence and their evidence in chief was filed by way of affidavit. The witnesses were the Plaintiff who filed a lengthy and detailed affidavit with many exhibits. In support of the Plaintiff's case, Cristol Smith D. Ch., a chiropodist, gave expert evidence regarding the state of the shoes that the Plaintiff was wearing at the time of the injury. On behalf of the Defendant, two witnesses were called, one being Susan Groody, the Director of Health Services at Fenbrook and Annette Allan, the Assistant Warden, Management Services at Fenbrook. Notably, Cathy Wherry, the Acting Head of Institutional Services and the person with the most direct knowledge regarding the ordering of new shoes for the Plaintiff, although still an employee of Corrections Canada and apparently available, was not called as a witness.

[5] The Defendant chose to cross-examine only the Plaintiff and then only very briefly on a few narrow points. In particular, there was no cross-examination on the exercise regime of the Plaintiff

which resulted in the injury nor was there any cross-examination regarding the scope or cause of the injury. Thus, almost the entirety of the Plaintiff's evidence in chief was uncontradicted.

II. Background

[6] Much of the following factual scenario is taken from the Plaintiff's affidavit, which, as noted, is almost entirely uncontradicted. The facts are set out at some length to support the conclusions and findings relative to the tort of misfeasance in public office.

[7] The Plaintiff is an inmate of Fenbrook near Bracebridge, Ontario. He has been incarcerated for some 26 years, 15 in the United States and a subsequent 11 years in Canada. The Plaintiff is a muscular individual who has large feet. His shoe size is size 13-4E width. Notwithstanding that his shoe size appears to be an unusually large size, the evidence was that it is a standard size that is manufactured by at least two running shoe manufacturers.

[8] As an inmate, the guidelines and directives issued under section 70 of the *Corrections and Conditional Release Act* require that inmates of federal institutions receive certain minimal clothing allotments including one pair of shoes per annum. Specifically, the Commissioner's Directive 352 (the "Directive"), issued under the authority of the Commissioner of the Correctional Service of Canada provides as follows:

> Each Regional Director Deputy Commissioner shall determine any restrictions, and the quantity and frequency of issue, for these items.
>
> [. . .]
>
> Shoes, running (general purpose shoes)

Further, subsection 83(2) of the *Corrections and Conditional Release Regulations* provides:

> Physical Conditions
>
> 83(2) The Service shall take all reasonable steps to ensure the safety of
>
> (a) every inmate and that every inmate is adequately clothed and fed;
>
> [. . .]
>
> (d) given the opportunity to exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors.

[9] Throughout his years as an inmate in Canada, prior to the incident giving rise to this claim, the Plaintiff had always been issued on an annual basis a pair of size 13-4E running shoes.

[10] In July 2003, the Plaintiff was transferred from the Collins Bay Institution to Fenbrook, a medium security facility. He had been issued in January, 2003, a pair of running shoes which were the correct size. The evidence is that while incarcerated at Collins Bay Institution he was issued annually a pair of size 13-4E New Balance running shoes almost routinely within two weeks of him submitting his requisition. There were no issues regarding the requisite size or the issuance of the shoes to the Plaintiff.

[11] In March 2004, after he had been transferred to Fenbrook he put in his request for his annual new pair of size 13-4E running shoes. Because New Balance was the manufacturer of the shoes he

had he referred to New Balance in his request. However, it was not until December 2004 that he received proper fitting shoes – a period of almost two years after the pair he received in January 2003.

III. The Ordering of the Shoes

[12] A department called Institutional Services ("IS") provides all institutionally issued items to inmates, including shoes. The Acting Chief of IS at Fenbrook at the time of these events was Cathy Wherry. In a note sent to the Plaintiff on March 4, 2004 in response to the Plaintiff's request for new shoes dated March 2, 2004, Ms. Wherry requested that he come and have his feet measured as there is "no record on our file to indicate any other footwear besides the Institutional Issue". The Plaintiff duly attended at the IS Office and his feet were measured as size 13-4E. It is surprising that there was no record on file at Fenbrook as every institution in which the Plaintiff was incarcerated maintained an Offender Clothing Record Card and a medical chart, which records the foot size of the Plaintiff. Further, there was a label on the tongue of the shoes the Plaintiff was wearing which clearly stated the size as 13-4E. Nonetheless, the Plaintiff's evidence was that Ms. Wherry told him that size 13-4E running shoes would be ordered and that he should check back within two weeks to see if they had arrived.

