Federal Court  Cour fédérale

Date: 20131127

Docket: T-1559-09

Citation: 2013 FC 1194

Toronto, Ontario, November 27, 2013

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

SELVA KUMAR SUBBIAH
ALSO KNOWN AS RICHARD SUBBIAH

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The Plaintiff, Selva Kumar Subbiah also known as Richard Subbiah, is an inmate at Kingston Penitentiary. He has been an inmate for some 20 years and will not be released until the completion of his full sentence (24 years, 9 months, 1 day) on January 29, 2017. Upon his release he is to be deported to Malaysia.

[2] Mr. Subbiah was convicted on two separate occasions for multiple counts of sexual assaults and other violent offences. His offences include those in which Mr. Subbiah would encounter women, drug them with what is colloquially known as a "date rape" drug, and then sexually assault them. He was charged and he pleaded guilty to over seventy offences – including twenty-six counts of sexual assaults and twenty-seven counts of administering a noxious substance – relating to over thirty victims. There were a substantial number of other charges which were either not proceeded with or dropped as a result of his guilty plea. The initial charges for which he was convicted arose in 1992. When the police were able to make further investigations, Mr. Subbiah was charged with an additional series of sexual assaults and those charges were dealt with in 1997. Again, Mr. Subbiah pleaded guilty to a number of those offences. The aggregate sentence that he received was in excess of 24 years. He has served most of his entire sentence to date at Kingston Penitentiary.

[3] In 2008, the National Parole Board, as it was then called, now called the Parole Board of Canada ("PBC"), was required to hold a hearing regarding parole for Mr. Subbiah. Mr. Subbiah waived his right to attend the parole hearing. Thus, Mr. Subbiah's parole consideration proceeded by way of a "paper hearing". In a decision dated December 9, 2008 the PBC determined that Mr. Subbiah was not a candidate for statutory parole and would have to serve the remaining part of his sentence. The decision set out Mr. Subbiah's criminal history and many details of his sexual offences. The decision also included details from psychological reports. Those reports indicated Mr. Subbiah's denial and minimization of his offending activities, his lack of victim empathy, and his substantial degree of indifference towards the consequences of his offending behaviour. The parole decision concluded that Mr. Subbiah was at a high risk of sexual and violent recidivism. Mr.

Subbiah alleges that he was not provided with a copy of the parole decision, but that fact, whether true or not, is immaterial to the issues that arise in this case.

[4] Soon after the parole decision was issued, in February 2009, a crime reporter at the Kingston Whig-Standard, Mr. Robert Tripp, made an application to the PBC for release of the parole decision regarding Mr. Subbiah ("the Decision"), pursuant to section 144 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. Subsection 144(2) allows for a "person who demonstrates an interest in a case" to request disclosure of individual parole decisions. The PBC redacted some portions of the Decision and forwarded a copy to Mr. Tripp on February 12, 2009. In turn, Mr. Tripp published the Decision on an internet site called CanCrime.com. Mr. Subbiah only learned that the Decision was published online when notified by his wife.

[5] Thereafter, on May 14, 2009, Mr. Subbiah was attacked by two inmates who managed to block open a door so that it could not be locked. These inmates, a Mr. McPhail and a Mr. Martin, stabbed Mr. Subbiah six times. Correctional Officers responded to the assault within one minute. Mr. Subbiah sustained six superficial stab wounds during the attack, along with cuts, scrapes and bruises to his head, neck and body. He was initially treated at Kingston Penitentiary, then transferred to Kingston General Hospital, but was released back to the penitentiary the same day.

[6] Mr. Subbiah now brings this action for breach of privacy and negligence against both the Crown and more specifically, the PBC and Correctional Services Canada (CSC) (collectively "the Crown"). As against the PBC, he alleges that they wrongfully released the Decision to Mr. Tripp who posted it on the internet. Mr. Subbiah claims that this was a breach of his privacy and did not

accord with section 144(2)(a) of the *CCRA*, which provides that information in parole decisions will not be disclosed where it "could reasonably be expected… to jeopardize the safety of any person". Mr. Subbiah alleges that the PBC's release of the Decision led to other inmates at Kingston Penitentiary obtaining information about his criminal history, which in turn prompted the attack of May 14, 2009. He maintains that this chain of events constitutes a causal connection between the PBC's release of the Decision and the eventual attack and injury that he suffered.

[7] As against CSC, Mr. Subbiah alleges that they were negligent by not taking steps to protect him from the planned attack at Kingston Penitentiary. In addition to the internet publication of the Decision, Mr. Subbiah alleges that the May 14, 2009 attack should have been anticipated because he was at high risk among the inmate population. Specifically, he alleges that another inmate, Mark Curry, wanted revenge against him because Mr. Subbiah had previously reported a rumoured affair between Mr. Curry and a female Correctional Officer. He also alleges that CSC had notice that the Decision was circulating among the inmate population, placing him at a heightened risk.

[8] In this simplified action, Mr. Subbiah claims damages in the amount of $15,000.00 for general damages; punitive damages of $35,000.00; and a finding that his *Charter* rights have been violated.

Facts

[9] During the course of the trial eight witnesses were called. Mr. Subbiah gave evidence on his own behalf as did a fellow inmate from Kingston Penitentiary, Michael Peteigney. On behalf of the

Crown, the witnesses were Nikki Smith, Jan Looman, Greg Van Rossem, Tim O'Hara, Miguel (Mike) Costa, and Lisa Blasko.

Plaintiff's Evidence

Evidence of Richard Subbiah

[10] As mentioned, Mr. Subbiah is incarcerated because of sexual offences he committed. He has served the majority of his sentence of some 24 years at Kingston Penitentiary. In that institution there were apparently various units where inmates are housed, called ranges. A number of those ranges are reserved for high profile offenders who may be subjected to abuse by other inmates. While Mr. Subbiah has been in and out of segregation ranges during the course of his time at Kingston Penitentiary, he has spent a large amount of time in the general population.

[11] During the course of his time in Kingston Penitentiary, Mr. Subbiah worked as a dome cleaner. The dome, or rotunda, is the central part of Kingston Penitentiary, and the various ranges extend like spokes of a wheel from the central dome. Mr. Subbiah worked afternoons and evenings in the dome, clearing garbage, washing the floors and stripping and cleaning the floors from time to time.

[12] On May 14, 2009, Mr. Subbiah was assaulted by two inmates, McPhail and Martin. He said he knew one of them a bit but did not know the other. Both of these inmates were housed in the Upper B range, a protected custody range for inmates who do not want to be a part of the general prison population. Mr. Subbiah said that it was not his duty to deal with the Upper B range, but a Correctional Officer asked him to take some cleaning supplies to that range. When he did, Martin,

who had just entered the dome area from the Upper "B" range, blocked the door so that it remained open and the Correctional Officer in the dome, a Ms. Alexandra McCormick, could not lock it. This afforded an opportunity for Mr. McPhail and Mr. Martin to attack Mr. Subbiah. He received six superficial cuts and a number of bruises in the course of the assault. He was taken to Kingston General Hospital for review where CAT scans and other tests were performed. He did not require stitches for any of his wounds. He was released from Kingston General Hospital within a few hours and returned to the Kingston Penitentiary Health Centre for a further 24 hours. He received Tylenol 2 and 3 for pain relief and eye drops. He was told to eat soft food for a couple of days.

[13] When he returned to his cell on May 15th, 2009, Mr. Subbiah was segregated in his unit. He was locked in his cell and did not have access to the general prison population, nor they to him. He said he was terrified.

[14] Mr. Subbiah alleges a connection between the online publication of the Decision by Mr. Tripp, the reporter from the Kingston Whig-Standard, and the assault which he suffered on May 14, 2009. After Mr. Tripp requested a copy of the Decision from the PBC, the PBC redacted some personal information relating to Mr. Subbiah and sent Mr. Tripp a copy. Mr. Tripp, in turn, posted the decision on the internet on a website entitled CanCrime.com.

[15] Mr. Subbiah said that he never saw the internet site because inmates at Kingston Penitentiary do not have access to the internet. He said he was told about the internet posting by his wife, and she read some of it to him. He stated that his wife suffered repercussions at her work as a result of the Decision being posted online. His wife is not a party to this proceeding.

