No. 1030033
Vancouver Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

(Small Claims Court)

BETWEEN:

Bobbi Tamara Denise O'Shea

CLAIMANT

AND:

City of Vancouver, Jail Sgt. Matt Clarke, Jennifer Fontana, Ramndeep Gregoriou, and Peter Bowater

DEFENDANTS

WRITTEN ARGUMENT FOR THE CLAIMANT

Counsel for the Claimant — Douglas C. King, *Pivot Legal Society*

Counsel for the Defendants — Iain Dixon, *City of Vancouver*

INTRODUCTION:

1. The Claimant has pled assault and battery after being placed into a modified restraint device by members of the Vancouver Police Department on March 27, 2008. In addition to her claim of assault by way of excessive force, the Claimant has plead that the manner in which the device was used against her was negligent, causing her unnecessary harm. In the Claimant's submission there are four primary questions that must be answered to determine the question of liability against the Defendants:

    - *Was the placement of the device on Ms. O'Shea a use of force, and did it constitute an assault on her person?*

    - *If an assault against Ms. O'Shea occurred, was the use of force against her justified by section 25 of the Criminal Code of Canada?*

    - *Did the Defendants negligently deploy the restraint device against the Claimant in a manner which caused her harm?*

    - *Does the application of s. 294 of the Vancouver Charter exempt the defendant City of Vancouver from liability, and if so did the actions of the individually named defendants constitute gross negligence or willful misconduct?*

- ***Was the placement of the device on Ms. O'Shea a use of force, and did it constitute an assault on her person?***

2. To answer this question we must first analyze whether or not the use of the restraint device against Ms. O'Shea qualifies as a "use of force". Ms. O'Shea must

be able to show that an assault or battery occurred, and that this assault was not justified pursuant to section 25 of the *Criminal Code*, which authorizes officers to use force in the execution of their duty. In this case the Claimant is alleging that the use of the restraint device against her constituted an assault against her person, and must be justified by the Defendants.

3. Both of the Defendant's witnesses familiar with training and deployment of the device, Jail Sgt. Matt Clarke and Sgt. Clive Milligan, acknowledged that the device could be seen as a use of force, while Mr. Milligan testified that he did not believe the VPD classified the use of the hobble restraint device as a use of force in its policies. In the case of Mr. Clarke he initially agreed with the classification of the hobble device as a use of force on cross-examination, and it was only after he was presented with *Exhibit 3*, sections of the Jail Operations Manual, which contained the various policies regarding the reporting requirements triggered by use of force incidents, that he then backtracked and suggested that it might not be classified as such.

4. The policies themselves are somewhat unclear as to whether or not restraint of a prisoner should be seen as a use of force. At page 2 of *Exhibit 3*, under the heading "Section 25.31 – Jail Guards – Use of Force" the following is used to define what incidents are seen as a use of force:

> *"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 suspect:*
>
> *a. Oleoresin Capsicum (OC) Spray*
> *b. A Baton that creates injury to a person*
> *c. A Vascular Neck Restraint*
> *d. The Wrap restraining device*
> *e. Any physical force to a person that causes injury, resulting in medical attention being required or requested.*

5. While the hobble restraint device is not explicitly listed in this section, the other methods of restraint used by the VPD, the Wrap, and a Vascular Neck Restraint,

are included. Most importantly, the heading of the section notes that the purpose of the action is to "gain physical control of a non-compliant suspect", which in our submission is exactly what happened in this case. Mr. Milligan suggested that the restraint device in question should probably have its own heading, as it does not necessarily fit well into the current policies, but neither he nor Mr. Clarke was adamant that the use of the hobble restraint device should not be considered a use of force.

6. Ms. O'Shea's description of what it felt like to be placed in the device was resolute that in her case physical force was used, and injury was caused to her person. Ms. O'Shea described the placement of the device on her legs as resulting in "excruciating pain". The jail observation log from her time in the device (located at 2nd tab #4 in *Exhibit 1*) confirm that the entire hour Ms. O'Shea was in the device she was screaming, and Ms. O'Shea testified on the stand that these were screams of pain, and not screams of anger. In fact Ms. O'Shea testified that the pain was so great that she did not feel like she could even concentrate on other emotions like anger. Ms. O'Shea testified that the device was so tight that she had no lateral movement in her legs at all, and described the sensation as feeling like her feet were going to be ripped from her legs. According to the testimony of Ms. O'Shea, the use of the restraint device in this case clearly constituted a use of force and an assault against her person.