[13] The Plaintiff checked back with IS after two weeks time to see if his new shoes had arrived. They had not. During a meeting with Ms. Wherry he was again informed that the shoes were on order and that Ms. Wherry would call him back to IS when the shoes arrived.

[14] After a further two weeks without hearing anything, the Plaintiff again contacted IS and was again informed by Ms. Wherry that the shoes had not yet arrived and was once again assured that the order had been placed. Apparently, in the conversation with Ms. Wherry, the Plaintiff questioned whether or not the shoes had in fact been ordered and whether Ms. Wherry was waiting for the new annual budget to come into effect in late April. Ms. Wherry assured the Plaintiff that she was not waiting for the April budget and that the running shoes had been ordered.

IV. The First Pair of Shoes

[15] In early May, the Plaintiff again inquired about his running shoes. He met with Ms. Wherry who produced a pair of size 13 Brooks running shoes for the Plaintiff. The shoes were not a 4E width but were a standard size 13. The box in which the shoes were taken did not indicate a 4E width. During this meeting, Ms. Wherry attempted to convince the Plaintiff that the shoes were in fact a 4E width as she had been assured by her supplier that they were. There was no indication on the shoes or on the box they came in that they were in fact a 4E width. The Plaintiff adduced evidence in the form of sizing labels from boxes of a Brooks size 13-4E and a New Balance size 13-4E running shoe that the sizing labels clearly indicate a 4E width. No such label appeared on the box of shoes that Ms. Wherry offered to the Plaintiff. Ms. Wherry insisted that the Plaintiff accept the shoes. However, they did not fit as they were not wide enough. Ms. Wherry then made a comment to the effect “my budget does not allow me to purchase New Balance and if you want New Balance you can purchase them yourself”. Ms. Wherry concluded the meeting by informing the Plaintiff that she would go back to her supplier and re-order size 13-4E.

[16] Later in May, the Plaintiff again attended at IS to try on another pair of shoes. At this meeting, Ms. Wherry produced a pair of Brooks size 14 running shoes. During the meeting Ms. Wherry attempted to convince the Plaintiff to take these shoes as she was assured by her supplier that they were extra wide. The Plaintiff tried the shoes on but they did not fit properly. On the Plaintiff's foot measuring chart maintained by IS, there is a notation reading "reorder Brooks 4E 04/05/07 rec'd 14 instead of 13-4E".

[17] Ms. Wherry, during this meeting, again reassured the Plaintiff that she had ordered a size 13-4E but said that her supplier had sent the wrong size, the size 14. She acknowledged that size 14 was the wrong size although she did attempt to convince the Plaintiff to accept them as his annual pair of running shoes.

[18] On June 7th, the Plaintiff again attended at IS and Ms. Wherry produced yet another pair of Brooks size 13 running shoes with no indication they were extra wide or a 4E width as required. Ms. Wherry noted that the box which the shoes were in were a size 13W. The W on the box had been hand written in a black felt pen and were not part of the original printing of the manufacturer. The Plaintiff tried on these shoes. Again, they did not fit.

[19] During this meeting, Ms. Wherry again tried to convince the Plaintiff to accept the shoes and stated "you'll be lucky to get a pair that fits before you're released".

[20] The Plaintiff adduced much evidence in the form of various copies of order forms demonstrating that size 13 and size 13 wide appeared to have been ordered but at least through June 2004, several months after the Plaintiff requisitioned his new shoes, Ms. Wherry had not put in a specific order for a size 13-4E shoe.

[21] During June 2004, the Plaintiff went through a grievance process regarding his shoes. Unfortunately, that did not lead to a satisfactory resolution. The Plaintiff pursued with some vigour his efforts to obtain new shoes and was met by resistance from Ms. Wherry and others within Fenbrook. The Plaintiff gave evidence that he had a number of other discussions with Ms. Wherry and during one of these discussions she said that Health Services should purchase the shoes. In an e-mail from another employee at Fenbrook, the employee stated that "he was told that we are not ordering from another company as we don't have the funding."

V. The Knee Injury

[22] The Plaintiff maintains a vigorous workout routine and works out on average of one hour per day five days per week. His workouts include weight training, stretching, aerobics, asymmetric core basic training, heavy bag (boxing), speed bag (boxing) and cardio vascular endurance training. Apparently, the Plaintiff is well known for his dedication to working out and his comprehension of training principles. He has worked out regularly throughout his incarceration. During these years until July 2004 he had not incurred an exercise related injury.