[16] Mr. Subbiah conceded that, unlike the internet, newspapers are accessible by inmates at Kingston Penitentiary. He was also aware that a television program about him and his crimes was accessible to inmates at Kingston Penitentiary. He conceded that an inmate's criminal background was not necessarily a secret within Kingston Penitentiary.

[17] Mr. Subbiah did not see the internet version of the Decision denying his parole. However, after hearing about the online publication of the Decision, he said he wrote a letter to Greg Van Rossem, his parole officer, which was copied to various other individuals including Mike Costa, a Security Investigation Officer (SIO) at Kingston Penitentiary. The letter, dated March 6, 2009, expressed Mr. Subbiah's concern that his parole information was provided to Mr. Tripp. Mr. Subbiah asked CSC to undertake an internal investigation to determine how this information was released. Nowhere in the letter does Mr. Subbiah indicate that other inmates might be in possession of a copy of his parole decision. On cross-examination Mr. Subbiah claimed that he was unaware that his Decision was circulating amongst the inmate population at the time he wrote the letter to his parole officer.

[18] Mr. Subbiah gave evidence at length about having had meetings with both Mr. Van Rossem and Mr. Costa regarding the release of the Decision. He said that he requested that CSC investigate how it came to be released. He gave evidence that both Mr. Van Rossem and Mr. Costa declared that his "privacy had been maliciously breached" and that there were "foreseeable consequences" for both Mr. Subbiah and his wife.

[19] During the cross-examination relating to both his letter and any subsequent discussions regarding the internet posting, Mr. Subbiah became evasive in his answers. Indeed, a number of his answers on cross-examination varied from the content of his affidavit. A few examples of this are as follows:

- Mr. Subbiah was asked how he delivered his letter to all of the individuals it was allegedly sent to, and he said by Canada Post. He then changed his evidence to say that with respect to Mr. Van Rossem and Mr. Costa it was sent by way of institutional mail. He said he put the letters in a mailbox in the dome that is cleared daily by the Visiting and Correspondence Department.
- He was asked about Mr. Van Rossem's and Mr. Costa's evidence that they never received his letter. He said he was surprised by their evidence, since they had given him the name of Ms. Karen Blanchard, an officer with the PBC, so that he might inquire about the PCB releasing his parole decision to Mr. Tripp.
- Mr. Subbiah initially claimed that he met with Mr. Costa in March 2009 to discuss his concerns over the release of the parole decision. Later, when confronted with evidence that Mr. Costa was on leave from Kingston Penitentiary in March of 2009, Mr. Subbiah acknowledged that he did not recall whether he had met with Mr. Costa after all.

[20] Mr. Subbiah was asked specifically whether he ever told anyone that he was concerned for his safety. On this issue he was extremely evasive and only answered, "I was very very concerned". Moreover, he did not ask to be segregated from the general prison population prior to the assault. The following is an excerpt of this exchange during Mr. Subbiah's cross-examination:

> Q. Did you ever ask to be either segregated in your cell, segregated on your range in segregation or any other type of segregated type housing for yourself?
>
> A. No, ma'am. I had concerns. I relayed my concerns, and I tried to work around any situations that may have occurred, but no. I relayed my concerns, and I do not feel that it is my place to – I wouldn't know.
>
> I do not have other inmates' files and know what they are thinking. I would not be able to foresee what would have happened to me, but that is why I relayed my concerns to the people in charge of my case.

[21] Mr. Subbiah's affidavit claimed that, on March 12, 2009, other inmates made derogatory and threatening comments to him as a result of the circulation of the Decision. He also claimed that, on previous occasions when his crimes had been publicized in the media, CSC would protect his security. Therefore, he expected that CSC should have segregated him from the general prison population when details of the March 12, 2009 threats came to light.

[22] On cross-examination, Mr. Subbiah was asked if he notified CSC about the threats he received on March 12, 2009. He maintained that he told his parole officer, Mr. Van Rossem, stating, "I would definitely have had this conversation with my parole officer, absolutely". However, he also admitted that when his crimes had been publicized in the past CSC had never removed him from the general prison population, or from his dome cleaner position. The only times he was "locked up" or segregated came when he specifically requested as much. Yet, he acknowledged that he did not request being segregated from the general population after receiving threats in March 2009, or after he received information that Mr. Curry was upset with him in April 2009.

[23] During the course of his evidence it became apparent that Mr. Subbiah was referring to a document which had not been produced in this proceeding. He said that he succeeded in obtaining an envelope of "notes", which apparently included a copy of section 24 of the *CCRA* and other "miscellaneous stuff". At times Mr. Subbiah seemed to develop a habit of fielding difficult questions with the response, "I don't have my notes".

[24] Mr. Subbiah claimed that there was a breach in security directly prior to the assault. He said that Correctional Officer McCormick was on duty, observing the Upper "B" range entrance, but somehow the door to that range was unlocked and propped open by one of his assailants. To him, this suggested a breach of security protocol, since barrier doors are to remain locked unless overseen by a Correctional Officer who is able to maintain static security. In his affidavit, he also stated that Officer McCormick banged on the glass of the observation bubble to encourage Mr. Martin to remain in his range, and that she was unable to engage the lock after Mr. Martin propped the range barrier door open. During the course of his cross-examination, Mr. Subbiah admitted that he did not have personal knowledge of how Officer McCormick behaved that day, or how, exactly, the door to the Upper "B" range was unlocked and propped open. In fact, he acknowledged that much of his recollection of what transpired with regards to Officer McCormick that day is his recitation of what was in her observational report, and the subsequent investigative report disclosed in this lawsuit, as opposed to any direct recollections.

[25] Following the attack, Mr. Subbiah complained that he suffered from anxiety, mental anguish and stress, and that he no longer felt safe in a group. He also said that he had developed nightmares. When asked whether he had reported this to anybody, he said he had reported it to a Mr.

Eastabrook, a psychology nurse at Kingston Penitentiary. He was given medications, and he assumed he had post-traumatic stress disorder (PTSD). He testified that he saw counsellors frequently and believed that the medications he was taking were for a diagnosed psychological disorder. There is no medical evidence in this case regarding his state of mind following the assault.

[26] In another part of his examination Mr. Subbiah conceded that after returning to Kingston Penitentiary and being moved to the Lower "G" range, he sought to become the range representative. When asked why he would do so in light of his anxiety and fear of groups, he indicated that these were groups of inmates whom he knew and therefore felt comfortable with. He indicated that he never took recreation time while he was in the Lower "G" range. In another exchange, when asked about being a part of a group program for sexual disorders at the Regional Treatment Centre (RTC), he said that this group was comfortable for him because all of the other six or seven inmates who were participating had similar criminal backgrounds and were dealing with similar issues.

[27] When I asked whether or not he was aware that inmates in the institution would share information about other inmates, Mr. Subbiah suggested that there were a lot of rumours going around. On the basis of all of his evidence, I find that knowledge would be shared and exchanged among inmates as to the crimes for which they were incarcerated, especially for an inmate like Mr. Subbiah who had been in the institution for approximately 15 years at the time of the assault. I also find that Mr. Subbiah was evasive, and believe that at times he endeavoured to overstate his case. Where his evidence conflicts with evidence of other witnesses of the Crown, I prefer the evidence of the Crown witnesses.

Evidence of Michael Peteigney

[28] Michael Peteigney was a friend of Mr. Subbiah when Mr. Peteigney was incarcerated at Kingston Penitentiary. He is now an inmate at Bath Institution.

[29] While incarcerated at Kingston Penitentiary, Mr. Peteigney worked as a change room worker essentially spending his time at a sewing machine doing repairs on bedding and other inmate clothing. He worked with approximately 4 to 6 other inmates. He said that he would have the opportunity to visit all ranges of Kingston Penitentiary and says he observed a document concerning Mr. Subbiah being passed around among the inmates.

[30] Mr. Peteigney frankly stated that he had no independent recollection of any of these events as he had "fried his brain". He said he did this by virtue of having consumed copious quantities of LSD 25 when he was young to stave off his suicidal depression. While he says the LSD helped him avoid the suicidal depression, it had a significant adverse impact on his brain and he now could not remember anything that happened more than 8 months ago. All of his recollections for the evidence he gave flow from a letter he wrote in 2010 to counsel for Mr. Subbiah. He frankly admitted that all of his current evidence is based on what was written in that letter.