7. Both Mr. Clarke and Mr. Milligan testified that they had been placed in the hobble restraint device in training, and that it was at least a very uncomfortable experience. Mr. Clarke testified that some people had described it to him as being painful, and both Mr. Clarke and Mr. Milligan agreed that being placed in the device was a significant event for the person restrained. Both Mr. Clarke and Mr. Milligan acknowledged that the greater the device was tightened, the more uncomfortable or painful it would be on the person restrained.

8. The case law in Canada regarding the use of restraint devices on detainees and whether or not it should be seen as a use of force is extremely limited, with the only reported case involving the use of a hobble restraint device, *Kinloch v. Edmonds*, focuses primarily on costs and does not provide any reasons for judgment as it involved a trial by jury. In that decision however the Court noted that the case was a complex matter, which involved the use of force by police:

> "With respect to complexity, this case featured issues of more than ordinary complexity or difficulty. While not excessively so, it involved dealing with the concurrency or relationship between acts of force by police officers, both as intentional torts and as negligence, and the effect of the Canadian Charter of Rights and Freedoms as giving rise to claims of tort. It involved as well issues of justification including self-defence and the lawful use of force by peace officers, matters that are not simple and straightforward. All in all, this case presented matters of some significant complexity, certainly more than average.

(*Kinloch v. Edmonds,* Tab 1 of BOA, ¶46)

9. The *Kinloch* decision contains a limited description of the facts in that matter, but there are strong similarities with the case at bar. Both cases involved an individual being taken to jail for intoxication, who was placed in a hobble restraint device. While not a definitive precedent on the use of restraint devices being seen in tort law as a use of force and an assault on the person, the Claimant submits that the *Kinloch* decision strongly suggests that to be the case.

10. Given the lack of case law from Canada addressing this question, it is helpful to look at other jurisdictions, which have examined the relationship between restraint devices and the use of force by police. There have been cases from the United States that touch on this question, and in those cases restraint devices have been classified as a "use of force". For example, in the case of *Ogden v. Johnson*, from the U.S. District Court, which similarly involved an inmate who suffered from anxiety being placed in a restraint device, the court found:

> "This device was more than just uncomfortable. It is a restraint that should be used only for the amount of time necessary to restore order. Here, plaintiff presented evidence showing that he was held long after the need for such a

restraint had ended. The jury found for the plaintiff on the excessive force claim and that determination will not be disturbed by this Court"

(*Ogden v. Johnson*, Tab 2 of the BOA, Pg. 7, *8)

11. The above cases, and the testimony of the Claimant about the affects of the device and the intense physical nature of its application, lead to the common sense conclusion that placing an individual in a restraint device should be classified as a use of force by police officers. It is our submission that to find that the device is not a use of force in this case would require a rejection of the Claimant's evidence, which clearly provided the factual basis for a finding that the restraint device was intentionally and forcefully applied, and caused injury. On the whole of the evidence the Claimant submits that the defendants committed an assault on her through the use of a restraint device, and that the failure of the defendants to explicitly classify it as such through policy should not have bearing on this determination.

- ***If an assault against Ms. O'Shea occurred, was the use of force against her justified by section 25 of the Criminal Code of Canada?***

12. If the use of the device is found to constitute a use of force and assault against Ms. O'Shea's person, the next question to ask if is whether or not that force was justified pursuant to section 25 of the *Criminal Code*. The relevant part of Section 25 (found in full at Tab 3 of the BOA) reads:

Protection of persons acting under authority

- **25.** (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
  - (*a*) as a private person,
  - (*b*) as a peace officer or public officer,
  - (*c*) in aid of a peace officer or public officer, or

- (*d*) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

13. With regards to the application of restraint devices, where the use of force in question lasts for an extended period of time, the question of justification should be seen as a two-part question. Firstly, was the initial application of the device justified? Secondly, was the continued application of the device over the period of time in question justified? While the initial application of a restraint device may be justified in the circumstnces, it's continued use must likewise be justified. If there is a change in behaviour of the detainee, or a change in circumstances which negates the need for the restraint device, the continued use of the device against a detainee may no longer be justified.

