No. 1030033
Vancouver Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

BOBBI TAMARA DENISE O'SHEA

CLAIMANT

AND:

CITY OF VANCOUVER, JAIL SGT MATT CLARKE, JENNIFER FONTANA, RAMNDEEP GREGORIOU AND PETER BOWATER

DEFENDANTS

SUBMISSIONS OF THE DEFENDANTS

INTRODUCTION

1. The circumstances of this case are unfortunate. It is clear from the testimony of Ms. O'Shea that she was suffering from the effects of drugs and some kind of anxiety attack when she was found by members of the Vancouver Police Department ("VPD") on March 27, 2008 running in traffic on Fraser Street.

2. It is unfortunate that the lack of an open detox facility meant that it was necessary for the VPD to take her to the Vancouver Jail (the "Jail"). As Sgt. Clarke testified the jail is not a pleasant place and no one wishes to be there regardless of their situation.

3. The question before this Court is not whether there should have been an alternative place for Ms. O'Shea to be taken or whether she should have been taken to the hospital. The question before this Court is whether the minimal force used by the Jail staff and the named officers was appropriate in the circumstances of Ms. O'Shea's legally justified detention in the Vancouver jail.

4. In circumstances such as those confronting the Jail staff on March 27, 2008 it is always difficult to balance the rights of the person in custody with the need of the Jail staff to ensure that person's safety.

5. Ms. O'Shea was brought to the Jail having committed a breach of the peace and suffering from the effects of the ingestion of illicit drugs. She was held in the Jail until the Jail staff determined that she was capable of caring for herself and would no longer cause a disturbance.

6. Throughout the time that Ms. O'Shea was in the custody of the Jail staff and the named Defendants they were responsible for her welfare. Given the erratic behaviour and acknowledged ingestion of unknown illegal drugs that caused Ms. O'Shea to be taken into custody it was incumbent on Jail staff to be vigilant to ensure that she did not harm herself.

7. It is essential for Jail staff to be able to observe prisoners to ensure their safety, particularly where they have demonstrated erratic behaviour. Suicides do occur in the Jail and had Ms. O'Shea successfully harmed herself as a result of the jail staff failing to make regular observations the Jail staff would be rightly criticized.

8. The Modified Restraint Device or hobble ("MRD") is designed to ensure that a person cannot harm themselves or others. While it is not pleasant to be placed in the MRD it is not designed to cause pain. It is designed to restrict movements and it is employed in circumstances where the subject has demonstrated that they must have their movements restricted.

9. Ms. O'Shea's actions in the Jail demonstrated that she could not be allowed to have free movement as she continually attempted to prevent Jail staff from making their routine observations and refused to comply with demands that she keep her handcuffs in their proper place. Regardless of the reasons Ms. O'Shea may, or may not, have given to the Jail staff for her behaviour it was incumbent on the Jail staff to consider the worst case scenario and act accordingly.

10. In the circumstances of Ms. O'Shea's detention and her continued refusal to comply with reasonable demands it was a perfectly reasonable conclusion on the part of the Jail staff to place her in the MRD to ensure that the Jail staff could continue to observe her and thus ensure her safety.

FACTS

11. The facts of this case are, for the most part, simple and undisputed.

12. On March 27, 2008 Sgt. Clarke was a member of the VPD and was assigned to the Jail as the Officer in Charge of the Jail. As the Officer in Charge of the Jail Sgt. Clarke was responsible for the operations of the Jail on March 27, 2008.

13. Cst. Peter Bowater was a member of the VPD assigned to the Jail.

14. On March 27, 2008 Jennifer Fontana, Ramndeep Gregoriou, Janine Ziani and Andrew Peters were special municipal constables working as guards at the Jail.

15. On March 27, 2008 James Macdonald was a special municipal constable working as the jail guard supervisor at the Jail.

16. On March 27, 2008, Ms. O'Shea had consumed crack cocaine and was arrested for being in a State of Intoxication in a Public Place ("SIPP") at around 9:30 a.m. She had been found walking in traffic of Fraser Street and had sat down in the passenger seat of a stranger's car.

17. Emergency Health Services assessed the Claimant at the scene before Vancouver Police officers transported her to the Jail. She arrived at the Jail at 10:40 a.m.

18. On arrival at the Jail Sgt. Clarke changed the basis for her detention from SIPP to Breach of the Peace.

19. Ms. O'Shea was searched by female guards and processed. At 13:40 hrs she was placed in Cell 120, a cell that is generally used for female prisoners who are intoxicated by alcohol or drugs. Although there is some contradictory evidence on this point from Cst. Ziani it is the position of the Defendants that Ms. O'Shea was not handcuffed at this time.

20. The Jail guards are required to conduct visual checks every fifteen minutes to ensure the safety of prisoners. The video camera in the cell is not sufficient as it is difficult to determine whether a person is in distress or merely sleeping on the video. As a result, visual

checks consisting of looking through the window into the cells, assessing the health and safety of prisoners, and documenting observations on the Prisoner Observation Log (the "Log", Exhibit 1: Joint Book of Documents, Defendant's Exhibit 4) are also conducted. At times, male Jail guards conduct cell checks of female prisoners being held in Cell 120 due to staffing limitations. Cell 120 is equipped with a door window, a video camera and a toilet.

21. The Log is a document which is placed on the exterior of each cell door. The Log is moved if the prisoner is moved to a different cell. The Log indicates when an observation was made, who made it and, using some simple codes, what was observed.

22. The Log for Ms. O'Shea records the following:

14:00	Sitting up and Awake
14:30	Awake/Standing/Yelling/Banging on the door
15:00	Awake and Standing
15:15	Lying on Left Side awake
15:29	Awake
15:43	Awake and Yelling
16:00	Cuffed &119

23. Ms. O'Shea admits that during this time she was obscuring the window of Cell 120 with toilet paper to prevent the male Jail staff from observing her. She states that she informed the Jail staff of why she was doing this and she denied that she made any attempts to obscure the camera in Cell 120.

24. In addition to this testimony Ms. O'Shea stated that she was watched constantly after being placed in Cell 120 by a male guard. She testified that he would watch her and then turn away briefly before returning to watch her. She testified that she felt degraded by this as a result of her history of abuse.

25. None of the jail guards who were working on March 27, 2008 have distinct recollections of their interactions with Ms. O'Shea.

26. Cst. Peters is noted on the Log as having observed Ms. O'Shea on three occasions between 14:00 hours and 16:00 hours. He has no recollection of any interactions with Ms. O'Shea but he did testify that if a prisoner had requested a female guard that he would have attempted to accommodate that request. Further he testified that it would have been impossible for a single guard to watch a prisoner "constantly" as Ms. O'Shea described. The jail was far too busy for one officer to watch a prisoner constantly unless there was some specifically documented reason to do so.

27. Sgt. Clarke was in charge of the jail and his notes (Exhibit 1: Defendant's Documents Tab 5A) and his recollection indicate that Ms. O'Shea was placed in cell 120 and she then "covered camera and window with tissue." His notes further state that "after numerous warnings, placed in 119 in handcuffs." There is no evidence that Cst. Clarke observed either the window covering or any camera covering. It is, however, clear from his notes and his testimony that he understood that Ms. O'Shea had covered both the window and the camera.

28. There was testimony from Cst. Peters that the camera feed for Cell 120 was viewable in the booking area. Cst. Ziani who was in the booking area at the time testified that she observed Ms. O'Shea climbing on the toilet in order to place tissue over the camera in cell 120. Cst. Ziani's evidence was not entirely clear as she appeared to conflate events that occurred in Cell 119 with those that occurred in 120 but her evidence does provide support for Sgt. Clarke's notes and recollection that both the window and the camera were being obscured.