[23] One of the exercises which the Plaintiff engages in at his workout sessions is with a heavy bag. In order to properly carry out the exercise involving the heavy bag he must plant his feet, particularly his rear foot in order to throw punches at the heavy bag. He has been doing this particular workout since he was a teenager.

[24] In his evidence, the Plaintiff stated that on July 1, 2004, during his regular workout, he was working on the heavy bag as he always has. While doing the workout with the heavy bag, his foot gave out, he dropped to the ground, heard a loud crunch and began experiencing searing pain in his right knee joint. Apparently, the lower half of his right leg from the knee downward was pointing at a 90-degree angle towards the left side of his body.

[25] Because it was Canada Day, there were skeleton services available at Fenbrook particularly in Health Services. The Plaintiff chose not to go to Health Services but returned to his living quarters and applied ice to his injured knee for the remainder of the day.

[26] On July 2nd, as he was unable to walk, he sought assistance in being taken to Health Services. He was told by a Correctional Officer in his living unit who spoke to Health Services that "they said it's a holiday weekend and you have to be dying before they'll see you". After some further communication with Health Services, he was taken there and reviewed by the on-duty nurse who then referred him to the South Muskoka Memorial Hospital where he was examined by an Emergency Room Physician. During the examination, the attending physician manipulated the right knee of the Plaintiff, which caused him severe pain. The doctor asked questions about how the

injury occurred and the Plaintiff stated that he was working out on a heavy bag and doing flying tackles.

[27] The doctor did not appear to understand what a heavy bag was and the Plaintiff tried to use analogies to assist the doctor in understanding the exercise that the Plaintiff was doing. However, the Plaintiff now emphatically states that flying tackle analogy was a misnomer and in fact what he meant to say to the doctor through the pain he was enduring was that he pushes the heavy bag away and when it comes back, it is like two boxers shoulder to shoulder in a boxing ring and with his feet planted he throws punches at the bag. As the Plaintiff has a weight of some 270 pounds a real flying tackle would have carried the Plaintiff past the bag and would not have caused him to fall on his knee in the manner he described. The Plaintiff states that he has not executed a flying tackle since he played organized football well over 15 years ago.

[28] The Plaintiff, subsequent to the date of the knee injury, had a number of medical appointments to ascertain the extent of his injury. In May, 2005 at the Hospital in Barrie, an MRI was taken on his right knee and it was determined that there was a displaced flapped tear on the posterior horn of the medial meniscus with lateral displacement of the minuscule tissue. It was noted that it was a “complex tear”. The note from a follow-up to the MRI in June, 2005 notes that he should be put on the waiting list for a right knee scope and that it would be approximately 1-2 years before his knee could be operated on to remedy the flap tear.

[29] The Plaintiff continued to live with the residual effects of the flap tear in the medial meniscus and followed a therapy program. However, no steps were taken by the authorities to ensure that he had any operation to deal with the problem with the knee. In a further examination by an orthopaedic surgeon, it appears that his knee had healed somewhat on its own and the Plaintiff conceded that he did not want anything done with his knee. To compensate for the problems with his right knee he began more weight bearing on his left knee with exacerbated an old injury to his left knee. The Plaintiff's evidence is that in his last meeting with the orthopaedic surgeon it was the surgeon who suggested that the Plaintiff give serious consideration to voluntarily postponing any surgery on his right knee until symptoms which he was incurring such as locking of the knee joint and floating cartilage left no other options. The Plaintiff agreed to follow this advice. The Plaintiff will require surgical intervention in the future.

VI. Meetings with Annette Allen

[30] When the Plaintiff still had not received his shoes by July 2004, he received a notice of appointment to meet with Annette Allen, Assistant Warden, Management Services at Fenbrook. He met with Ms. Allen and during the meeting Ms. Allen produced what appeared to the Plaintiff to be the exact same pair of Brooks size 13 running shoes that had previously been refused when proffered by Ms. Wherry. The Plaintiff tried on the shoes and told Ms. Allen that they did not fit. The Plaintiff explained to Ms. Allen the background of the matter and that IS had measured his shoe size to be a 13-4E. At this meeting, Ms. Allen tried to convince the Plaintiff to accept the shoes because she had a fax from her supplier which stated "after inquiring with our design and fabrication department they have stated that this particular shoe does not have a gauge for width.