[31] Mr. Peteigney has no independent recollection of the events he described in his testimony. He cannot independently recall the specific document he supposedly saw being passed between inmates, or which inmates were involved. He does not remember which range he was in when he saw the document exchanged, and he does not remember the names of those inmates he worked

with at the time. He could not give evidence concerning relationships between inmates, specifically the relationship between Mr. Curry and Mr. Subbiah.

[32] The relevant events that Mr. Peteigney sought to describe took place in early 2009, prior to the attack on Mr. Subbiah. Yet the letter upon which he swore his affidavit and gave his evidence was written in February 2010, more than 9 months after the attack. He admits he has no recollection of the events giving rise to this proceeding, or any events that took place more than 8 months ago. As he stated several times during his testimony, in reference to the February 2010 letter, "I take my own word for it", "I believe it to be true", and "that was my recollection at that time".

[33] Based on Mr. Peteigney's evidence, and his own admission that his memory only extends back for 8 months, the letter he relies upon is simply not reliable. There is no evidence that the past recollection in his letter was recorded in a reliable manner. Considering he has no memory beyond 8 months, there is also reason to believe that his past recollection was not "sufficiently fresh and vivid to be probably accurate". Therefore, his evidence in chief cannot be accepted on the basis of the "past recollection recorded" doctrine (*R v Fliss*, 2002 SCC 16, at para 63). In all, I did not find the evidence of Mr. Peteigney persuasive, and so I give his evidence no weight.

Crown's Evidence

Evidence of Nikki Smith

[34] Nikki Smith is the regional manager for the Kingston region of the PBC. I found her to be an articulate witness who answered questions fairly and frankly during cross-examination. She is

the regional manager of the PBC and has a background working as a Correctional Officer at CSC. She spoke at length about PBC procedures and policies regarding disclosure of information.

[35] Of particular importance is Ms. Smith's evidence that a registered victim would receive as much information as the victim wished under both sections 142 and 144 of the *CCRA*. She further noted that the restriction on the release of information that might "jeopardize the safety of any person", as contained in *CCRA* section 144(2)(a), extends to include the safety of an offender. Still, her view was that there was no requirement in the *CCRA* or in the PBC's internal policies to inquire with CSC into the safety of releasing certain documents to the public. Ms. Smith's evidence was that the PBC redacts information that might identify where the inmate is residing, along with personal identifiers other than the offender's name. It appears to be the policy of the PBC that persons who seek information are provided with it, except where standard redactions are required.

Evidence of Jan Looman

[36] Dr. Jan Looman is a psychologist who was in charge of the sexual offender treatment program (SOTP, or "the program") at the Regional Treatment Centre (RTC) in Kingston. Between October 2010 and January 2013, Mr. Subbiah was imprisoned at the RTC, and as of November 2010 he attended the program.

[37] Mr. Subbiah completed the program but remained imprisoned at the RTC until his return to Kingston Penitentiary in January 2013. After Mr. Subbiah completed the SOTP a lengthy report was prepared relating to his participation. For purposes of this decision it is not necessary to relate in detail Mr. Subbiah's specific involvement in the SOTP, save for a few observations. First, the

report notes that Mr. Subbiah was feeling depressed and frustrated because of his lack of contact with his mother. Second, the report concludes that Mr. Subbiah "has a tendency to use his intellectual abilities to support his anti-social values through the manipulation and control of others". The Report also states, "I suspect that his manipulative behaviour will be ongoing". Upon Mr. Subbiah's completion of the SOTP, it was concluded that he has a well-engrained pattern of manipulating his environment for personal gain, and that those interacting with him should be aware of this pattern and not allow him to gain what he desires through manipulation.

[38] The report on Mr. Subbiah's participation in the SOTP also notes that when he arrived at the RTC he did not appear to have any "obvious problems with depression or anxiety". The report further notes that Mr. Subbiah's "anxiety and depression did not present until he began participating in the SOTP, which required him to admit to, and take responsibility for, his sexual offending behaviour, including understanding the impact of his offending on his victims". It appears Mr. Subbiah's family, and specifically his mother, impacted him the most. He reported feeling depressed because of a lack of contact with his mother, and because he failed to disclose to her that he was in prison, having his family cover for him all of these years.

[39] Mr. Subbiah's participation in the SOTP, and the subsequent report, led Dr. Looman to the following conclusion:

> Based on the information and knowledge I have of the plaintiff, including overseeing his participation in the SOTP, and observing his behaviour during this time, it is my professional conclusion that the plaintiff does not have any ongoing psychological issues beyond those relating to his offending behaviour and concerns related to taking full accountability for those behaviours in regard to his disposition within the prison.

[40] In his evidence, Dr. Looman conceded that traumatic stress could be a reaction to an attack such as the one suffered by Mr. Subbiah. Dr. Looman also described part of the prison hierarchy. He stated that sex offenders are ordinarily the "bottom of the prison hierarchy" and that known sex offenders are targets and subject to assault. He also said that Kingston Penitentiary is a protective custody institution, so sex offenders there are less likely to be subject to such assaults.

[41] When asked about traumatic stress and depression, Dr. Looman indicated that he was not aware of any specific diagnosis relating to Mr. Subbiah and suggested that one possibility for Mr. Subbiah's claim of depression relates to the fact that symptoms often increase the closer an inmate comes to the end of a program, perhaps to avoid return to Kingston Penitentiary. This is defined as malingering. Dr. Looman reiterated that Mr. Subbiah did not present any symptoms of depression or other traumatic stress when he arrived at the RTC. Dr. Looman also indicated that there were many other sex offenders at the RTC during Mr. Subbiah's stay.

Evidence of Greg Van Rossem

[42] Mr. Van Rossem was Mr. Subbiah's parole officer from 2003 through 2010. Generally speaking he carried a caseload of 25 inmates and spent his time managing their cases in accordance with their correctional plan and assisting them, if possible, to cascade down to a lower security institution. He was concerned about behaviour, programming, work habits and the like to assist inmates with their correctional plan.

[43] When asked about the treatment of sex offenders generally within the prison system, Mr. Van Rossem acknowledged that these offenders cause problems because they are picked upon,

"muscled", or threatened. He said this part of the prison code did not exist as significantly in Kingston Penitentiary, where a relatively large number of sex offenders are held, as compared to an institution such as Millhaven, where there are few sex offenders.

[44] I found Mr. Van Rossem to be articulate and knowledgeable regarding his position and the policies within Kingston Penitentiary. He gave evidence regarding the position of dome cleaner. He stated that being the dome cleaner was not necessarily the safest job within Kingston Penitentiary because all inmates, at one time or another, pass through the dome on any given day. He said that several assaults have occurred in the dome itself. This is so notwithstanding that there is a large number of security staff in the dome area.

[45] In March 2009, Mr. Subbiah advised Mr. Van Rossem that a copy of the Decision was available online. Mr. Van Rossem made inquiries to see if a CSC employee had leaked the document, and on March 16, 2009 the PBC responded to him to clarify that the Decision had been obtained by Mr. Tripp pursuant to a written request. The PBC also confirmed that CSC was not involved in releasing the Decision.

[46] Mr. Van Rossem acknowledged that a document such as the internet posting of the Decision would be a concern, as it is always a concern if a document relating to a specific inmate circulates amongst the inmate population. He said public safety is a paramount concern within Kingston Penitentiary, both for inmates and staff. He emphasized that Kingston Penitentiary is a maximum security institution and can be a very dangerous environment for all.

[47] He described the Upper "B" range where the assault on Mr. Subbiah occurred as a transitional range. It houses inmates who have had problems in the open population because they are incompatible with others, or are targets in some fashion. He said it was a range where assaults occur.

[48] Mr. Van Rossem conceded that Mr. Subbiah was a good worker. However, as much as Mr. Subbiah might have wanted to have his dome cleaner position back, Mr. Van Rossem was of the view that it was not in Mr. Subbiah's best interest, essentially because of the vulnerability of the dome cleaner that would be in contact with the entire prison population.