29. In addition it is simply logical that a person who, as Ms. O'Shea testified, was concerned about being observed by a male guard would attempt to block all means of observation not just the window.

30. At 16:00 hrs Ms. O'Shea, at the direction of Sgt. Clarke, was moved to Cell 119, which has no toilet, and placed in handcuffs. Ms. O'Shea admits to moving the handcuffs to the front on two occasions. She testified that she did this as she had a runny nose and needed to blow her nose. In addition, she testified that she told the guards about her medical condition and asked the guards to provide her with a tissue but they ignored her.

31. None of the officers has any recollection of having a conversation with Ms. O'Shea on the night in question.

32. Ms. O'Shea admits that the handcuffs were placed behind her back and that she was warned to leave them there.

33. Sgt. Clarke's notes state that after Ms. O'Shea was moved to cell 119 she "kicked door, yelled continuously. She moved cuffs to front and spat on the camera. After the cuffs were moved to the back 2X she was placed in the hobble".

34. Sgt. Clarke also testified that when he heard via radio that Ms. O'Shea was attempting to cover the camera in Cell 119, he opened the Cell 119 camera view on his computer screen. He observed that the camera in Cell 119 was partially covered with snot. He recalled white discharge which appeared to be from her nose on the camera lens. At that point he was satisfied that Ms. O'Shea was attempting to prevent staff from seeing inside the cell via the camera.

35. Ms. O'Shea denies having made any attempt to obscure the camera.

36. The testimony of the officers revealed that the cell was 7.5 feet high with the camera near the roof of the cell. Cst. Fontana testified that there had been numerous incidents involving inmates damaging the camera in an attempt to either damage the camera or themselves.

37. Sgt. Clarke concluded that based on Ms. O'Shea's behaviour since her arrival at the Jail it was necessary to place her in the MRD to allow for continued visual checks to ensure her safety.

38. The use of the MRD in the Jail is governed by Section 1.2.3 Use of Force – Restraint Devices of the Vancouver Police Department Regulations and Procedures Manual. That policy dictates that a member may use a restraint device, such as the MRD, when the member believes that it is necessary to ensure the safety of the officer or the prisoner.

39. The notes of Cst. Macdonald and the Log indicate that Csts. Gregoriou and Fontana placed Ms. O'Shea in the MRD at 16:15 hours. Cst. Macdonald's notes indicate that Cst. Ziani was the cover officer and that the application of the MRD was observed by Cst. Macdonald and Cst. Bowater. Sgt. Clarke testified that he also would have observed the application of the MRD. None of these officers has a specific recollection of the application of the MRD.

40. Ms. O'Shea testified that being placed in the MRD was not initially painful. She testified that it became painful when the strap was tightened underneath the door. It must be concluded that the application of the MRD was uneventful.

41. The MRD was applied by Gregoriou and Fontana with Ziani as the cover officer. The application of the MRD was observed by Cst. James MacDonald and Cst. Bowater. None of the officers has a specific recollection of the incident and it must be concluded that this was a routine application of the device.

42. Sgt. Clarke testified that the MRD was applied to ensure Ms. O'Shea's safety by allowing the jail staff to conduct necessary visual inspections and to ensure that Ms. O'Shea did not injure herself. Ms. O'Shea's behaviour to this point had been erratic and she had refused to comply with the direction of the Jail Staff. By restraining her movements using the MRD the Jail Staff were able to ensure that she did not move her handcuffs in front of her body and could no longer obscure the camera or window which were being used to conduct visual checks. By preventing these two activities the Jail Staff were able to ensure that Ms. O'Shea was not a danger to herself and that they would be able to continue to monitor her condition.

43. Ms. O'Shea was checked at 16:30, 16:45 and at 17:18 and the Prisoner Observation Log recorded the following observations:

16:30	Awake/Yelling/Crying
16:45	Awake/Yelling/Crying
17:18	Moved to 108 and uncuffed

44. These observations are consistent with Ms. O'Shea's testimony that she was screaming throughout the time she was in the MRD. Ms. O'Shea's continuing screaming and crying clearly indicated that her behaviour remained erratic and that she remained a potential risk to harm herself and the jail staff concluded that it remained necessary to restrain Ms. O'Shea.

45. Although there are no specific observations it must be concluded that Ms. O'Shea became calmer between 16:45 and 17:18 and the jail staff concluded that the restraints were no longer necessary.

46. After being removed from the MRD Ms. O'Shea was checked four more times before being released. The Prisoner Observation Log recorded the following observations:

17:30	Sitting up/ crying
17:45	Sitting up
18:04	Awake/Talking/Standing
18:17	Awake/Talking/Standing
18:44	Released

47. The Vancouver Jail Arrest Report states that Ms. O'Shea was released at 19:15 hrs.

48. Ms. O'Shea testified that after being released she went to a friend's house and began consuming illicit drugs.

Jail Policies

49. Counsel for the Claimant has discussed a number of policies pertaining to the Vancouver Jail and has suggested that these were not complied with. It is the Defendants' submission that all jail policies were complied with.

50. Claimant's counsel states that Section 25.31 of the Jail Operations Manual "Jail Guards – Use of Force" is applicable in this case and was not followed. In particular he suggests that the reporting requirements found in Sections 7, 8 and 9 were not complied with.

51. It is clear from a close reading of this policy that it does not apply in the circumstances of the case at bar. The policy is entitled "Authority to Use Force" (Exhibit 3) and sets out some general statements with respect to when force may be used. The Definition section of the policy then states:

> For the purpose of this procedure a "Use of Force" incident is defined as an incident where one or more of the following have been applied in order to gain physical control of a non-compliant subject:
>
> a. Oleoresin Capsicum (OC) Spray
> b. A Baton that causes injury to a Persons
> c. A Vascular Neck Restraint
> d. The Wrap (later changed to BodyCuff) restraining device
> e. Any physical force to a person that causes injury, resulting in medical attention being required or requested.

Given this definition the policy, and the attendant reporting requirements, only apply in circumstances where one of the situations set out in "a" through "e" have occurred. The Claimant does not assert that the actions of the Jail staff in this matter fall into any of the above categories.

52. The Jail Manual considers the use of the above noted devices and techniques to be more significant than the use of handcuffs, plastic straps or the MRD. Handcuffs, plastic straps and the MRD are conspicuously absent from Section 25.31 of the Jail Operations Manual but are found in Section 31.03 Use of Force – Restraint Devices (Exhibit 1: Defendant's Tab 7A) which states:

> When an officer arrests or detains a person, or when a person is restrained for officer safety and is transported by police wagon, police vehicle or on foot, the officer must consider their lawful authority for applying any restraint devices), e.g. handcuffs, to the prisoner. The safety of the prisoner and the safety of the officer are two lawful reasons why restraint devices may be applied; however an officer must articulate in each circumstance the reasons why they applied a particular restraint device(s) to the prisoner
>
> Handcuffs and plastic straps are two common approved devices used by members to restrain a person. When a member believes that a person is using, or is about to use, their legs/feet to injure themselves or others, damage property, cause a disturbance, or escape, the member may, where appropriate and reasonable to do so, restrain the person by using a Modified Restraint Device (Hobble), BodyCuff, or other approved device, in addition to applying handcuffs/plastic straps to the person.

This policy is identical to Section 1.2.3 of the Vancouver Police Department Regulations and Procedures Manual "Use of Force – Restraint Devices."

53. It is this policy which governs the use of the MRD in the Jail and it is clear from the evidence of the Defendants that this policy was adhered to by the Jail staff in dealing with Ms. O'Shea.

54. The Claimant also suggests that the jail staff failed to follow the established jail policies and procedures as they relate to those people brought in "HSIPP – Hold State of Intoxication in a Public Place" ("SIPP"). Again, it is the Defendants' position that this policy does not apply in the circumstances of this case. As noted on the Vancouver Jail Arrest Report Sgt. Clarke reviewed Ms. O'Shea's file upon her arrival at the jail and concluded that she should be detained for Breach of the Peace, not SIPP.