They also stated that it could comfortably fit a wide foot with ease because it was a wider width that (sic) all our usual specs". The Plaintiff rejected the shoes.

[31] During this same time frame, the Plaintiff made inquiries of Brooks Canada Customer Service regarding size 13 shoes and was advised that size 13 are for a standard width and not intended for extra wide feet. Apparently, there were further meetings concerning the proper shoes for the Plaintiff and at one point Ms. Allen e-mailed a direction to a Correctional Investigator that they should go back to the manufacturer of Brooks and obtain a statement that clearly says "these shoes are equivalent to a size 13EEEE". It was during this series of meetings that the Plaintiff told Ms. Allen and a Correctional Investigator that he had suffered a knee injury and he was concerned about the fact that he was wearing worn out running shoes. The Correctional Investigator noted that the shoes the Plaintiff was wearing were in fact worn out. The worn out running shoes were a further concern to the Plaintiff because he believed they were exacerbating his knee injury.

[32] There is documentation and evidence regarding further meetings, grievances and correspondence as to whether or not the size 13 shoes were the proper width and when the Plaintiff would be issued his new shoes. By September 2004, the Plaintiff had ascertained that Brooks Canada manufactures two styles of shoe both in size 13-4E. This information was shared with Ms. Allen. Nothing appears to have taken place with respect to the Plaintiff's new shoes until November. In an e-mail dated November 22, 2004 Ms. Allen e-mailed Ms. Wherry and stated "can we order another pair of shoes for Mr. McMaster from a different supplier? Please action and let me know when this is complete." There does not appear to have been any response to this e-mail

from Ms. Wherry. In a further e-mail dated November 23, 2004 Ms. Allen states the following to the Correctional Investigators Office who was inquiring on behalf of the Plaintiff:

> I apologize again for the delays and duration it has taken to bring this issue to resolution. **Although I have no excuse**, I have been struggling with a resource problem in SIS. Our Acting Chief was not extended passed September 30th. I have been without a Chief since that date. The two staff operating in that department are occupied with weekly critical requirement for cleaning supplies, hygiene items and inmate clothing. **We have not had the opportunity to order Mr. McMaster's shoes**. I have confirmation that one of the SIS staff will pick up the New Balance running shoes this week and they will be issued to Mr. McMaster. The size labelling of shoes has contributed to this problem, there are only two companies that use the 13EEEE labelling of their shoes. Other companies claim their shoes fits a wide foot but do not specify EEEE width. I would like to put this issue to rest so **I have directed SIS to purchase the New Balance shoes**. [emphasis added]

That e-mail is dated November 23, 2004 but it is not until almost a further month has elapsed before the Plaintiff gets his shoes.

[33] The correct size of shoes for Plaintiff was not ordered until November 24, 2004 some eight months after they were requisitioned by the Plaintiff. On November 26, 2004 Ms. Wherry signed a receipt for the delivery of the shoes at Fenbrook. In what is a further appalling delay in getting the shoes to the Plaintiff, it was not until December 16, 2004 that Ms. Allen's office finally issued a statement that "Running shoes have been purchased. To be issued this afternoon". The Plaintiff did not know of this direction until December 17 and endeavoured to pick up his running shoes. When he attended at the IS Office he was informed by an officer that indeed a pair of size 13-4E New Balance running shoes were in the IS Department and were designated to be given to the Plaintiff

but, as Ms. Wherry was not in the office, this officer did not wish to become involved and requested that the Plaintiff return when Ms. Wherry was back.

[34] On December 20, 2004, the Plaintiff once again attended at the IS office and met with Ms. Wherry who provided to him the new pair of New Balance running shoes size 13-4E. Both the tongue of the shoe and the box in which they arrived indicated that the shoe size was13-4E. The Plaintiff accepted this pair of shoes.

[35] In subsequent years, the Plaintiff ordered his annual pair of running shoes size 13-4E and received the shoes in a timely fashion after his request was made.