Evidence of Tim O'Hara

[49] Tim O'Hara was the head of the Kingston Penitentiary Health Services. He is a registered nurse and gave evidence identifying Mr. Subbiah's medical file. It was his view that Mr. Subbiah had no ongoing physical injuries following the assault after the stab wounds healed.

[50] In his evidence in chief, Mr. O'Hara stated that Mr. Subbiah has no major or chronic health issues. With respect to the May 14, 2009 assault, Mr. Subbiah suffered six superficial stab wounds as well as numerous superficial cuts, scrapes and bruises to the face, neck and head. After the assault Mr. Subbiah was brought to health services, but he did not lose consciousness and had no major complaints of injury or pain. While in health services, Mr. Subbiah's blood pressure dropped and he was taken to Kingston General Hospital as a result. The implication of Mr. O'Hara's evidence is that the assault itself did not necessitate intervention to Kingston General Hospital. Rather, a subsequent drop in blood pressure required Mr. Subbiah to be taken to the hospital.

[51] Mr. O'Hara also observed that following Mr. Subbiah's return to Kingston Penitentiary he required minimum follow-up. However, one issue arose in that Mr. Subbiah complained that he was stressed and was having sleepless nights because he believed that he may have been exposed to HIV and Hepatitis C during or following the May 14, 2009 assault. As a result of Mr. Subbiah's stress and sleepless nights, blood tests were taken to determine whether or not he had either of HIV or Hepatitis C. All of the test results came back negative.

[52] Mr. O'Hara observed that although Mr. Subbiah was prescribed Remeron®, an anti-depressant drug, there was no formal diagnosis that Mr. Subbiah suffered from depression. Health Services continued to provide Mr. Subbiah with Remeron® on the recommendation of a Dr. McBride, the doctor on duty at Kingston Penitentiary.

[53] Mr. O'Hara also commented on one further incident. Apparently, on August 25, 2010, Mr. Subbiah was in segregation. Following his release from segregation he indicated that he was sad and worried about retaliation, and he reported further sleep disturbances. Remeron® was again prescribed for him at an increased dosage. Mr. Subbiah made no further reports regarding worry or sadness or depression between August 25, 2010 and his transfer to the RTC in October 2010.

Evidence of Miguel Costa

[54] Mr. Costa is the former Security Intelligence Officer (SIO) at Kingston Penitentiary. He gave evidence regarding security within Kingston Penitentiary. In particular he defined "dynamic security" as information from sources including partners in the criminal justice system such as the police or the parole board, and "static security" as elements of security that do not change, such as

the towers, barriers, locks, etc. He described Kingston Penitentiary as having an active "flow through" of population, but there were many inmates who were spending the entirety of their sentence there. He said that the presence of a sex offender was not necessarily a risk. He said that the risk to a sex offender might increase if it were known that the sex offender was involved with underage persons, or that the number of victims involved was high.

[55] Mr. Costa said it was inappropriate for staff to talk about inmate crimes with other inmates, but conceded that inmates could obtain information about other inmates if they so chose through privacy legislation. He said he was initially unaware that the Decision relating to Mr. Subbiah was on the internet, but once he learned about it he checked it and saw its contents.

[56] Mr. Costa stated that Mr. Subbiah's offences were known in the general inmate population. Therefore, it was not a concern that the Decision was published online because much of the information was known or could be obtained in other ways. He did not agree with Mr. Subbiah's counsel that posting the decision was a breach of privacy, since the PBC's proceedings are public.

[57] Mr. Costa had no knowledge about the inmate, Mr. Curry, who was alleged to have had an affair with a Correctional Officer. He said he had no recollection whatsoever of Mr. Subbiah ever reporting to him about such an affair.

[58] Overall, it was Mr. Costa's view that the prevailing circumstances leading up to the May 14, 2009 attack did not render Mr. Subbiah an overwhelming security risk.

Evidence of Lisa Blasko

[59] Lisa Blasko is a SIO at Kingston Penitentiary. She has been a SIO since 1998. She reiterated in her evidence that Kingston Penitentiary is sometimes called a "protective custody" institution because of the number of serious offenders housed there, including many who are convicted of sexual offences or offences against children.

[60] Her evidence was that inmates within Kingston Penitentiary have knowledge of Mr. Subbiah's background and criminal convictions. According to Ms. Blasko, prior to the May 14, 2009 assault Mr. Subbiah never advised security intelligence that he felt at risk for any reason, or that his safety was in jeopardy within Kingston Penitentiary.

[61] Ms. Blasko's evidence was that inmates in the Upper "B" range, where Mr. Subbiah's two attackers were housed, are considered vulnerable and at risk in relation to all general population inmates at Kingston Penitentiary, including Mr. Subbiah.

[62] Following Mr. Subbiah's return to Kingston Penitentiary on May 15, 2009, he was placed in segregation so that security intelligence could assess his security and the assault could be investigated. Ms. Blasko gave evidence that Mr. Subbiah pleaded with her to let him out of segregation, so he could return to his range and to his dome cleaner position. On May 18, 2009, security intelligence determined that Mr. Subbiah was not at risk within his own range, and he was returned to his cell.

[63] There was much evidence given concerning Mr. Subbiah's job in the dome cleaner position, and how he sought to remain in that position following the assault. However, the dome cleaner position was central within Kingston Penitentiary, allowing Mr. Subbiah to have contact with all inmates, so a decision was made that it was not in his best interest to return to that position.

[64] Mr. Subbiah was not happy with being denied the position of dome cleaner and he filed a formal inmate complaint or grievance. The result of his grievance was additional confirmation that it was not in his best interest or safety to return to the dome cleaner position.

[65] One of the documents in evidence is Mr. Subbiah's hand written grievance, dated June 19, 2009. Interestingly, the assault is discussed in the complaint but there is no suggestion that the assault was in any way connected to the release of the PBC parole decision. Mr. Subbiah's complaint provides a number of speculative reasons for his attack by inmates from the Upper "B", or "U/B" range. Paragraph 6 of his complaint reads as follows:

> 6. Reasons for this assault, as told to me, included the following:
>
> - I was allegedly selling cleaning supplies to the U/B inmates – this is false.
>
> - I was allegedly stealing the cleaning supplies from the U/B common room – this is false
>
> - For allegedly muscling the U/B inmates for canteen – this is false
>
> - As a set up "paid" for by a population inmate to teach me a lesson to stay out of other people's business

[66] With respect to the latter point raised by Mr. Subbiah, there was a suggestion that another Kingston Penitentiary inmate, Mr. Curry, had it in for Mr. Subbiah. As mentioned, Mr. Subbiah supposedly reported to CSC about a rumoured affair that Mr. Curry was having with a female officer. However, Ms. Blasko denies that security intelligence ever had any information to suggest that Mr. Curry orchestrated the assault on Mr. Subbiah because he was angry with him. Similarly, security intelligence did not have any information to suggest that the assault on Mr. Subbiah was the result of the circulation of the Decision amongst other inmates.

[67] Ms. Blasko also gave evidence at length regarding Mr. Subbiah's criminal background and the availability of information concerning his specific criminal activity and his *modus operandi* of administering stupefying drugs to female victims in order to sexually assault them. Such information included media articles, as well as a cable television program which was based upon Mr. Subbiah's criminal conduct. Copies of the episode guide were filed as exhibits. That particular episode of the program specifically refers to Mr. Subbiah and the manner in which he drugged potential victims.

[68] I found Ms. Blasko to be an impressive witness. She was articulate, confident and knowledgeable concerning the matters she discussed. I have no qualms about accepting her evidence over any other evidence where it conflicts with hers. She spoke at length about the duties of a SIO and described for the Court how she assembles information relating to what goes on in Kingston Penitentiary. She was unequivocal in her evidence that Mr. Subbiah's crimes were well known among inmates at Kingston Penitentiary. She conceded that there is a "flow-through" of inmates, but there was knowledge of his crimes, nonetheless. She said the fact that the PBC

decision was posted on the internet would not have elevated the risk to Mr. Subbiah, since the Decision contained nothing new. His crimes were already out there.