55. Sgt. Clarke further testified that prisoners, regardless of their status, are not seen by the jail nurse until they can safely have a private conversation with the jail nurse. He testified that in his view Ms. O'Shea was not capable of safely having such a conversation until after the MRD was removed.

LIABILITY

Section 294(2) of the *Vancouver Charter*

56. Section 294(2) of the *Vancouver Charter* (Joint Book of Authorities Tab 30) requires that a person who wishes to make a claim against the City of Vancouver must provide written notice of that intention within two months of the date of the incident:

> **294.** (2) The city is in no case liable for damages unless notice in writing, setting forth the time, place, and manner in which such damage has been sustained, shall be left and filed with the City Clerk within two months from and after the date on which such damage was sustained; provided that in case of the death of a person injured the want of a notice required by this subsection is not a bar to the maintenance of the action. The want or insufficiency of the notice required by this subsection is not a bar to the maintenance of an action if the Court or Judge before whom such action is tried or, in the case of an appeal, the Court of Appeal is of the opinion that there was reasonable excuse for the want or insufficiency and that the city has not been thereby prejudiced in its defence.

57. It is admitted that Ms. O'Shea failed to provide any notice to the City of Vancouver of this claim prior to the filing of the Notice of Claim two years after the incident.

Reasonable Excuse

58. In order to be relieved of the requirement to provide notice, the Claimant must demonstrate that she had a reasonable excuse and that the City has suffered no prejudice as a result of the failure to provide notice.

59. Ms. O'Shea testified that subsequent to the incident in March 2008 she began regularly using drugs and that this led to the loss of her children (who went to live with their father) and a period of homelessness. During this period Ms. O'Shea lived in shelters and at friends, she did not live on the street.

60. Ms. O'Shea testified that she did not know that she could take legal action against the police for the incident in March 2008 until an acquaintance told her about PIVOT's services in January 2009. In her testimony she did not provide the Court with any information about what steps she may have taken prior to 2009 to discover her legal rights so it must be presumed that she took no such steps.

61. It is Ms. O'Shea's position that she was unable to file notice within two months due to the chaotic nature of her life and that this constitutes a reasonable excuse. It is clear from the Court of Appeal's decision in *Thauli v. Delta* 2009 BCCA 455 (Joint Book of Authorities Tab 22) that it is incumbent upon the Claimant to establish a reasonable excuse and that there is no specific test as to what constitutes a reasonable excuse. *Thauli* directs that the Court must consider the totality of the circumstances in order to determine whether the proffered excuse is "reasonable".

62. In *Griffiths v. New Westminster*, 2001 BCSC 1516 (Joint Book of Authorities Tab 5) Mr. Justice Burnyeat considered both incapacity and ignorance of the law as bases for a finding of reasonable excuse. In rejecting incapacity as a basis for a reasonable excuse Mr. Justice Burnyeat stated, at paragraph 27:

> The incapacity of a plaintiff may also be a reasonable excuse for not giving notice: Bissel v. Rochester (Township) (1930), 65 O.L.R. 310 (Ont. S.C.); Horie v. Nelson (City) (1987), 20 B.C.L.R. (2d) 1 (B.C.C.A.); Lost Lake Properties Ltd. v. Parksville (City), [2000] B.C.J. No. 596 (B.C.S.C.); Estepanian (Guardian ad Litem of) v. Brown, [1997] B.C.J. No. 337 (B.C.C.A.); and Landrey v. North Vancouver

(City), [1993] B.C.J. No. 69 (B.C.S.C.). In Bissel, supra, the court noted:

> ...if there is any principle to be extracted from the decisions, it is that to constitute reasonable excuse there must be such incapacity, either mental or physical, on the part of the injured party, as to incapacitate him from discussing business affairs or from being able to give instructions for the notice. (at p. 315).

And in rejecting the ignorance of the law as a basis for a reasonable excuse he stated at paragraphs 30 and 31:

> No decision was cited by counsel for Mr. Griffiths that ignorance of the law alone will be reasonable excuse. In fact, the contrary has often been stated: Lloyd v. Richards, [1985] B.C.J. No. 2823 (B.C.S.C.); Holland v. Oak Bay (1978), 84 D.L.R. (3d) 91 (B.C.S.C.); Schmidt v. Prince Rupert (1960), 24 D.L.R. (2d) 443 (B.C.S.C.); and O'Connor v. City of Hamilton (1905) 10 O.L.R. 529 (Ont. C.A.).
>
> If the time provisions set out in s. 286(1) of the Act are to have any meaning at all then it cannot be the case that only ignorance of the section is sufficient excuse to bring into play the two fold test set out in s. 286(3) of the Act. The Legislature long ago decided that municipalities should be given notice of potential claims long prior to the expiry of the limitation periods for actions relating to those claims. That decision having been taken by the Legislature, is not for the court to remove the effectiveness of the notice provisions where a plaintiff can only rely on his or her ignorance of s. 286. In the circumstances of this case, I am satisfied that Mr. Griffiths has not shown that he had reasonable excuse for not giving the notice within the required two months.

63. Ms. O'Shea's reasonable excuse cannot be solely based on her undoubted ignorance of the law and there is no evidence that she was so incapacitated between March 2008 and January 2009 that she could not consult legal counsel. Ms. O'Shea simply stated that she didn't know that she could take legal steps not that she was incapable of obtaining legal advice to try and discover what her legal rights were.

64. It is the submission of the City that the evidence provided by the Claimant falls short of showing a reasonable excuse. Ms. O'Shea's life was undoubtedly chaotic from March 2008 until January 2009. However, a chaotic life and a lack of knowledge about the potential legal avenues available to her do not constitute a reasonable excuse.

65. Further, even if the Claimant had a reasonable excuse for not providing the City with Notice within two months of the incident there is no excuse offered regarding the lack of notice after January 20, 2009.

66. On January 20, 2009 the Claimant attended at the offices of PIVOT and consulted with counsel there. As a result of those discussions Ms. O'Shea swore an affidavit with respect to this incident and agreed to have her name used in a policy complaint being prepared by PIVOT. Still no notice was provided to the City.

67. The PIVOT complaint is dated March 2, 2009 and is addressed to the Vancouver Police Department and not the City of Vancouver. Further, it addresses the appropriateness of the use of the MRD by VPD members and cites several examples of its use, including on Ms. O'Shea. It does not contain a suggestion that a claim for damages will be forthcoming.

68. Ms. O'Shea has been continuously represented by PIVOT lawyers with respect to this incident from January 2009 until this trial. Ms. O'Shea testified that the PIVOT lawyers did not advise her of the issue surrounding the Notice requirement to the City until a few days before the trial. This is inconceivable. The Notice provision was pled by the City in its initial response filed in April 2010, some five years ago.

69. It is the City's submission that if Ms. O'Shea was not informed of the Notice provision it is more likely that it is due to the fact that Ms. O'Shea and her lawyer made a conscious decision not to sue the City in January 2009. This interpretation is supported by both Ms. O'Shea's testimony and the Trial Statement filed in this action.

70. In her testimony Ms. O'Shea stated that the decision to sue was taken after the VPD refused to take the MRD out of service. This statement is reiterated in the Trial Statement filed by Ms. O'Shea which states:

> "Following her release the Claimant had difficulty coping with the events in question and in addition to physical harm the Claimant experienced significant mental trauma. She engaged in the assistance of counselors and a psychiatrist, and after a period of recovery time elected to file a police complaint with the Office of the Police Complaints Commissioner. When that complaint was rejected the Claimant elected to file a Notice of Claim and began these proceedings."