VII. The Expert Evidence

[36] The only expert evidence called was that of Cristol Smyth, D.Ch, a chiropodist. She examined the old running shoes (Exhibit 5) and submitted a report dated July 25, 2007. Ms. Smyth's report was attached to her affidavit as well as her *curriculum vitae*. She was not cross-examined nor was any issue taken with her qualifications. Based on the information contained in her *curriculum vitae* and given the fact that the Defendant did not oppose her being qualified as an expert in the field of foot health care, I am satisfied and so find that she is an expert in foot health care as a doctor of chiropody. Her report analyses the old running shoes. She describes the state of the shoes and also states that the Plaintiff's measured shoe size is not unusually large and is a common size seen in her practice. She notes that this size should be readily available. She

concludes that there was substantial wear and tear of his old shoes which was evident and that the shoes showed lack of rigidity, stability and support.

[37] Based on her observations, she concludes that the "excessively worn sole and lack of support and stability of the footwear could have caused Mr. McMaster to invert his foot excessively, placing strain on the right knee". Her report does not go so far as to say that the shoes were the cause of the knee injury but it does provide some evidence to assist the Plaintiff in his assertion that his feet gave out because the shoes were significantly worn. It is to be noted that the Plaintiff wore the shoes for some 5 months after the accident and that Ms. Smyth examined the shoes in July, 2007. Some of the wear of the shoes would have occurred between July and December 2004 but it is reasonable to conclude that the shoes were significantly worn down in July 2004 given that the Plaintiff is approximately 270 pounds, worked out regularly, and wore the shoes daily for almost 18 months prior to the injury.

[38] Without the benefit of an expert, even a cursory examination of the shoes indicates that they are indeed large shoes and are worn out on the outside sole of the shoes. There is also a noticeable significant wearing out of the tread on the heel of the shoes and in the ball section of the shoes. On the inside of the shoes one can see that the weight of the plaintiff has compressed the insoles and there is virtually no support or padding to the insoles. Notably, the tongues of the shoes have a label which states they are a size 13-4E.

VIII. The Defendant's Evidence

[39] The Defendant filed affidavits of Susan Groody, the Chief of Health Services at Fenbrook and Beaver Creek Institutions and of Ms. Allen. No evidence was given by Ms. Wherry although she is still employed by Corrections Canada.

[40] The evidence of Ms. Allen focuses on three areas: the shoe supply policy and procedure of Correctional Services Canada; the multiple priorities of IS; and, the ordering of the Plaintiff's shoes. With respect to the shoe supply policy, Ms. Allen speaks throughout her evidence of "non-standard sizing" and "non-standard issue shoes". There is no evidence that the Plaintiff's shoes was a non-standard size. Indeed, the evidence is to the contrary that the size of the Plaintiff's shoes was a standard size manufactured by at least two well-known shoe manufacturers. Ms. Allen does state in her evidence that "if the inmate requires a non-standard size of the shoe, SIS will make attempts to obtain the required size of shoes from community suppliers. Phone calls will be made to determine what suppliers have stock available and at what cost."

[41] Ms. Allen also makes the point in her evidence that in mid to late 2004, due to funding issues, the IS Department was short staffed and Ms. Wherry had higher priorities than clothing for new inmates.

[42] With respect to the Plaintiff's shoes, Ms. Allen's evidence relies in large part on information and belief from Ms. Wherry. She refers to conversations, meetings and steps taken by Ms. Wherry. During the course of the trial it became evident that Ms. Wherry was still an employee of

Corrections Canada. Thus, to the extent that Ms. Allen has relied upon information and belief from Ms. Wherry, I discount that evidence and prefer the evidence of the Plaintiff. Further, I found that Ms. Allen was somewhat defensive in giving her evidence and somewhat evasive during cross-examination.

[43] Ms. Allen endeavoured to justify the delay in getting new shoes for the Plaintiff on the basis that IS had other priorities, i.e. that there was labour action within Corrections Canada and that IS was understaffed. However, while this is the work environment in which Ms. Allen and her staff were operating, in the end result it took a simple phone call to a supplier to acquire the proper size of shoes.

[44] The other witness on behalf of the Defendant was Susan Groody, the Chief of Health Services at Fenbrook and Beaver Creek Institutions. Her evidence focused primarily on the injury suffered by the Plaintiff on July 1, 2004. Her evidence was to the effect that he reported that while working out his “right leg gave out” and “hit the ground”. Her evidence also reviews the Plaintiff’s report to medical staff that he had been working on the heavy bag doing “flying tackles” into the bag.

IX. The Issues

This case raises the following issues:

1. Have the tests to make out the tort of misfeasance in public office been met?

2. Is the plaintiff contributorally negligent in continuing to exercise in shoes that progressively became more and more worn out?