[69] In particular, she referred to the television documentary which had been made about Mr. Subbiah's criminal activity. She said that the program had been replayed and was available on inmates' televisions. She specifically recalls discussing the replay of that television program with colleagues at the institution, and even heard that one of her colleagues was in an inmate cell when it was playing. She was adamant that Mr. Subbiah never expressed that the showing of the television program was a possible security risk to him. This makes sense, considering Ms. Blasko's evidence that Mr. Subbiah's criminal background was a well known matter of public record.

[70] With respect to the specific incident involving the assault on Mr. Subbiah, Ms. Blasko noted that Mr. Martin, one of the assailants, was also a cleaner and was on duty at the time of the assault. Ms. Blasko said there were many theories regarding the assault, but she had never heard the theory that it resulted from the posting of the Decision on the internet. She described the internet site, CanCrime.com, as an "obscure" site. She noted that another theory regarding the assault involved Mr. Subbiah's abuse of duties and privileges as the dome cleaner. This theory is explicit in Mr. Subbiah's own formal inmate grievance, which notes rumours about him seeking payment from inmates for cleaning supplies. Ms. Blasko explained that she relies on information from a variety of sources within Kingston Penitentiary to understand what is going on and to identify potential security risks. Her sources include staff, inmates, family, visitors and others. She said if the publication of the Decision on the internet was the cause of Mr. Subbiah's assault she would have

heard about it from one of the many sources available to her. Yet, as Ms. Blasko noted, the reason for the assault was never substantiated or corroborated.

Issues

[71] This case raises for the first time the obligations of the PBC under section 144(2)(a) of the *CCRA*. This is a novel issue dealing with the PBC's statutory obligations relating to offender safety and privacy when releasing a parole decision. Mr. Subbiah's claim also raises issues of negligence by CSC and by the PBC. Accordingly, the issues are as follows:

1. Was CSC negligent in failing to protect Mr. Subbiah from attack?
2. Was the PBC's disclosure of Mr. Subbiah's Decision negligent?
3. Did the PBC breach its statutory obligation under s 144(2) of the *CCRA*, or otherwise breach Mr. Subbiah's privacy rights when it released the parole decision?
4. What, if any, is the appropriate level of damages?

Legislative Background

[72] The main legislation in issue in this action is the *CCRA*, and more specifically, sections 70 and 144.

[73] Section 70 establishes the obligations of the CSC to ensure that living and working conditions of inmates and staff members are, *inter alia*, safe. The section reads:

Living conditions, etc	70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.	70. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portent atteinte à la dignité humaine.	Conditions de vie
	1992, c. 20, s. 70; 1995, c. 42, s. 17(F).	1992, ch. 20, art. 70; 1995, ch. 42, art. 17(F).	

[74] Section 144 of the *CCRA* deals with a registry of decisions of the PBC and, in particular, provides in subsection 144(2)(a) that persons may obtain access to the contents of the registry other "than information the disclosure of which could reasonably be expected (a) to jeopardize the safety of any person". Section 144 reads as follows:

Registry of decisions	144. (1) The Board shall maintain a registry of the decisions rendered by it under this Part or under paragraph 746.1(2)(*c*) or (3)(*c*) of the *Criminal Code* and its reasons for those decisions.	144. (1) La Commission constitue un registre des décisions qu'elle rend sous le régime de la présente partie ou des alinéas 746.1(2)*c*) ou (3)*c*) du *Code criminel* et des motifs s'y rapportant.	Constitution du registre
Access to registry	(2) A person who demonstrates an interest in a case may, on written application to the Board, have access to the contents of the registry relating to that case, other than information the disclosure of which could reasonably be expected (*a*) to jeopardize the safety of any person; (*b*) to reveal a source of information obtained in confidence; or (*c*) if released publicly, to adversely affect the reintegration of the offender into society.	(2) Sur demande écrite à la Commission, toute personne qui démontre qu'elle a un intérêt à l'égard d'un cas particulier peut avoir accès au registre pour y consulter les renseignements qui concernent ce cas, à la condition que ne lui soient pas communiqués de renseignements dont la divulgation risquerait vraisemblablement: *a*) de mettre en danger la sécurité d'une personne; *b*) de permettre de remonter à une source de renseignements obtenus de façon confidentielle; *c*) de nuire, s'ils sont rendus publics,	Accès au Register

		à la réinsertion sociale du délinquant.	
Idem	(3) Subject to any conditions prescribed by the regulations, any person may have access for research purposes to the contents of the registry, other than the name of any person, information that could be used to identify any person or information the disclosure of which could jeopardize any person's safety.	(3) Sous réserve des conditions fixées par règlement, les chercheurs peuvent consulter le registre, pourvu que soient retranchés des documents auxquels ils ont accès les noms des personnes concernées et les renseignements précis qui permettraient de les identifier ou dont la divulgation pourrait mettre en danger la sécurité d'une personne.	Idem
Idem	(4) Notwithstanding subsection (2), where any information contained in a decision in the registry has been considered in the course of a hearing held in the presence of observers, any person may, on application in writing, have access to that information in the registry. 1992, c. 20, s. 144; 2012, c. 1, s. 99.	(4) Par dérogation au paragraphe (2), toute personne qui en fait la demande écrite peut avoir accès aux renseignements que la Commission a étudiés lors d'une audience tenue en présence d'observateurs et qui sont compris dans sa décision versée au registre. 1992, ch. 20, art. 144; 2012, ch. 1, art. 99.	Idem

ISSUE 1

Was CSC negligent in failing to protect Mr. Subbiah from attack?

Plaintiff's Submissions

[75] Mr. Subbiah argues that CSC was negligent because CSC staff failed to take reasonable care to protect his safety when they knew or ought to have known his safety was in jeopardy. There is a duty on prison officials to ensure the safety of inmates. This duty is accepted in Canadian law and arise from *Ellis v Home Office*, [1953] 2 All ER 146 (Eng CA) at 154 and adopted in *Timm v Canada, [1965] 1 ExCR 174.*

[76] However, there is no absolute liability on prison authorities to prevent all harm to inmates; liability generally flows only where correctional authorities have actual knowledge of harm. In

other words, harm must be reasonably foreseeable. In *Miclash v Canada*, 2003 FCT 113, CSC was held liable for an attack on an inmate where CSC "should have known" that the inmate's safety was compromised.

[77] Further, in *Carr v Canada*, 2008 FC 1416, Prothonotary Milczynski held that CSC breached its duty of care to an inmate where it failed to take reasonable steps in both static and dynamic security once "pre-indicators of violence" against the inmate where known. Thus, CSC can be held liable where there is a failure to provide reasonable protection against the actions of other prisoners where CSC has notice of a risk to an inmate's safety. Therefore, the key issues here are whether there were pre-indicators of violence, whether CSC knew or ought to have known that Mr. Subbiah was in danger, and whether reasonable steps were taken to ensure his safety.

[78] Mr. Subbiah alleges that CSC had knowledge of pre-indicators of violence in his case, yet failed to provide adequate security in light of the risks. The Decision had been obtained by inmates in Kingston Penitentiary, and Mr. Subbiah had alerted a prison official – Mr. Van Rossem – of this fact in March 2009, about two months prior to the attack. While Mr. Subbiah did not specifically request protection, the CSC staff either knew or ought to have known that the distribution of the Decision detailing Mr. Subbiah's offences would put him at risk.

[79] It is argued that the fact that information about the circulation of his Decision was not passed on to the SIO indicates a breach in dynamic security. As corroboration for Mr. Subbiah's safety concerns, CSC staff also knew that Mr. Subbiah requested protective segregation on multiple occasions, asked to meet with Mr. Curry, and inquired about a range change. In the face of this

knowledge, it is alleged that CSC allowed Mr. Subbiah to enter a transition range, Upper "B", and come into contact with other inmates who were intended to be segregated. Section 70 of the *CCRA* requires that all reasonable steps are taken to ensure that the penitentiary and its environment are safe for inmates and staff, regardless of whether an inmate complains about a risk. The fact that the information in the Decision was previously available public information does not relieve CSC of the duty to ensure security.