71. It is clear from the trial statement and Ms. O'Shea's testimony that she, in consultation with her counsel, decided to proceed with a Police Complaint rather than a lawsuit and then decided to proceed with a lawsuit after her Police Complaint was rejected.

72. It is not a reasonable excuse to decide for tactical reasons not to file a lawsuit or provide notice. The notice provision exists for good reason, to allow a municipality to properly investigate an incident in a timely way, and the decision by Ms. O'Shea not to file such notice, even though the notice would only preserve her right to sue and not obligate her to sue, frustrates those reasons.

73. The City submits that even if there was a reasonable excuse for missing the initial notice period under Section 294(2) that reasonable excuse ceased to exist in January 2009 and still no notice was provided by the Claimant to the City of Vancouver.

Prejudice

74. In the event that this Court is satisfied that the Claimant has a reasonable excuse for her failure to provide notice under Section 294(2) she must also demonstrate that the City has suffered no prejudice as a result of the absence of notice for her to be relieved of her obligation to provide notice under Section 294(2).

75. The City submits that it has suffered considerable prejudice as a result of the failure to provide the required notice.

76. It was apparent from the testimony of the various officers who dealt with Ms. O'Shea in March 2008 that they have little to no recollection of the events of that evening. Two of the named officers had no recollection or notes of the incident while the others had bare notes from which they were able to testify. Ms. O'Shea asserts that she had conversations with various Jail staff during her time at the Jail and her submissions make it clear that she considers those conversations to be material to her claim. The Jail staff involved have no recollection of those conversations. The City submits that it has suffered prejudice due to the fading of memories associated with the incident due to the passage of time.

77. In *Lost Lake Properties v. Parksville (City)* 2000 BCSC 475 (Joint Book of Authorities Tab 9) Mr. Justice Hutchinson found prejudice as a result of the passage of time. At paragraph 15:

> The defendant also argued that it had been prejudiced by the passage of time since the claim arose. In its material it disputes the allegation that there were ongoing negotiations with the plaintiff from 1996 to 1998. Two of the employees with the defendant who dealt with the plaintiff regarding the issues in contention have since left the City's employment, and one swore he was unable to recall certain facts due to the passage of time. I accept there is prejudice to the defendant arising the failure to give notice, as had it been on notice it would likely have ensured the facts surrounding its dealings with the plaintiff were better preserved by contemporaneous memoranda or notes. I find the plaintiff has failed to discharge the onus on it to show that the defendant has not been prejudiced by the failure to give notice. I allow the application and dismiss the plaintiff's claims with costs against the plaintiff.

78. The VPD officers involved in the incident first became aware of any issues surrounding the March 27, 2008 incident when they are contacted by the VPD Professional Standards Section as part of a Professional Standards investigation with respect to the incident. This investigation was into the appropriateness of Sgt. Clarke's decision to have the Claimant placed in the MRD.

79. In their testimony the officers stated that they became aware of that there was a complaint about the incident at the following times:

a. Sgt. Clarke in late April or early May 2009
b. Andrew Peters in late April or early May 2009
c. James MacDonald in November 2009
d. Janine Ziani in December 2009
e. Jennifer Fontana in November 2009

80. The earliest that any of the involved officers became aware that there was an issue surrounding their interactions with Ms. O'Shea was in April 2009 a year after the incident.

81. Ms. O'Shea's complaint regarding the incident was received by the Vancouver Police Department, but not the City of Vancouver, in March 2009 a year after the incident. No officers are named in that complaint. The VPD determined that Sgt. Clarke and Cst. Peters were involved and notified the officers in April or May 2009. James MacDonald, Janine Ziani

and Jennifer Fontana were not notified until November 2009 some 19 months after the incident. The other named officers in this action, Ramandeep Gregoriou and Peter Bowater have no recollection or notes of this incident and were not aware that there was an issue surrounding their conduct in March 2008 until 2013.

82. Had the officers been informed of the potential claim within the requisite 60 days despite the routine nature of the events it is highly likely that they would recall the incidents in more detail than they did a year or 19 months later. In particular the Claimant, in her testimony, made numerous allegations regarding conversations she had with various jail staff members. None of the jail staff recall whether or not such conversations took place or what their content might have been.

83. Further, the cells where the Claimant was held contain video cameras. The video from these cameras is recorded on a loop and overwritten on average every 30 days. The City submits that the inability of the City to retain this video evidence is prejudicial to it.

84. The objective of these municipal notice provisions was set out by the Court of Appeal in *Thauli* at paragraphs 46 through 48 as follows:

> **46** The object or purpose of the notice provision in the *Municipal Act* was stated in *Grewal v. Saanich (Dist.)* (1989), 60 D.L.R. (4th) 583, 38 B.C.L.R. (2d) 250 at 256:
>
> > The object of the section ... is to provide an early opportunity for the municipality to examine the place where the damage has occurred, to interview witnesses, and to consider whether to settle or contest the matter.
>
> **47** That object was referred to again in *Teller* in which Southin J.A. said that the obvious purpose of the notice provision in the legislation was to "enable a municipality to investigate a claim fully" (at 383). However, as Southin J.A. observed, that purpose "is addressed by the second branch" which requires that the municipality not be prejudiced in its defence by the failure or insufficiency of the notice if an action against it is to proceed.
>
> **48** Prejudice may be caused either by the failure to give notice within the stipulated time or by giving notice with inadequate or false information. If the municipality is prejudiced in its defence by the insufficiency or failure to give notice, the saving provision does not assist a plaintiff, for s. 286(3) requires both conditions to be met. However, actual knowledge of an incident and the damage caused would generally be sufficient to show that the municipality has not suffered prejudice.

85. The City of Vancouver had no actual knowledge of this incident. Further it has not had an "early opportunity to… interview witnesses, and to consider whether or not to settle or contest the matter." The City was wholly unaware of the incident and there was no opportunity to interview witnesses while their memories of the incident were fresh in their minds. The notice provision is of particular importance in cases such as this where officers who have hundreds of interactions with hundreds of individuals are asked to recall a specific incident which was in no way out of the ordinary. If the City had been notified of the potential claim within the necessary time period the officers could have been appropriately interviewed and their detailed recollections confirmed before memories faded over a two year period.

86. The City had no "actual knowledge of the incident" such as in *Thauli* and contrary to the assertion of the Complainant there was no applicable policy which required that a written report of this incident be created.

87. The City of Vancouver has been prejudiced in its ability to defend this claim as a result of the delay in providing appropriate notice. The City was unable to interview witnesses before the memories of those witnesses began to fade. The Claimant asserts that she had a number of conversations with officers in the jail on the day in question. The City can provide no evidence to refute what she claims was said in those incidents as none of the officers has a recollection of an interaction with Ms. O'Shea. If the City had been notified of the potential claim as required by Section 294(2) the City would have interviewed the officers involved prior to their memories fading and would, as a result, be in a better position to defend this claim.

Liability of the City of Vancouver

88. Section 20 of the *Police Act* (Joint Book of Authorities Tab 28) states:

> **20** (1) Subject to an agreement under section 18 (1) or 23 (2),
>
> > (a) a municipality is jointly and severally liable for a tort that is committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or employees of its municipal police board, if any, if the tort is committed in the performance of that person's duties, and

> (b) a regional district, government corporation or other prescribed entity is jointly and severally liable for a tort that is committed by any of its designated constables or enforcement officers, if the tort is committed in the performance of that person's duties.
>
> (2) If it is alleged or established that any municipal constable, special municipal constable, designated constable, enforcement officer, bylaw enforcement officer or employee referred to in subsection (1) has committed a tort in the performance of his or her duties, the respective board and any members of that board are not liable for the claim.
>
> (3) Despite subsection (2), if it is alleged or established that any municipal constable, special municipal constable, designated constable, enforcement officer, bylaw enforcement officer or employee referred to in subsection (1) has committed a tort in the performance of his or her duties, the respective municipality, regional district, government corporation or other prescribed entity on behalf of which that person is employed may, in the discretion of the following, pay an amount that it considers necessary to settle the claim or a judgment against that person and may reimburse him or her for reasonable costs incurred in opposing the claim:
>
> (a) in the case of a municipality, the council of the municipality;
>
> (b) in the case of a regional district, the board of the regional district;
>
> (c) in the case of a government corporation or other prescribed entity, that entity itself.