3. Should an adverse inference be made respecting the failure of the Crown to call Ms. Wherry as a witness?

4. If the tort has been made out, what is the quantum of damages that the plaintiff should receive?

X. Analysis

A. *Misfeasance in Public Office*

[45] The tort of misfeasance in public office is an intentional tort. In *Odhavji Estate* v. *Woodhouse,* [2003] 3. S.C.R. 263 the Supreme Court of Canada most recently considered the elements of this tort. Justice Iacobucci made the following observation:

> 22. What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts*, *supra*; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus

necessary to consider the elements that are common to each form of the tort.

23. In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

24. Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers*, *supra*, at p. 1269:

The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: “If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office].” See also *R. v. Dytham*, [1979] Q.B. 722 (C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.

[. . .]

> 32. To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and, (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirement common to all torts. More specifically, the plaintiff must prove that the tortuous conduct was the legal cause of his or her injuries, and that the injuries are compensable in tort law.

[46] *Odhavji* concerned a fatal shooting by police officers. The police officers involved in the incident did not comply with certain requests from the Special Investigation Unit ("SIU") which requests included remaining segregated, providing shift notes, blood samples etc. While the officers did not comply with the requests, the SIU nonetheless cleared them of any wrongdoing. The estate of the deceased commenced an action against the officers involved as well as the chief of police and others. The causes of action included misfeasance in public office and negligence. The plaintiffs alleged that the officers' failure to cooperate with the SIU and comply with its requests amounted to misfeasance in public office. This cause of action was struck out by the motions judge and the decision was upheld by the Court of Appeal for Ontario. The Supreme Court allowed the appeal on that point and permitted the action to proceed as it was not plain and obvious that it could not succeed.

[47] Misfeasance in public office first requires that there be an unlawful exercise of a statutory or prerogative power by a public officer, in this case Ms. Wherry. She was in a position of authority and had a statutory obligation to comply with the Directive. Indeed, her department was the one responsible for providing the required shoes to the Plaintiff. There can be no doubt that she is a

public officer. The more difficult question is whether she unlawfully exercised the statutory power with which she was clothed. In my view she did.

[48] The evidence has been summarized at length. The common thread to the ordering of the Plaintiff's shoes was that it was acknowledged throughout that the Plaintiff required a size 13-4E. It was Ms. Wherry who did the measurement of the Plaintiff's shoe size because the Plaintiff's records were not in Ms. Wherry's possession although she did not need to measure as the size of the Plaintiff's shoes was clearly labelled on the Plaintiff's old shoes. She knew from the outset that he required that specific shoe size which was readily available. However, rather than simply ordering the right pair from the outset she deliberately tried to force the wrong size on the Plaintiff and made threats to him during the course of meetings he had with her. There was no explanation or evidence from Ms. Wherry.

[49] Rule 81(2) of the *Federal Courts Rules* provides as follows:

> Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

[50] Neither of the affidavits of either Ms. Groody or Ms. Allen provided any explanation of why Ms.Wherry was not available and why the best evidence was not before the Court. Thus, to the extent that Ms.Groody and Ms. Allen relied on information and belief from Ms. Wherry I give no weight to that evidence. Further, I make an adverse inference as I am entitled to do that Ms. Wherry's evidence would not support the lawfulness of her actions. Thus, based on the evidence, I

have no reservation concluding that Ms. Wherry was acting unlawfully in contravention of the statutory obligations placed on her as a public officer.

[51] Counsel for the Defendant argued that the Plaintiff had to prove that both Ms. Allen and Ms. Wherry must have had the intent to act unlawfully. In my view, there is no such requirement. The actions of Ms. Wherry are sufficient to ground the cause of action.

[52] Counsel for the Defendant argued vociferously that the Defendant made reasonable efforts to satisfy the Plaintiff's request for shoes as they were ordered three times and that the Defendant did not know the old shoes were worn out. I disagree. The evidence shows that the Defendant dragged its feet in ordering the correct shoes for the Plaintiff and improperly tried to convince the Plaintiff to accept the ill-fitting shoes when it obviously knew they did not and could not fit. Further, the Directive requires that the Plaintiff be issued new shoes on an annual basis. The Plaintiff requisitioned his new shoes because his old ones were over a year old. Ms. Wherry knew this to be the case.