[80] Mr. Subbiah also maintains that CSC's static security was inadequate, as evidenced by the unlocked barrier door to the Upper "B" range. It was unlocked despite the fact that Correctional Officers knew that Mr. Subbiah was attending near the Upper "B" range to deliver supplies, and the area outside the Upper "B" range is a restricted space. Either the barrier door to Upper "B" should not have been released, or, Correctional Officers should have prevented Mr. Subbiah from entering the dome. Mr. Subbiah alleges either an Officer negligently released the barrier door to the Upper "B" range; an Officer negligently allowed Mr. Subbiah to enter the dome with knowledge that inmates from the Upper "B" range had breached the area; or, an officer was negligent in allowing Mr. Subbiah into the dome prior to surveying the area to ensure its safety. Officer McCormick is said to be negligent opening the barrier door.

[81] Mr. Subbiah also argues that no Correctional Officers present at the time of the assault, including Officer McCormick, testified at the hearing, so a negative inference should be drawn against CSC.

Crown's Submissions

[82] The Crown maintains that the evidence suggests that CSC was unaware of any risk to Mr. Subbiah prior to the assault and therefore it was not foreseeable. Thus, CSC's actions were reasonable throughout.

[83] The Crown concedes that CSC has a duty of care, but argues that CSC met its standard of care to Mr. Subbiah, and so his claim of negligence must fail.

[84] The Crown argues that the legal question is whether, in the circumstances and on a balance of probabilities, the harm to Mr. Subbiah was reasonably foreseeable so that CSC knew or ought to have known of the risk of danger (see *Carr*, *supra*). The Crown maintains that the May 14, 2009 attack was not foreseeable, and therefore there is no breach of the standard of care for a "quick, planned and violent attack" (see *Carr*, above, at para 17; *Hodgin v Canada (Solicitor General)* (1999), 218 NBR (2d) 164 at para 3). A prison is an inherently dangerous environment, and CSC cannot guarantee each inmate's safety, or protect inmates from unpredictable dangers (*Miclash*, *supra*, at para 40).

[85] In the prison context, pre-indicators of violence will satisfy the requirement of reasonable foreseeability, but in this case the Crown maintains that there were no such pre-indicators. For example, security intelligence at Kingston Penitentiary had no information that Mr. Subbiah's parole decision was being distributed amongst inmates, and even if they did it would not have caused concern because the information in the Decision was publicly available.

[86] The Crown notes that an inmate, particularly one as well-versed with the prison environment and culture as Mr. Subbiah, would be expected to warn CSC if there was a risk of danger. In the past, when Mr. Subbiah felt his safety was at risk, he made a protective custody request. He made such a request in March 2008, and security intelligence took the requisite steps to ensure his safety. Yet, Mr. Subbiah made no such request after learning that the Decision was posted online. Indeed, Ms. Blasko, Mr. Costa, and Mr. Van Rossem all confirm that Mr. Subbiah never advised them that he was at risk or in danger, or that he had reason to believe that the Decision was circulating among inmates. Moreover, Mr. Subbiah never indicated that he felt at risk due to Mr. Curry, and CSC had no other information to suggest that this might be the case.

[87] The Crown argues that CSC took reasonable steps, in both static and dynamic security, to prevent an assault, in accordance with the principles set out in *Carr, supra*. It is argued, with some force that CSC's security measures need not be perfect or infallible. Rather, they must be adequate and reasonable, taking the entire context of the event into account. Considering the entire context of the attack on Mr. Subbiah, the Crown argues that CSC's measures were adequate and reasonable. There was nothing to suggest that an Upper "B" inmate presented a risk to Mr. Subbiah. Once the "quick, planned and violent" attack occurred, CSC Officers responded in less than one minute. Officer McCormick had a duty to remain at her post and face the Upper "B" range; she did so, and radioed for assistance immediately upon seeing the assault. There is no evidence that the Upper "B" range door malfunctioned. Overall, there is no failure by CSC to provide reasonable static and dynamic security. Thus, CSC did not breach the standard of care.

[88] Even if CSC breached the standard of care owed to Mr. Subbiah, the Crown insists that there is no causal link between the breach and his injuries, because Mr. Subbiah suffered no more than minor and superficial cuts and bruises. If he did suffer a greater injury, it is not causally linked to any breach by CSC. There is no evidence that the Decision was circulating amongst other inmates prior to the assault, let alone that its distribution two months earlier precipitated the assault. Therefore, there is no causal link between the distribution of the Decision and the attack and there is no causal link between any alleged breach in static or dynamic security and the assault. The evidence suggests that the assault was caused either by Mr. Subbiah's problems with Mr. Curry, or his selling of cleaning supplies to inmates.

[89] Finally, while Mr. Subbiah argues that an adverse inference should be drawn against the Crown because Correctional Officer McCormick was not called as a witness, the Crown submits that such an adverse inference can only be drawn where the plaintiff has established a *prima facie* case, and Mr. Subbiah has failed to do so. Regardless, the Crown called six witnesses, including Ms. Blasko who had received a copy of Ms. McCormick's observation report from the time of the assault. Ms. Blasko considered this report to be truthful, and she made use of it when supervising the drafting of the investigation report about the assault. Therefore, any evidence that Ms. McCormick could have advanced was provided by Ms. Blasko. In addition, nothing prevented Mr. Subbiah from calling Ms. McCormick as a witness.

Analysis

[90] With respect to the claim of negligence against CSC, I find that there was no negligence. Both parties accept that CSC owed Mr. Subbiah a duty of care. Both also agree that if pre-

indicators of violence existed, or if violence against Mr. Subbiah was otherwise predictable, then CSC was obliged to take reasonable steps to ensure his safety (*Carr* at para 17).

[91] The evidence of the various CSC officers all indicates that assaults are fairly frequent at Kingston Penitentiary and that it is a "dangerous place". However, there was no indication that an assault on Mr. Subbiah was pending and there was no security intelligence information to that effect. Significantly, Mr. Subbiah did not make it known to anyone that he might be the subject of an attack. It does appear he may have had some information about another inmate, Mr. Curry, being upset with him. However, he did not report it but simply sought to meet with Mr. Curry. Several of the reports indicate that Mr. Subbiah had a private conversation with Mr. Curry prior to the assault.

[92] As well, Mr. Subbiah made no comment to security intelligence that he felt his safety was imperilled. The evidence shows that inmates in the Upper "B" range are considered to be at risk from the general inmate population, of which Mr. Subbiah was part. There is no evidence that Mr. Subbiah had a pre-existing antagonism with either of his assailants, so it appears that "inmate incompatibility", a common predictor of risk or violence, was not an issue (see *Miclash* at para 41). Absent convincing evidence of a foreseeable risk to Mr. Subbiah, or any pre-indicators of violence, CSC could not have anticipated that inmates from the Upper "B" range posed a threat to him.

[93] To be foreseeable, there must be a reasonable prospect that the event will occur. In *Bastarache v Canada,* 2003 FC 1463 Madam Justice Leyden-Stevenson described the duty owed to inmates by prison authorities as follows:

> 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.) (at para. 23).

[94] Was the attack on Mr. Subbiah foreseeable in all of the circumstances? In my view it was not, for a number of reasons.

[95] First, significantly, an investigation following the assault indicated that Mr. Subbiah was targeted because he was selling cleaning supplies to inmates. Even after the event, Mr. Subbiah did not tell anyone that he blamed the release of the Decision for his assault.

[96] Second, at the time of the assault, Mr. Subbiah was carrying out his duties as a dome cleaner and taking supplies to the Upper "B" range. At the same time, Mr. Martin was carrying out his duties as a cleaner on the Upper "B" range. The officer observing the situation acted with dispatch as soon as she detected that Mr. Martin had blocked open a door which could not be relocked. Within a minute Correctional Officers responded and took control of the situation. Given the dangerous environment in which these inmates live, this response to a quick, violent, unanticipated assault was entirely appropriate.

[97] Third, I accept SIO Blasko's evidence that there were no pre-indicators of violence and that the officer in charge acted appropriately. Therefore, I find that security measures were adequate and reasonable in the circumstances (see *Carr* at para 17). On these facts, CSC met the standard of care owed to Mr. Subbiah.

ISSUE 2

Was the PBC's disclosure of Mr. Subbiah's Decision negligent?