89. As a result of this Section it is the City of Vancouver, not the officer personally, who is liable for any tort, including negligence, committed by a member of the VPD in the course of their duties. For the purposes of this section a jail guard is a member of the VPD.

90. Ms. O'Shea does not dispute that the VPD had reason to detain her.

91. Ms. O'Shea claims that the application of the MRD in the circumstances was unwarranted and therefore an assault or, alternatively, that the application of the MRD was done in a negligent manner.

Use of Force

92. Ms. O'Shea's counsel has asserted that the threshold question to be determined on this action is whether or not the application of the MRD is a "use of force". The placement of any person in a restraint device constitutes a use of force by the person placing that person in the restraint device.

93. Ms. O'Shea's submission is that the application of the MRD to Ms. O'Shea was an unnecessary, disproportionate and unreasonable use of force. Her submissions are predicated on the belief that the MRD is a significant use of force which should only be used in exceptional circumstances. The Defendant's submit that, in fact, the MRD is a minimal use of force which does not cause significant pain or long lasting injury. It is a safe, relatively harmless means of restraining those in custody. The evidence of Sgt. Milligan, who is responsible for training all officers in the VPD on the MRD, is that the device while uncomfortable does not cause significant pain.

94. It is the position of the Defendants that the placement of Ms. O'Shea in the MRD was a minimal use of force which was fully justified by Section 25 of the *Criminal Code* in the circumstances of March 27, 2008.

95. Ms. O'Shea was detained pursuant to Section 31 of the *Criminal* Code for Breach of the Peace. The Claimant takes no issue with the basis for her detention or the duration of that detention.

96. It is not disputed that Ms. O'Shea was placed in the MRD. Further, the testimony of the defence witnesses, including Sgt. Milligan, demonstrate that the MRD, like all restraints, is uncomfortable but it is not painful.

97. Ms. O'Shea testified that she was in agony for the entire duration of her time in the MRD commencing with when it was tightened under the door. It is also true that Ms. O'Shea was observed by Jail staff, as noted in the Log, standing after the MRD was removed. Further, she walked out of the Jail and sought no medical attention. On her testimony there were some abrasions to her ankles as a result of the application of the MRD. These are not injuries or activities which are consistent with being in agonizing pain for an hour.

98. Ms. O'Shea's reliability as a witness to these events is questionable. For example, in her direct evidence she testified that a Jail guard watched her constantly for an hour while she was in the cell H 120. The testimony of the officers is that no member of the Jail staff had sufficient time to constantly watch a particular prisoner. Ms. O'Shea was undoubtedly bothered by the fact that there were male guards periodically checking on her health and well being and she has come to believe that they were watching her constantly.

99. Similarly, it is the Defendant's submission that Ms. O'Shea was very upset with being placed in the MRD and her perceived treatment by the Jail staff. As a result of this, her perception and recall of what actually occurred on that day is flawed and she was not in the type of pain she described in Court. Had she been in that type of pain for the duration of time that was in the MRD she would have suffered more severe injury.

100. The Supreme Court of Canada in *R v. Nasogaluak* 2010 SCC 6 (Joint Book of Authorities Tab 16) considered the question of the appropriate legal standard for analyzing whether police actions are protected by Section 25 of the *Criminal Code*. At paragraph 32 the Court makes the general statement that "the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness." In the Defendant's submission the appropriate question to be asked by this Court is whether in all of the circumstances the use of force was justifiably reasonable.

101. At paragraphs 34 and 35, the Court sets out the test for determining whether a police use of force is justified:

> Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.
>
> Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):
>
> > In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218

102. The Court must ask itself whether it is objectively reasonable for an officer with the same training and experience as Sgt. Clarke to conclude that the use of force was reasonable in the circumstances to achieve a legally justified objective.

103. The reasonableness test was explained by the B.C. Court of Appeal in *R v. Pompeo* 2014 BCCA 31 (Joint Book of Authorities Tab 17) at paragraph 36 where the Court stated that:

> It is well-established that a trial judge must assess the reasonableness of the police officer's belief that the use of lethal force was necessary on a "subjective-objective basis" (see *Nasogaluak* at para. 34). In order to make such an assessment, the judge must consider the matter from the standpoint of a person with the background, experience, and training of the police officer in question. In *Berntt v. Vancouver (City)*, 1999 BCCA 345 at para. 24, Southin J.A. described the trial judge's role as being "a doppelganger to the peace officer whose conduct is in issue."

The Court of Appeal went on to explain the subjective-objective nature of the test for the reasonable use of force as follows:

> The analysis of reasonableness on a subjective-objective basis includes both subjective and objective elements. It requires the court to place itself in the shoes of the police officer, and to take into account considerations unique to that individual. Once those considerations are taken into account, however, objective elements of the analysis are applied. While I do not suggest that the test to be applied is identical to the test for "reasonable suspicion" discussed in *R. v. MacKenzie*, 2013 SCC 50, there are significant similarities in the manner in which the individual characteristics of the police officer must be taken into consideration in applying an objective test. In that case, at paras. 63-64, Moldaver J., for the majority, said:
>
> > ... [I]n assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person "standing in the shoes of the police officer" (*R. v. Tran*, 2007 BCCA 491, 247 B.C.A.C. 109, at para. 12; see also *R. v. Whyte*, 2011 ONCA 24, 272 O.A.C. 317, at para. 31).
> >
> > That is not to say, however, that police training and experience must be accepted uncritically by the courts. As my colleague Karakatsanis J. notes in *Chehil* [*R. v. Chehil*, 2013 SCC 49], "hunches or intuition grounded in an officer's experience will [not] suffice", nor is deference necessarily owed to a police officer's view of the circumstances because of his or her training or experience in the field (para. 47). Reasonable suspicion, after all, is an objective standard that must stand up to independent scrutiny.

104. To determine whether the decision to place Ms. O'Shea in the MRD was reasonable the Court must look at the totality of the circumstances as seen through the eyes of an officer with the training and experience of Sgt. Clarke.

105. The Court must also confine itself to what Sgt. Clarke actually knew about Ms. O'Shea and her circumstances and not what Ms. O'Shea has testified she was feeling and saying at the time.

106. The basis for the breach of the peace arrest and detention was the erratic behaviour of Ms. O'Shea prior to being taken into custody. The Ambulance Crew Report (Exhibit 1: Defendant's Document #1) informed the Jail staff that Ms. O'Shea suffered from anxiety/depression and that she was running in traffic after a crack hit. There was no information about how much crack cocaine was ingested and the Jail staff had no way of knowing the duration or effect of the drug usage.

107. The Log indicates that after Ms. O'Shea was placed in Cell H120 her behaviour oscillated between yelling and banging on the door to relative calm. It was during this time that Ms. O'Shea began to obscure the window and camera in the cell to prevent the Jail staff from making their routine checks.

108. At this juncture Sgt. Clarke knew that a person who had been taken into custody for running into traffic, who suffered from anxiety/depression and had ingested an unknown quantity of illegal drugs, was now attempting to prevent Jail staff from making routine observations of her. There is no evidence that he was aware of Ms. O'Shea's issues with being observed by male guards.