[53] Further, Ms. Wherry and Ms. Groody were well aware of the need for new shoes for inmates and that there was an obligation to provide new shoes. In addition to dealing with Ms. Wherry, the Plaintiff also had a number of meetings and discussions with Ms. Groody. Subsequent to the Plaintiff's injury, in a key memorandum dated February 21, 2006 entitled "Shoes and Injury to right knee July 1/04" Ms. Groody wrote:

> As per our conversation February 21, 2006, we discussed the matter of shoes. It is documented that you have size 13-4E shoes. As these shoes are regular footwear and do not require orthopaedic type shoes, in the Spring 2004 I directed you to SIS. It is their responsibility to provide proper fitting footwear as per CD-352."

[54] In a subsequent memorandum dated February 27, 2007 Ms. Groody again wrote:

> You and I had numerous conversations relating to your efforts to try and obtain proper fitting footwear. I advised you at those times that providing proper fitting footwear did not fall into the Health Services Department. Clothing and shoes were to be issued by SIS. I advised you to return to SIS on this matter and advised SIS that Correctional Service of Canada is mandated to provide proper footing footwear to all offenders.

The second part of the test is whether the public officer must be aware that she is acting unlawfully and that the result of such conduct will result in harm to the Plaintiff. Does the evidence adduced support this part of the test? In my view of the evidence, it does.

[55] The Defendant through its officers knew the correct shoe size of the Plaintiff. They also knew that they had an obligation to provide shoes as one of the necessities prescribed by the Directive. By failing to order the correct sized shoes and trying to force the wrong size on the Plaintiff, Ms. Wherry was acting unlawfully. The evidence also allows the conclusion, and I so find, that the Defendant was also aware that the unlawful conduct of not ordering the proper shoes would result in harm to the Plaintiff. In the memo dated February 27, 2007, Ms. Groody also notes:

> It is noted through out [sic] your files that you require a 13 EEEE shoe. This is not orthopaedic footwear but a shoe sizing issue. In the

> community you would have your feet sized properly and be advised that you should wear shoes that fit. You do not need a health care professional to advise you that by wearing a pair of shoes that do not fit, you will have foot problems. It only goes to say that shoes should be fitted properly.

[56] It cannot be argued by the Defendant that there was no awareness that the unlawful conduct could result in harm to the Plaintiff. The old shoes were significantly worn which could and did cause harm and the various pairs of new shoes were not the right size.

[57] Defendant's counsel argued that the tort of misfeasance in public office was meant to remedy grave and intentional abuses of power. I do not read *Odhavji* as supporting that proposition. Justice Iacobucci in his description of the elements of the tort does not require that there first be a finding of "grave and intentional abuses" but simply intentional abuse. On the evidence before me the intentional abuse is made out.

[58] Another argument put forward by the Defendant was that the failure to acquire the correct shoes was a result of budgetary constraints and other priorities facing Ms. Wherry at Fenbrook. Thus, the failure to order the shoes in a timely way did not amount to unlawful conduct as it was based on factors beyond Ms. Wherry's control. Justice Iacobucci in *Odhavji* made the following observation:

> 26 . . . Nor is the tort directed at a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control. A public officer who cannot adequately discharge his or her duties because of budgetary constraints has not deliberately disregarded his or her official duties. The tort is not directed at a public officer who

> is unable to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who could have discharged his or her public obligations, yet wilfully chose to do otherwise.

[59] There are significant evidentiary hurdles to give this argument any credence, however. The Defendant's witness, Ms. Allen, conceded that the shoes were a "small dollar" issue and a "small item". Ordering a pair of shoes can hardly be a budgetary constraint when the ultimate cost according to the evidence was something in the range of $123.00. Further, the evidence of the Defendant does not explain why Ms. Wherry simply failed to order the shoes initially after she met with the Plaintiff in March and why some time later she ordered what she clearly knew were the wrong size of shoe.

[60] Thus, on the evidence before me, the failure to order the correct shoe size in a timely way was an unlawful act and did not result from circumstances beyond the control of Ms. Wherry.

XI. Cause of the Knee Injury

[61] Is there a causal connection between the failure to provide the Plaintiff with the correct size of new shoes and his knee injury? Again, based on the evidence before me, I find there is a causal connection.