Plaintiff's Submissions

[98] According to Mr. Subbiah, the PBC's decision to disclose the Decision to Mr. Tripp constitutes negligence because: 1) the PBC owed a duty of care to Mr. Subbiah; 2) the PBC failed to meet the requisite standard of care; and 3) the PBC's failure to meet the requisite standard of care caused injury to Mr. Subbiah. Specifically, he contends that the PBC's release of the Decision contributed to his vulnerability to attack, and so the PBC is contributorily negligent.

[99] Mr. Subbiah submits that the PBC owed a duty of care because there is a relationship of proximity between him and the PBC, according to the two-pronged test from *Anns v Merton London Borough Council*, [1978] AC 728 (HL) [*Anns*] at 754, as refined by the Supreme Court of Canada in *Cooper v Hobart*, 2001 SCC 79 [*Cooper*], and *Edwards v Law Society of Upper Canada*, 2001 SCC 80.

[100] Mr. Subbiah argues that at the first prong of the *Anns* test, the harm Mr. Subbiah suffered as a result of the PBC's disclosure was a foreseeable consequence, since all parties acknowledge that sexual offenders are at greater risk within Canada's penal system. Further, subsection 144(2)(a) of

the *CCRA* compels the PBC to withhold information that could jeopardize any person's safety. Mr. Tripp was a member of the media, the PBC ought to have foreseen that Decision would be published. The PBC also should have known that published material, whatever the medium, can be obtained by inmate populations. Thus, the harm to Mr. Subbiah occasioned by the PBC's disclosure of the Decision was foreseeable. Whatever review of the circumstances that the PBC undertook was inadequate.

[101] The next aspect of the first prong of the *Anns* test concerns the proximity between the PBC and Mr. Subbiah. Mr. Subbiah submits that his circumstances are analogous to other established categories of proximity where a government actor, in this case the PBC, is entrusted with duties unique to government. Proximity in tort law includes those persons who could suffer harm by the acts of another if that harm was reasonably foreseeable. Moreover, while section 8 of the *Privacy Act*, RSC 1985, c P-21, may allow for the disclosure of personal information, such disclosure is subject to any other Act of Parliament, and the *CCRA* establishes that the PBC has a legislated duty to withhold information that could pose a risk of harm to anyone, including Mr. Subbiah. Accordingly, he submits that a *prima facie* duty of care has been established, so the onus shifts to the PBC to negate that duty.

[102] Regarding a breach in the standard of care and causation, Mr. Subbiah relies on Mr. Peteigney's evidence. If Mr. Peteigney's evidence is accepted, then it is established that the Decision was circulating in Kingston Penitentiary prior to his assault on May 14, 2009, and that inmates were placing bets on when Mr. Subbiah would be attacked. This was a breach of the prison's dynamic security, and it was caused by the PBC's failure to alert CSC that the parole

decision was being released to a media member. While PBC claims that it has no obligation to alert CSC when a parole decision is released, Mr. Subbiah argues that PBC's present practice contravened s 144(2)(a) of the *CCRA* in the specific context of this case, and so liability must be found. Mr. Subbiah notes that a finding of such liability will not open any "floodgates", because such a precedent will only apply where the PBC fails to comply with the *CCRA*.

Crown's Submissions

[103] The Crown submits that Mr. Subbiah has failed to prove his allegations of negligence by the PBC. Mr. Subbiah has failed to establish that a duty of care exists between him and the PBC. There is no proximate relationship between them, since the duty of care proposed by Mr. Subbiah would be incompatible with the PBC's mandate to balance the interests of offenders with various other social interests.

[104] Further, the Crown argues, there is no evidence of any interaction between the PBC and Mr. Subbiah in relation to the disclosure of his Decision. Even if there was a proximate relationship, the Crown argues that there are multiple residual policy reasons exist to negate any *prima facie* duty of care (see, *Holland v Saskatchewan*, 2007 SKCA 18, aff'd 2008 SCC 42). To establish liability against the PBC for complying with its statutory mandate to release parole decisions to interested parties would open the floodgates, leaving PBC liable in tort for all of its decisions.

[105] Even if a duty of care existed, the Crown submits that there was no breach of the standard of care because the PBC acted in accordance with the *CCRA* and the *Privacy Act*. The PBC also acted

in good faith, so even if there was an error in the exercise of its statutory duties, the PBC cannot be said to have breached the applicable standard of care.

[106] Finally, even if there was a breach of the standard of care, the Crown submits that there is no causal link between the release of the parole decision to Mr. Tripp and the assault. There is no evidence that the parole decision was circulating in Kingston Penitentiary prior to the assault, and even if there was, the security situation would be unchanged because the information in the decision was publicly available. Therefore, a negligence claim against the PBC must fail.

Analysis

[107] At the outset it is helpful to set out the *Anns* test as refined by the Supreme Court in *Cooper*, wherein the Supreme Court observed:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

> 31 On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> 32 On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed.

[108] In applying the first part of the *Anns* tests, was the harm to Mr. Subbiah reasonably foreseeable? Is there proximity in the relationship between Mr. Subbiah and the PBC? Based on the evidence, it is my conclusion that there is "proximity" as described in the authorities, in that the PBC is required to act in a manner consistent with the CCRA and ensure that the safety of persons including Mr. Subbiah is maintained. He has that expectation. However, the harm alleged by Mr. Subbiah was not foreseeable in these circumstances.

[109] On this issue there is no forseeability and no causation established that the publication of the Decision on the internet precipitated the assault on Mr. Subbiah. I make this finding based on the evidence and more particularly the following points:

(i) Mr. Subbiah's own notes and formal inmate grievance provide a number of theories as to why he was assaulted. None of those theories refer to the publication of the Decision on the internet;

(ii) The evidence of several witnesses, and particularly the evidence of Ms. Blasko, confirmed that Mr. Subbiah's criminal background was well known to inmates within the institution;

(iii) The evidence of Mr. Peteigney regarding the circulation of the internet article is simply not credible given its many frailties. Specifically, he admitted that he could remember nothing further back than 8 months, but the letter he wrote which refers to seeing the internet article circulate amongst inmates was written at least 9 months after he supposedly witnessed such events;

(iv) After the assault, Mr. Subbiah did not attribute the assault to the publication of the Decision; and,

(v) Ms. Blasko was firm in her evidence that there was no report regarding any risk to Mr. Subbiah at Kingston Penitentiary, or any knowledge of the circulation of the internet article.

[110] Mr. Subbiah relies exclusively on Mr. Peteigney's evidence to establish that the Decision was being passed between inmates at Kingston Penitentiary in the time leading up to the May 14, 2009 attack. Yet, for the reasons described above, Mr. Peteigney's evidence is wholly unreliable and must be completely discounted. Therefore, there is no evidence to support the allegation that the Decision made its way into the hands of inmates at Kingston Penitentiary. Accordingly, there is no basis for Mr. Subbiah's allegation that the release of the Decision was a proximate cause of his assault, and therefore no basis for his claim of negligence against the PBC.

ISSUE 3

Did the PBC breach its statutory obligation under s. 144(2) of the *CCRA*, and breach Mr. Subbiah's privacy rights?

Plaintiff's Submissions

[111] Mr. Subbiah claims that the PBC must have reasonably assumed that Mr. Tripp would publish the Decision once it was disclosed. Further, the PBC must have been reasonably aware that sexual offenders like Mr. Subbiah are at the low end of the prison hierarchy, and, therefore are at risk of harm if the nature of their sexual offences becomes known among the inmate population. Mr. Subbiah contends that the release of the Decision not only jeopardized his personal safety, but also that of Correctional Officers at Kingston Penitentiary, who would face the risk of protecting Mr. Subbiah from attack after his sexual offences were made public.

[112] Mr. Subbiah argues that where the PBC is in possession of information that could harm a prisoner, there ought to be a duty to ensure the maintenance of safety for the inmate concerned. This is so especially considering that CSC and the PBC are governed by the same Act, the *CCRA*. Mr. Subbiah submits that it is inconceivable that Parliament would enact legislation authorizing one branch to release information that could negatively affect another branch by jeopardizing safety in a correctional institution. Instead, the responsibilities of CSC and the PBC must be consistent, so that the PBC has a duty to put CSC on notice if a request for disclosure could harm an inmate or put him at risk.

[113] Therefore, Mr. Subbiah alleges that the PBC did not comply with the requirements of subsection 144(2)(a) of the *CCRA*, because the PBC disclosed the Decision to Mr. Tripp without

ensuring that the release would not jeopardize the safety of any person. The PBC did not contact CSC for guidance or information about the potential repercussions of releasing the Decision to Mr. Tripp. There was no collaboration between the PBC and CSC to ensure safety of Mr. Subbiah and the employees of the institution. While media coverage of Mr. Subbiah's crimes peaked in the 1990s, there is significant turnover in the population at Kingston Penitentiary; by 2008 or 2009 many inmates would have been unfamiliar with the nature of Mr. Subbiah's offences. He claims that old news reports of his crimes are no longer common public knowledge. To his mind, it was the release of the Decision that informed inmates at Kingston Penitentiary of his criminal history, and thus jeopardized his safety.

Crown's Submissions

[114] The Crown maintains that Mr. Subbiah's privacy rights were not infringed by the PBC, since government institutions are permitted to release personal information about an individual without his consent, so long as the release is in accordance with section 8 of the *Privacy Act*. Disclosure of personal information is permitted when authorized by an Act of Parliament, and subsection 144(2) of the *CCRA* allows for the release of parole decisions to interested persons.

[115] Moreover, subsection 69(2) of the *Privacy Act* provides that section 8 does not apply to information that is "publicly available", and the Crown notes that details of Mr. Subbiah's criminal history are a matter of public record, as he himself admits. The nature of his crimes resulted in widespread media attention, including at least one television show that was first broadcast in 1997 and has been re-run on an on-going basis since. Therefore, even if the PBC did not act in accordance with section 144(2)(a) of the *CCRA*, it did act in accordance with the *Privacy Act*. Mr.

Subbiah's claim against PBC is barred, pursuant to section 74 of the *Privacy Act*, which prohibits civil proceedings against the Crown where personal information was disclosed in good faith.

Analysis

[116] It appears that there are no cases which have considered the purpose and function of section 144(2) of the *CCRA*, and, there appears to be no authority that explains or clarifies the PBC's obligation to withhold information that might reasonably be expected to "jeopardize the safety of any person" as set out in subsection 144(2)(a) of the *CCRA*.

[117] Section 144 requires that the PBC maintain a registry of its decisions, and subsection (2) allows a "person who demonstrates an interest" to submit a written request for access to a decision in a specific case. A person with an interest in a specific case will be granted access to the registry, subject to certain restrictions, such as where the release of information might reasonably jeopardize another person's safety [s. 144(2)(a)] or negatively interfere with the reintegration of the offender into society [s. 144(2)(c)].

[118] The object of the registry is "to promote openness of decision-making and accountability of the Board" as noted in *R v Zarzour*, [2000] FCJ No 2070 (FCA) [*Zarzour*] at para 60. The Federal Court of Appeal in the *Zarzour* case discusses issues similar to those in issue here. That case dealt with the release of information by the PBC to the ex-wife (Ms. Bélanger) of an inmate. The inmate had been serving a life sentence for second degree murder. He met Ms. Bélanger while she was studying criminology and she visited the penitentiary where he was being held. They met and eventually were married upon his release. They were married in 1988 and divorced in 1991. They

had a child together. The marriage failed as alleged by Ms. Bélanger by virtue of spousal abuse. The inmate was returned to prison for violations of his conditions of release unrelated to his marital issues. Ms. Bélanger wrote letters to the PBC requesting that if he was paroled that a condition of release be that he stay away from her and her son. She wrote a second letter alleging she was subjected to spousal abuse and a "victim" as defined in the CCRA. Again, she sought conditions relating to his release that would protect her and her son. Both her letters were on file with the PBC.

[119] Ultimately, the inmate was granted parole and one of the conditions was that he refrain from contacting Ms. Bélanger. The inmate sued the government alleging that the information in the letters should not have been considered as they were the source of his difficulties. He sued for breaches of various *Charter* rights. He was successful at trial but the decision was reversed on appeal.

[120] One of the issues in the case related to information about the inmate which Ms. Bélanger received from the PBC. First, she was advised of the fact that a decision had been rendered by the PBC on a specific date concerning her ex-husband's parole and then received a copy of the PBC's decision. This was argued by the inmate to be an interference with his privacy and *Charter* rights. Ms. Bélanger did not request observer status at the hearing and it was conceded she was not a "victim" as defined in the *CCRA*.

[121] Counsel for PBC argued that Ms. Bélanger received the information pursuant to section 144 (2) of the *CCRA* as being a person who demonstrates an interest in a case. Ms. Bélanger had written the PBC requesting the decision and the PBC complied on the basis she had demonstrated an

interest. The PBC treated the request as a continuing request and continued to provide information to Ms. Bélanger. The Federal Court of Appeal overturned the trial judgement and declared that Ms. Bélanger was entitled to receive the decisions as a person who demonstrated an interest in a case.

[122] Access to decisions is limited to interested individuals. A media representative is an interested person. The PBC *Policy Manual – 11.2: Registry of Decisions* in section 8 lists "media representative" as an example of an individual who might demonstrate an interest in a case. In *Zarzour*, the Court stated that, in light of Parliament's intention in enacting section 144 of the *CCRA*, the PBC can adopt a "liberal approach" towards specific requests for access to the registry, and need not "impose unnecessary and sterile formalities" relating to the disclosure of individual decisions (at para 62).

[123] In furtherance of its mandate regarding access to hearings and therefore information relating to inmates seeking parole is the PBC *Policy Manual – 9-3: Observers at Hearings* issued pursuant to s 140 (4) – (6) of the *CCRA*. This section provides a protocol for anyone interested in attending a hearing. The PBC controls its own process and endeavours to operate in a transparent way. The *Policy Manual 9.3* provides as follows:

> **Purpose**
>
> 2. The Parole Board of Canada permits observers to attend specific hearings to increase the openness of its decision-making, the accountability of the Board, and to contribute to the public's understanding of the decision-making process.
>
> **Definition**
>
> 3. Observers: persons authorized by the Board to attend an offender's hearing to only observe the proceedings.

[124] There is also a section which specifically permits media personnel to attend with the appropriate security clearance. All of these provisions support the openness of the process. However, it is to be noted that information or documents discussed at a hearing at which a media representative is present is not a release of information for purposes of either the *Access to Information Act* or the *Privacy Act*.

[125] In any event, the *Privacy Act* allows the disclosure of personal information with or without consent if the disclosure is in accordance with subsection 8 of the *Privacy Act*. First, "personal information" is defined in subsection 3 as "any information about an identifiable individual recorded in any form . . ." and expressly includes medical, employment or criminal history in subsection 3 (b). Second, pursuant to subsection 8, government institutions may release information where there is provision for disclosure. The relevant portion of subsection 8 is as follows:

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.	8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.
(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;	a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
(b) for any purpose in accordance with any Act of Parliament or any regulation made there under that authorizes its disclosure;	b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;

[126] In this case, Mr. Tripp received the Decision pursuant to a specific provision of the *CCRA* [subsection 144 (2)] and Mr. Tripp was an "interested person". The PBC redacted some personal information and given all of the circumstances acted within the legislative intent of subsection 144 (2)(a) and the provisions of the *Privacy Act* in releasing the Decision. In any event, quite apart from any *Privacy Act* considerations, Mr. Subbiah's criminal history in the Decision was information that was publicly available. There was therefore no infringement of Mr. Subbiah's privacy interests.

Damages

[127] As I have found (a) that there is no causal connection between the stabbing and the release of the Decision; and, (b) that there is no negligence on behalf of either the PBC or CSC, Mr. Subbiah is not entitled to damages. Even if there was some causality or negligence any damages awarded would be purely nominal.

Conclusion and Disposition

[128] For the reasons given, the action is dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The action is dismissed.

2. The Defendant is entitled to their costs to be assessed.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1559-09
STYLE OF CAUSE:	SELVA KUMAR SUBBIAH, ALSO KNOWN AS RICHARD SUBBIAH v HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 19, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	AALTO P.
DATED:	NOVEMBER 27, 2013

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