109. In these circumstances it was eminently reasonable for Sgt. Clarke to conclude that Ms. O'Shea would attempt to harm herself if she succeeded in preventing the jail staff from making their routine observations.

110. Sgt. Clarke first decided to have Ms. O'Shea placed in handcuffs, a lesser form of restraint, to prevent her from continuing to obscure the window and camera. Ms. O'Shea refused to keep her hands behind her back which left her able to continue to obscure the window and camera. Given Ms. O'Shea's behaviour and the jail staff's obligation to ensure here safety this was not a situation that could be tolerated.

111. The only means open to the Jail staff to ensure that Ms. O'Shea was unable to continue preventing them from making the routine observations that they were required to make was to place her in the MRD. The MRD guaranteed that Ms. O'Shea could no longer prevent the staff from observing her and it ensured that she could cause no significant injury to herself. The MRD is not intended to cause pain and is not considered to be a significant use of force.

112. The Jail staff, and in particular Sgt. Clarke, were required to ensure the safety of Ms. O'Shea and that need had to be balanced against the unpleasant experience of being placed in the MRD. The MRD, even it caused Ms. O'Shea some transient if intense pain (which the Defendant's deny that it did), did ensure that she could not cause herself any permanent harm.

113. The fact that a person responds badly to being placed in restraints does not make it unreasonable to place that person in restraints.

114. Taking into consideration the training and experience of Sgt. Clarke, the policies of the Vancouver Jail, the information which he had with respect to Ms. O'Shea's drug use, her behaviour prior to being taken into custody and at the Jail his decision to place Ms. O'Shea in the MRD was justified and reasonable.

115. Ms. O'Shea remained in the MRD for a period of one hour. The Defendants accept that the continued application of the MRD must be justified. The appropriate duration of any restraint is an inherently difficult one to make. It is a judgment call made by a person, Sgt. Clarke, with experience with individuals who are in the jail setting. It is very difficult, in the absence of some type of expert evidence, for this Court to substitute its view of the reasonable duration of the restraint without more evidence than exists in this case.

116. Once placed in the MRD both the Log and Ms. O'Shea's testimony demonstrate that she was yelling and crying. This is not behaviour that suggests that a person should be removed from a restraint that was applied due to erratic behaviour, a concern that she would harm herself and a refusal to comply with the reasonable directions of Jail staff.

117. Given Ms. O'Shea's behaviour both before and after being placed in the MRD it was reasonable for an officer with experience of the way people react in the Jail environment to be cautious in assessing the duration of time that a person must be restrained before they will be cooperative with Jail staff and no longer be a danger to themselves.

118. By 17:18 hours the jail staff had determined that Ms. O'Shea was no longer a threat to harm herself and could be relied upon to allow routine observations by Jail staff.

119. As outlined by the case law above the Courts do not require peace officers to be exact, or right, in their use of force. They must be reasonable in their use of force and in these circumstances with the behaviour of Ms. O'Shea both before and during the application of the MRD the duration of her restraint was reasonable.

Negligence and Gross Negligence

120. The Claimant asserts that the MRD was applied to her negligently.

121. In order to demonstrate negligence in the application of the MRD the Claimant must demonstrate what the appropriate standard of care in the application of the MRD is. The Claimant has offered no evidence of what the appropriate standard of care should be in the application of the MRD.

122. The Claimant asks this Court to determine the standard of care in the absence of any evidence on the point. The Claimant relies on the decisions in *Roy v. B.C.*, 2005 BCCA 88 (Joint Book of Authorities Tab 19) and *Radke v. M.S.*, 2007 BCCA 216 (Joint Book of Authorities Tab 18) which state that in certain circumstances there is no need for expert evidence as to the standard of care. In *Roy* Madam Justice Southin on behalf of the Court states, at paragraph 36:

> "Where, as here, at issue is the standard of a competent member of a trade or profession (and the occupation of peace officer falls within that rubric), evidence of those carrying on that occupation is necessary unless, in the words which McPherson C.J.M., in Anderson v. Chasney, [1949] 2 W.W.R. 337 (Man. C.A.) at 341, adopted from the American case of Mehigan v. Sheeham, 51 Atlantic Rep. 2nd series, 632, the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge."

At paragraph 41 she goes on to say:

> But in the absence of evidence that those are the standards of peace officers in Canada it was not, in my opinion, for the learned judge to impose her standard. In coming to this conclusion, I think it right that we remind ourselves of what the principal duty of a peace officer is. It is to keep the Queen's peace, an obligation which includes the prevention of crime and the detection of criminals. Peace officers are not emergency services personnel and cannot be held, unless and until they receive similar training, to a standard which would be appropriate for such persons.

123. These principles were applied in the decision of *Baiden v City of Vancouver et. al.,* 2009, Chamberlist J., Vancouver Registry, unreported, where Mr. Justice Chamberlist dismissed a negligence claim against individual officers as no evidence had been led as to the appropriate standard of care. He stated:

> At paras 39 to 41 of the decision, Southin JA went on further to find that in the absence of such evidence as to the standard of care, the learned trial judge could not properly find that the defendant officers failed in their duty to take reasonable care and therefore it was not open to the trial judge to impose her standard in the absence of evidence of the standard of police officers in Canada.
>
> While Mr. Ward has, I think, come close to arguing that in a case of this nature involving police officers the jury can assess the standard of care using their common sense, I have concluded that this would be dangerous and an incorrect approach. I pointed out to counsel during submissions that this is quite a different case from six civilians going into a café in the same circumstances. Civilians do not have the same rights and obligations as peace officers either under the *Police Act* or the *Criminal Code*.
>
> Southin JA in *Roy* specifically identified police officers as professionals engaged in an occupation for which evidence as to the proper standard of care must be led. I agree with the defence submission that Southin JA did not draw any distinction between them and other professionals with more education and training such as doctors and engineers.

124. It is suggested by the Claimant that the decision in *Radke* materially modifies the analysis in *Roy*. In *Radke* Mr. Justice Lowry stated as follows:

> However, as I have attempted to explain in ***Burbank***, it was not necessary that there be evidence, much less expert evidence, of the standard of care to be met by a police officer for the judge to be able to determine whether the utility of the officer's conduct justified the risk to public safety. The question the judge had to answer was simply whether the nature of the crime (theft of an automobile) for which the police officer sought to apprehend M.S. was sufficiently serious to justify the risk of the consequences that became manifest within less than a minute of the commencement of the pursuit. The question was not unlike the kind of question judges have to regularly answer in negligence cases and, while there may be aspects of police

> pursuits that are foreign to those who are not trained or experienced police officers, the answer to the question lay well within what can be said to be common knowledge and experience. It lay in assessing whether Constable Kurtz had properly balanced the competing concerns of the apprehension of a young offender who had stolen a car against the danger of a pursuit at considerable speed on city streets where significant pedestrian and vehicular traffic could be expected.

Similarly in *Burbank* Mr. Justice Lowry concluded:

> Evidence of the standard of care was not required in this case because the nature of the inquiry into the police officer's conduct in pursuing R.B. was not beyond common understanding. In the final analysis, the question the judge had to address was simply whether in the circumstances the officer should have pursued R.B. when she believed him to be impaired. Put another way, was the risk of the possible consequences of the pursuit, which became tragically manifest within a minute of it having been commenced, a risk that the officer was justified in taking in order to pursue and attempt to apprehend the young impaired driver? No evidence, expert or otherwise, was needed to assist the judge in giving the answer. Because of the great importance society places on keeping impaired drivers off the road, it may not have been an easy question, but the answer did not lie beyond common knowledge and experience. It was the kind of question judges regularly have to answer in negligence cases when they weigh the utility of the activity against the risk of harm in determining whether the requisite standard of care has been met. The judge decided the question was to be answered in the negative. It was his decision to make.