[62] It is to be observed that there was no cross-examination of the Plaintiff on the question of how the injury occurred. The only evidence was the medical records and the direct evidence of the Plaintiff. Both parties conceded that the medical reports could be accepted for the truth of their

contents. The medical reports refer to a “flying tackle” as being the cause of the injury. However, there is no explanation in the reports of what is meant by this. The Plaintiff, who gave his evidence in a straightforward and direct manner, described his recollection of the events surrounding the injury. He admits to using the phrase “flying tackle” but has explained that what he was trying to do when being examined and suffering from the pain associated with the injury was use an analogy that the doctor might understand. As part of his regular routine he pushes the heavy bag away and then steps into it as a boxer would do. His explanation is plausible that when stepping into the bag his foot gave out because there was little tread on his shoe. In the circumstances, this evidence provides a nexus between the injury and the old worn out shoes he was wearing.

[63] Counsel for the Defendant argues that there is no nexus between the act and the injury as the Plaintiff is not an expert and more weight should be given to the medical evidence. However, it is not “expert” medical evidence on causation and the Defendant did not challenge the Plaintiff on causation and relied solely on the medical reports, which, while accepted as true, have been explained away by the Plaintiff. The medical reports do not describe how the injury was incurred, but provide merely a descriptive that came from and which has been explained in greater detail by the Plaintiff and not challenged by the Defendant. I accept the evidence of the Plaintiff.

XII. Contributory Negligence

[64] Was the Plaintiff contributorily negligent in working out in his worn shoes? Should he have known to reduce the level of intensity of his workout, knowing that he was wearing significantly worn out shoes? In my view, based on the evidence, the Plaintiff should have been aware that there

was some likelihood that the vigorous workouts in which he engaged required solid footing. Thus, there is some blame to be attributed to the Plaintiff in engaging in this kind of activity in worn shoes. I assess the contributory negligence at 33%.

XIII. Damages

[65] The remaining consideration is the amount of damages to be awarded to the Plaintiff. Little guidance was provided other than the Defendant's position that no amount should be paid to the Plaintiff who sought general and exemplary damages in the amount of $50,000.00.

[66] There do not appear to be any cases which assess damages for misfeasance in public office. In my view, when the tort has been proved, as here, the measure of damages is the amount the Plaintiff should receive for pain and suffering which flows directly from the unlawful conduct. While the conduct causing the injury is unlawful it does not necessarily incur a punitive element.

[67] The Plaintiff was in severe pain immediately following the injury. He was unable to walk. He was also unable to receive immediate medical help. He has had several examinations and while the tear has improved the indications from the doctors who examined him is that he will still need surgical intervention. Further, his evidence is that because of the injury he has put more stress on his other knee and because of the injury he fell in the shower and further exacerbated in the injury.

[68] I have reviewed several cases concerning the range of general damages for these types of injuries including *Maher v. Beaton*, [1999] N.B.J. No. 33, *Coffey v. Dalin Investments Ltd.* (1997), 176 N.B.R. (2d) 148 and *Hickey v. Canada Safeway*, 1998 CanLII 4874 (B.C.S.C.). In all of the circumstances it is my view that $9,000.00 is the appropriate amount of damages that the Plaintiff should receive for his pain and suffering. When reduced by the contributory negligence component of 33%, the amount payable is $6,000.00. The Plaintiff is also entitled to pre-judgment interest and costs to be assessed in accordance with the middle column of Tariff B unless there are other factors unknown to the Court that should be considered. If there are factors which affect the costs award the parties may provide written submissions to the Court limited to three pages within 30 days of the date of this decision.

ORDER

THIS COURT ORDERS that:

1. The Plaintiff shall receive the sum of $6,000.00 for general damages for pain and suffering.

2. The Plaintiff is entitled to receive pre-judgment and post-judgment interest on the amount awarded.

3. The Plaintiff is entitled to his costs of this proceeding to be assessed at the middle column of Tariff B. If there are matters which affect this award of costs of which the Court is unaware, the parties may make brief written submissions, limited to three pages, within 30 days of the date of this order.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1761-05
STYLE OF CAUSE:	GREGORY J. MCMASTER v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 8, 2008
REASONS FOR ORDER AND ORDER BY:	AALTO P.
DATED:	OCTOBER 14, 2008

APPEARANCES:

John L. Hill	FOR THE PLAINTIFF
Susan Keenan Natalie Henein	FOR THE DEFENDANT

SOLICITORS OF RECORD:

John L. Hill Barrister & Solicitor Cobourg, Ontario	FOR THE PLAINTIFF
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT