

New Case Shows Challenge of Litigating Prison Assaults

Assaults among prisoners at Ontario jails are common, but a recent case demonstrates the challenges lawyers face in proving liability for inmate incidents.

For a start, successfully proving prison officials failed in their duty of care and are liable for injuries can be challenging, especially given the resources at the Crown's disposal.

And while bringing a personal injury case against an attacker could be straightforward to prove, imprisoned defendants — by the nature of their situation — may be unable to pay significant damages.

The recent Ontario Superior Court of Justice decision, *Melvin v. Ontario (Correctional Services)*, demonstrates the challenges involved in litigating a prisoner-on-prisoner assault.

It also shows, however, that those prepared to take on the Crown against the odds can achieve considerable success for their clients.

The case stemmed from an incident in 1997 when two inmates, David Ogima and John Davis, assaulted Thomas Melvin, an inmate at the district jail in Thunder Bay, Ont.

Melvin suffered a serious head injury and had to undergo a craniotomy, a procedure that involves removing part of the bone from the skull to expose the brain.

An action against Ogima, Davis, and the Crown began in 2003. Lawyer Richard Courtis and law firm Thomson Rogers represented Melvin as co-counsel.

The Crown agreed to a \$750,000 settlement in June 2012.

On Aug. 23, 2013, the Ontario Superior Court of Justice released a decision that ordered payment as a structured settlement. It also approved the legal fees charged by Melvin's counsel that amounted to about \$240,000.

Justice Douglas Shaw praised the lawyers for taking on a file that lasted nine years "with no guarantee that they would ever recover their time or disbursements."

The disbursements had come to about \$80,000 and the legal fees represented a 29-per-cent reduction from the docketed time.

The lawyers had faced "an uphill battle on liability" but "achieved a very good result," Shaw stressed in his decision.

Underlining the victory, he stated: "The case was vigorously defended by the Crown, with virtually unlimited resources."

One of Melvin's lawyers, Thomson Rogers partner Craig Brown, acknowledges that persistence is important when it comes to representing plaintiffs assaulted by fellow inmates.

"It's a hothouse area in that there aren't many cases," he says. There were three mediations before the case settled.

Part of the challenge was showing that the harm sustained by Melvin was due to the assault and didn't relate to his extensive pre-accident medical history, says Brown.

To prove the Crown was liable, he and Courtis had to show the province had failed to behave reasonably in its duty to look after the people in its care.

Luckily, a prison supervisor who had left his position was willing to write a statement.

The lawyers were also able to find a record revealing that Ogima was a known dangerous offender. "He'd beaten up an elderly prisoner seven to 10 days before the assault [on Melvin]," says Brown.

Gillian Hnatiw, a personal injury lawyer at Lerner LLP, says this kind of information can be key in proving that the Crown has failed in its duty of care.

"You're putting a vulnerable person in a cage with someone who's known to be extremely violent. It's a perfect recipe for an assault of this nature," she says.

Because prisoners are relatively powerless, the Crown has a significant duty to anticipate trouble and intervene on inmates' behalf, she notes. "Prison is a unique environment because there's no way of knowing your cellmate's history or doing anything about it."

The number of assaults on prisoners by other inmates is increasing.

Figures provided to Law Times by the Ministry of Community Safety and Correctional Services show that in 2009, there were 2,552 inmate-on-inmate assaults in Ontario prisons.

The number has climbed steadily each year since to 3,153 assaults in 2012.

There are no readily available figures on the number of assaults that have resulted in serious harm or required medical treatment.

Some observers blame overcrowding for heightening tensions among inmates. According to ministry statistics released in July, overcrowding is a problem in half of the province's prisons.

But the increase in assaults doesn't seem to be leading to a corresponding rise in settlements or trials.

According to Shaw's judgment, Brown had been "repeatedly told by counsel for the Crown that the Crown had never settled a claim in respect of a prisoner [on] prisoner assault."

Alf Kwinter, founding partner at Singer Kwinter, says the alleged statement by the Crown is pure bluff and describes it as "nonsense."

But he admits that representing plaintiffs in these types of cases is "tough" as the province must only show it has taken reasonable steps to protect those in its care and "no one is held to a standard of perfection."

However, there would be an access to justice issue if no lawyers were willing to take on these files, he says.

Hnatiw says she'd never agree to represent a prisoner who was only launching a claim against another inmate and not the Crown.

"That person [the accused] probably doesn't have a great deal of assets to go after," she notes.

"And you're still out of pocket for your legal fees and disbursements, not to mention the emotional toll."

She says Melvin provides an important lesson for lawyers considering taking on a case against the Crown.

"We learn to not be intimidated just because we're looking at naming the correctional services as a defender," she says.

She adds: "Sometimes it may require a bit of deeper digging. And we're all aware of the overcrowding issues in the provincial prisons.

"But the resource limitations don't relieve the Crown of its duty of care to the inmates in its custody."

The case is also likely to be of interest to personal injury lawyers whose clients reject advice to take a structured settlement instead of a lump sum.

Melvin's litigation guardian and mother decided she didn't wish to follow the advice of her solicitors to place \$366,882 in a structure that would increase by one per cent, compounded, each year.

The lawyers referred the settlement decision to the Office of the Public Guardian and Trustee that recommended the structure as the best use of the funds.

In a letter to Shaw dated Feb. 13, 2013, the office wrote: "A structured settlement, professionally arranged, enjoys the advantages of tax-free income to the injured person, with predictable monthly payments for future care.

"To the contrary, a lump-sum payment is subject to the investment expertise of the person to whom the funds are entrusted, or anyone they hire, and any income earned on the settlement funds is taxable as income to the injured person."

Shaw agreed that a structured settlement protected Melvin's interests.

Kwinter says it's not uncommon for plaintiffs to reject advice to put settlement money into a structure.

It's vital to put this advice in writing in case plaintiffs later change their minds and decide to sue the lawyer, he warns.

"We get very carefully written instructions pointing out that we have given advice and the person has rejected it," says Kwinter.

There appear to be few, if any, cases in Canada where someone has sued a lawyer on these grounds. But a 1990 U.S. case, *Grillo v. Pettiete*, provides fuel for Kwinter's warning.

In the medical negligence case, the court awarded a \$2.5-million cash payment after a child suffered severe injuries during birth. The defendants had offered a structured settlement that could have paid out more than \$100 million over the child's lifetime.

When the cash payment was gone within a few years, the child's family sued the former attorney and former guardian, who were jointly ordered to pay \$4.1 million.

Regarding Melvin, Brown says he was simply recommending what he felt was in Melvin's best interests rather than pre-empting a potential lawsuit.

"It was more about an obligation to a client who's without capacity," he says, noting he was happy with the overall outcome of the case.

"I think Justice Shaw did the right thing," he adds.

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