125. These cases do not modify *Roy* but rather make it clear that there may be "non-technical matters" or matters that are "not beyond common understanding" where a trial judge may determine the standard of care of a professional person without expert evidence.

126. Both the *Burbank* and *Radke* cases involve accidents that resulted from police chases and the question being asked was whether the decision to engage in the chase was negligent given the obvious risks to public safety. This is clearly a decision which is within the realm of common understanding.

127. The Court of Appeal gave a further indication of the need for expert evidence in the decision of *Camaso Estate v. Egan*, 2013 BCCA 6 (Joint Book of Authorities Tab 3) where in reversing the trial judge's decision to find negligence in a police pursuit that ended in a shooting death the Court stated, at paragraph 71:

> This court has said that in police negligence cases expert evidence is not required to establish the standard of care: see *Burbank v. R.T.B.*, 2007 BCCA 215. However, the present case was concerned with a police officer's conduct in performing his duty by lawfully pursuing on foot and lawfully attempting to apprehend a person who was a

> danger to public safety. It also, of course, was concerned with the police officer's use of his firearm with unfortunate and tragic results. These are not matters of ordinary or everyday experience: see the reasons of Madam Justice Southin in *Roy v. British Columbia*, 2005 BCCA 88 (at para. 3, 251 D.L.R. (4th) 233. In my opinion, the court needed expert evidence to properly adjudicate the claims that became the subject of this appeal. On those claims, the expert evidence was of primary importance and central to the submissions of the parties.

128. The question here, as framed by the Claimant, is: what is appropriate manner in which the MRD is to be deployed? This is not a question of "common understanding" or a "non-technical matter". The MRD requires specific training before it can be used by an officer and it is not a simple matter to say what the appropriate manner of applying the device is without the assistance of an expert.

129. As there is no expert evidence the Claimant has proposed a standard of care that is purely speculative. The Claimant suggests that the device must be applied in a manner which does not cause unnecessary physical pain to the subject. What is to constitute "unnecessary" physical pain? Without some kind of expert analysis of the proper application of the device it is impossible to determine what degree of pain is to be expected and tolerated due to its application.

130. The Claimant also suggests that the subject who has been placed in the device "must be constantly monitored" and that the person must not be left unattended at any time. This proposed standard is based on a line from the Kinloch public hearing where it is recommended that a policy of this nature be introduced with respect to the application of restraints to children. The Kinloch public hearing did not consider the use of such restraints on adults and contains no analysis at to whether this is a practical or desirable policy for adults in a jail setting.

131. Finally, the proposed standard of care suggests that the subject should be removed from the MRD as soon as possible. In the Defendant's submission this is simply not part of the standard of care for the application of the device. The application of any restraint is a "use of force" which must be justified pursuant to Section 25 of the *Criminal Code*. If the application of the restraint can no longer be justified then it becomes an illegal use of force and an assault.

132. These difficulties with establishing the appropriate standard of care point to the necessity for the Court to have the assistance of expert evidence to determine the appropriate standard of care for the application of the MRD by a jail guard in a jail setting. As stated by Mr. Justice Chamberlist it would be dangerous for this Court, in the absence of such evidence, to speculate as to the appropriate standard of care.

Evidence of Negligence

133. The only suggestion that there was any negligence in the application of the MRD is the simple fact that the Claimant states that she was in pain when she was secured by the MRD.

134. There is simply no evidence that the cause of Ms. O'Shea's pain was an improper application of the device. The officers who testified did not dispute that it may be painful to be in a properly applied MRD.

135. Without some kind of analysis, likely from an expert on the application of the device, there is no basis upon which this Court can conclude that simply because Ms. O'Shea states that she was in pain while in the MRD that the MRD was applied in a negligent manner.

136. There is simply no evidence that the MRD was applied in a negligent manner.

Gross Negligence

137. The Claimant suggests that the behaviour of the jail guards constitutes a marked departure from the standard to which reasonable and competent peace officers working in a jail would act.

138. There can be no finding of gross negligence without a finding of negligence. There is no evidence with respect to the appropriate standard of care for either manner in which the MRD was applied or the decision to apply the MRD. In the absence of any evidence as to the appropriate standard of care for peace officers in this situation using this device there can be no finding of negligence against any of the named Defendants. Further, the Defendant's state that even if the Court is able to determine the appropriate standard of care in this situation there is no evidence that the named Defendant's acted negligently.

139. The Ms. O'Shea's evidence of negligence relies heavily on Ms. O'Shea's testimony that she screamed in pain for the entire hour that she was in the MRD and an assertion that the Jail staff were aware that she was in pain.

140. The Defendant's evidence with respect to Ms. O'Shea's behaviour while in the MRD is found in the Log. The Log indicates that at various times both before and during the application of the MRD Ms. O'Shea was yelling. The Log also notes that both during the application of the MRD and after it was removed Ms. O'Shea was crying. There is no notation that the Defendant was in pain.

141. There is no evidence that the officers knew that Ms. O'Shea was in pain. Ms. O'Shea had been yelling prior to being placed in the MRD and continued to do so once she was placed in the MRD. This is equally consistent with someone being upset with being restrained as it is with someone being in pain.

142. Further, the Claimant fails to differentiate between the named officers. The only officer who made observations of Ms. O'Shea while she was in the MRD was Cst. Peters. Cst. Peters is not one of the named Defendants. There is no evidence that any of the other named Defendants made any observations of Ms. O'Shea while she was in the MRD. There is no evidence that any of the named officers, with the exception of Sgt. Clark, were aware of Ms. O'Shea's behaviour while she was in the MRD.

143. Contrary to the submission of the Claimant there were no "obvious indications that there was a problem" and no basis for a finding of gross negligence.

Willful Misconduct

144. The Claimant asserts that the application of the MRD in these circumstances constitutes willful misconduct on the part of the individual named Defendants (the "Individual Defendants").

145. Sections 20 and 21 of the *Police Act* specifically protect municipal constables such as the Individual Defendants from personal liability for actions undertaken in the course of their duty, unless they are found to be guilty of dishonesty, gross negligence or malicious or willful misconduct, by assigning such liability to the City of Vancouver.

146. The protection of the police officers from liability arises under s. 21 of the *Police Act* (Joint Book of Authorities Tab 29) which states:

> Personal liability
>
> 21 (2) No action for damages lies against a police officer… for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.
>
> (3) Subsection (2) does not provide a defence if
>
> (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or willful misconduct, or
>
> (b) the cause of action is libel or slander.

This section bars any action for damages against the Individual Defendants when they are acting in the course of their duties, for any alleged neglect or default in the performance of his duties, unless they are guilty of dishonesty, gross negligence, or malicious or willful misconduct.

147. The Individual Defendants are protected from liability for intentional torts, such as battery or wrongful detention, by virtue of s. 21. The fact that the tort is intentional, as opposed to negligent, does not mean it constitutes "dishonesty, gross negligence or malicious or willful misconduct" such as to remove the protection.

148. Willful misconduct requires much more than simply committing an intentional tort. It requires that the tort be committed deliberately, knowing it to be wrong, or with reckless indifference as to whether it is wrong or not: *Ward v. Vancouver (City)* 2007 BCSC 3 paras 102 and 103 (Joint Book of Authorities Tab 23):

> In my view, a clearer description of the meaning of wilful misconduct is contained in *R. v. Boulanger*, [2006] 2 S.C.R. 49, 2006 SCC 32, a case dealing with the criminal offence of breach of trust by a public officer. The Supreme Court of Canada held that it is necessary to have reference to the common law authorities on misfeasance in public office in considering the offence. In this regard, the Court summarized parts of an English authority, *Attorney General's Reference (No. 3 of 2003)*, [2004] W.L.R. 451 (Eng. C.A), at [paragraph] 27:
>
> > Wilful misconduct was held to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it was wrong or not" (para. 28), and recklessness to mean "an awareness of the duty to act or a subjective recklessness as to the existence of the duty" (para. 30). The recklessness test was said to apply to the determination of whether a duty arises in the circumstances, as well as to the conduct of the defendant if it does.
>
> Although the Court did not specifically adopt or approve of these meanings, it did not express any disapproval of them.
>
> In the present case, there is no evidence that either Sergeant Kelly or Sergeant Gatto decided not to release Mr. Ward when they knew that he should have been released. It is not sufficient to establish that their acts constituted the commission of an intentional tort. It must also be established that they committed the tort knowing it to be wrong or with reckless indifference as to whether it was wrong or not.

149. In *Woods v. City of Vancouver,* 2009 BCPC 305 (Joint Book of Authorities Tab 25) one VPD member was found to have been recklessly indifferent with respect to whether he had the grounds for arrest and another member was found to have willfully used excessive force. The facts of that case, as found by the trial judge, were that the officers acted as a result of a desire to use their authority to show Mr. Woods who was in control. These are very different facts from the case at bar.

150. The Claimant has suggested that Ms. O'Shea irritated the jail guards by her actions in the cell and that she was placed in the MRD to punish her for that behaviour, to show her who was in control. In my submission the testimony of the officers and their demeanour in Court do not substantiate this allegation. None of the officers suggested that they were in any way irritated by Mr. O'Shea's behaviour and they were clear that the MRD is never deployed as a

pain compliance device. The MRD was applied out of a genuine concern for the safety of Ms. O'Shea who admitted to refusing to comply with reasonable instructions from the jail staff.

Peter Bowater

151. The evidence shows that Cst. Bowater simply observed the application of the MRD to Ms. O'Shea. It cannot be suggested that anything that he did constituted willful misconduct. He had no other interactions with Ms. O'Shea apart from this observation.

Ramandeep Gregoriou and Jennifer Fontana

152. The evidence demonstrates that Csts. Gregoriou and Fontana were responsible for the application of the MRD. In addition, the evidence establishes that they did not take the decision to apply the MRD. The decision to apply the MRD was taken by Sgt. Clarke.

153. There is no evidence that they acted in a manner that could possibly constitute willful misconduct pursuant to s. 21. Csts. Gregoriou and Fontana were employees of the Vancouver Police Board and were required to follow the policies and procedures set out in the Vancouver Police Department Regulations and Procedures Manual. The evidence in this case is that they did follow those policies and procedures in applying the MRD to ensure the safety of Ms. O'Shea.

154. If this Court determines that the application of the MRD in the circumstances was inappropriate or done negligently, it would still not give rise to a finding of liability against Csts. Gregoriou and Fontana. The circumstances of the application of the MRD may give rise to a finding that excessive force was used or that Csts. Gregoriou and Fontana were negligent but under the *Police Act* it is the City of Vancouver and not them personally who would be liable for those torts. For Cst. Gregoriou and Fontana to be found personally liable this Court must determine that something they did in applying the MRD was committed deliberately, knowing it was wrong or with reckless indifference as to whether it was wrong. There is simply no evidence before this Court to make such a finding.

Sgt. Matt Clarke

155. The allegation against Sgt. Clarke is that his decision to place Ms. O'Shea in the MRD in the circumstances constitutes willful misconduct pursuant to s. 21.

156. If this Court determines that the decision to apply the MRD in the circumstances was inappropriate or done negligently, it would still not give rise to a finding of liability against Sgt. Clarke. An inappropriate use of the MRD may give rise to a finding that excessive force was used or that the Police Defendants were negligent but under the *Police Act* it is the City of Vancouver and not them personally that would be liable for those torts. For Sgt. Clarke to be found personally liable this Court must determine that the decision to apply the MRD to Ms. O'Shea was taken knowing that it was wrong or with reckless indifference as to whether it was wrong.

157. It is clear from the evidence of Sgt. Clarke that he followed the appropriate VPD Policies in circumstances where he considered Ms. O'Shea to be a potential danger to herself and that the best way to ensure that she did not harm herself was to place her in the MRD. As this was a reasonable conclusion based on the information that Sgt. Clarke had at the time it cannot be said that he committed an intentional tort knowing it was wrong or with reckless indifference as to whether it was wrong. This was a considered decision arrived at after considering the circumstances and the options available and there is no evidence that Sgt. Clarke knew that his actions were wrong or that he was recklessly indifferent as to whether it was wrong.

DAMAGES

158. It is the submission of the Defendants that there should be no finding of liability. In the event that this Court does find liability in this case it is submitted that damages should be nominal. There is no claim here for wrongful arrest or detention. The only claim is that excessive force was used during an otherwise lawful detention. The Claimant says that she suffered some minor physical injuries and that she now suffers from ongoing anxiety.

159. The Claimant has provided no medical evidence to support any of her claims. The report of Dr. Mohammed simply details what Ms. O'Shea has reported to him. There is a distinct absence of any kind of conclusion in the report as to what the root cause of the ongoing anxiety issues are. It is also clear from the evidence that Ms. O'Shea was suffering from severe anxiety prior to this event.

160. It is the submission of the Defendants that damages, if awarded, should not exceed $500 for the minor, and undocumented, physical injuries suffered.

161. The Claimant suggests that this is a case, if liability is found, where punitive damages are appropriate. As quoted in *Hanisch v. Canada* 2004 BCCA 539 (Joint Book of Authorities Tab 6), at paragraph 54: "Punitive damages are awarded against a defendant in exceptional cases where the defendant's conduct is so malicious, oppressive and high-handed that it offends the court's sense of decency." It is clear from the evidence that this is not such a case.

CONCLUSION

162. The City of Vancouver (the "City") submits that the claim against it should be dismissed as the Claimant, contrary to Section 294(2) of the *Vancouver Charter*, failed to provide notice of her claim to the City within 2 months of the incident. The Claimant has no reasonable excuse for her failure to provide such notice and, even if a reasonable excuse is found, it is clear that the City has suffered prejudice due to the delay in bringing this claim.

163. In the alternative, the City submits that the claims against it should be dismissed as the force used in these circumstances was entirely reasonable. The Claimant was initially placed into a cell with a toilet and a small window. The Claimant was not placed in handcuffs at this time. The Claimant began actively obstructing the Jail staff from making their required checks by placing toilet paper over the camera and the window. She was asked to desist from this behaviour and she refused.

164. The Jail staff elected to move the Claimant to a smaller cell with no toilet and to place her in handcuffs. These measures were taken to ensure that the Jail staff could make their required regular checks so as to ensure her safety. The Claimant then moved the handcuffs to the front of her body contrary to direction from the Jail staff.

165. Given the uncooperative actions of the Claimant and the need to ensure her safety it was decided to place her in the MRD. The MRD allowed the Jail staff to keep the Claimant under observation and to ensure that she did not harm herself.

166. As soon as it became clear that the Claimant was calming down she was removed from the MRD and the handcuffs were removed.

167. All of these actions were entirely reasonable ones for properly trained Jail staff to take in the circumstances and were in keeping with their training and the policies and procedures in the Jail.

168. The Defendants further submit that the claims in negligence should be dismissed as there is no evidence as to the appropriate standard of care nor is there any evidence of negligence in the application of the MRD.

169. The Defendants submit that the claims of wilful misconduct against the Individual Defendants must be dismissed as there is simply no evidence to suggest that any of the Individual Defendants committed a tort deliberately, knowing it to be wrong, or with reckless indifference as to whether it is wrong or not. The Individual Defendants, in particular Sgt. Clarke, acted in a reasonable manner throughout this incident.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Iain Dixon
Counsel for the Defendants