❖ *Was the initial placement of the restraint device on Ms. O'Shea justified?*

14. The leading case on section 25 of the Criminal Code is the case of *R v. Nasogaluk* from the Supreme Court of Canada. In that case Justice LeBel, writing for a unanimous court in 2010, laid out the principles involved in assessing whether or not police use of force was excessive:

> police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.
>
> (*R v. Nasogaluk*, Tab 4 of the BOA, ¶32)

15. Quoting the case of *R v. Bottrell*, the court in *Nasogaluk* also emphasized that an analysis on whether the amount of force used was appropriate must look at the circumstances as they existed at the time. The analysis should not be done in a

vacuum, nor should police be expected to measure the forced used with exactitude.

(*R v. Nasogaluk*, Tab 4 of the BOA, ¶35)

16. The Claimant submits that all three principles espoused by the Supreme Court in *Nasogaluk* are relevant to the analysis of the case at bar. The actions of the jail guards must be analyzed with a lens to whether or not the force used against Ms. O'Shea was proportional to the potential harm she presented, whether or not the force used was necessary in the circumstances, and ultimately whether or not there were reasonable grounds to administer the device.

Proportionality:

17. The VPD's policies on use of force at the jail, found in the Jail Operations Manual, provide specific circumstances where force may be employed. It reads:

> "Examples of circumstances where reasonable force may be used include: in self-defence against unprovoked assault; to prevent against a personal assault or assault against another; to prevent the commission of an offence; to suppress a riot; and as required or authorized by law in the administration or enforcement of the law. Jail Guards shall under no circumstances use excessive force, i.e., a greater level of force than is reasonably necessary in the circumstances to which it is applied."

(*Exhibit 3*, pg. 2, ¶2)

> "In the context of performing jail guard duties, the authority to use force will generally only arise in circumstances in which it is reasonably necessary for self-defence, to prevent an assault or the commission of another offence, or to suppress a riot"

(*Exhibit 3*, pg. 3, ¶1)

18. None of the Defendant witnesses in this case testified that they believed Ms. O'Shea to be a threat of physical violence in any way. Likewise, all of the Defendant witnesses stated that at no point did Ms. O'Shea physically resist any of their attempts to handcuff her, move her from cell to cell, or ultimately the

decision to place her in a restraint device. In short, Ms. O'Shea was not a violent prisoner. This is supported by the Vancouver Jail Arrest Report (Found at 2nd Tab #3 in *Exhibit 1*), and the B.C. Ambulance Crew Report (Found at 2nd Tab #1 in *Exhibit 1*), which makes no mention of Ms. O'Shea as being violent, and lists her only concerns as those relating to anxiety and intoxication.

19. The VPD's specific policy regarding the use of restraint devices suggests that restraints can be used against a prisoners in a wider variety of circumstances than just those who are a threat of violence, stating:

> "When a member believes that a person is using, or 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 using a Modified Restraint Device (Hobble), Wrap, or other approved device".

(*Exhibit 1*, 2nd Tab #7)

This policy however must be read along with the provisions of the Jail Operations Manual which restrict the use of force in the jail setting to "rare circumstances", and warn that jail guards should "proceed cautiously".

(*Exhibit 3*, pg. 3, ¶2)

20. In the Claimant's submission the use of the hobble restraint device in this case, and the manner in which it was applied, was clearly disproportionate to the potential threat Ms. O'Shea presented to either herself or jail staff. In the *Kinloch* matter, referenced above, the conduct of the officers involved was brought to a public hearing, with Judge Filmer presiding. In the transcript from the decision of Judge Filmer he expresses the perception that restraint devices should be reserved for dangerous prisoners:

> "Restraints in my view are something which historically have been used to curtail dangerous conduct by persons who might hurt themselves or others, and the restraints have been accepted in the system for a very long time. It is

> one thing to restrain an adult. It's one thing to restraint a person who is six foot two and weighs 223 pounds, and its another thing to restrain a child."
>
> (*Kinloch Public Hearing*, Tab 5 of the BOA, lines 11-20)

21. The fact that Ms. O'Shea was not a violent prisoner, and posed no immediate risk to herself or others, demonstrates that the use of the restraint device was disproportionate to the potential risks the Defendants were confronted with. The reasons advanced for placing Ms. O'Shea in the device were essentially at best procedural in nature, and at worst in order to make Ms. O'Shea's compliant to Jail Guard commands. This rationale appears to contradict existing policy on the use of force in the Jail Operations Manual, which states that use of force should be restricted to rare circumstances, and that the authority to use force will generally only arise in self-defence, to prevent an assault or the commission of an offence, or to suppress a riot. In the Claimant's submission this Court should find as Judge Filmer did in the *Kinloch* matter, that use of the restraint device is designed to curtail dangerous conduct by persons who may hurt themselves or others, and that its use was disproportionate in this case.

Necessity:

22. The Defendant Jail Sgt. Matt Clarke testified that the restraint device was deployed against Ms. O'Shea to ensure visual observation through the windows and cameras, in case the Claimant decided to harm herself, however the Defendant Jennifer Fontana stated that jail guards were also ultimately looking for a change of behaviour after deploying the device. Either of these assertions begs the question of what alternatives existed to the use of force in this case, and whether or not any of those alternatives would have effectively resolved the situation without the use of a modified restraint device.

23. It is the Defendant's obligation to attempt alternative means of control before resorting to the use of force. This principle is confirmed in the VPD's Jail Operations Manual, which states:

> "In the course of carrying out their duties, Jail Guards may only use force on prisoners in circumstances where all other reasonable means of control have failed or cannot be used."

(Exhibit 3, pg. 2, ¶5)

24. In order to answer this question we must examine the reasons why the Claimant was acting the way that she was in the first place, and whether or not alternative forms of intervention other than the use of force would have been effective at resolving the conflict. Ms. O'Shea testified that the reason her disagreement with jail staff began was because she wished to be watched over by a female guard, but had that request denied. Specifically Ms. O'Shea stated that she wished to use the washroom inside her cell without being watched by a male guard, and was disturbed by the sight of a male guard looking through the cell window as she attempted to use the toilet. Ms. O'Shea described the jail outfit she was given, and noted that for her to be able to use the washroom in her cell she would have to remove the arms of the jumpsuit as well, exposing her entire upper torso and breasts in addition to her lower body if she were to do so. In essence Ms. O'Shea testified that she would have to get almost completely naked in front of both the camera in the cell and any guard who looked into her cell.

25. Jail Guard Andrew Peters, who was tasked with observing Ms. O'Shea at times, offered no explanation for why Ms. O'Shea was watched by a male guard, nor why she was not allowed to use a washroom in private. In fact, Mr. Peters actually testified that the jail was capable of both observing female prisoners with female guards, and that female guards could use a private washroom facility with no cameras just like male prisoners if needed, giving an example of if it were "that time of the month". Jail Sergeant Clarke testified that there were

multiple female officers on shift that day, and that there was actually a separate floor of the jail where female prisoners could be held which was staffed entirely by women. Despite these facts there was no explanation given for why the request of the Claimant to be observed by a female guard was denied, and the Claimant testified that all of her efforts to obtain privacy and her requests to be watched by a female guard were completely ignored.

26. In the time since this incident occurred there have been significant changes in policy and decisions from superior courts which validate the concerns of the Claimant, and recognize the rights of a prisoner to privacy in the jail, especially in the use of washroom facilities. In the Ontario case of *R v. Mok* where a woman was incarcerated under suspicion of drinking and driving, a challenge was made to the videotaping of prisoners using toilets in cells. The court found that jail guards watching a prisoner use the washroom constituted a breach of a prisoner's section 8 *Charter* rights. In analyzing the observation of prisoners the court commented:

> "I come now to the balancing of the individual's interest in privacy against the state's legitimate law enforcement interests.
>
> Sergeant Cummins testified that cells are subject to surveillance for reasons of safety and preservation of evidence. There is no doubt that these are legitimate concerns. The question is whether they are so pressing that the individual's right to personal privacy when using the toilet must give way to them entirely. I find that they are not.
>
> Sometimes bad things happen when a person is in custody. Sometimes detainees attempt to hurt other detainees. Sometimes they attempt to hurt the police officers charged with their care. Sometimes they allege police brutality. Sometimes they attempt to hurt themselves. Sometimes they suffer from a medical emergency. The ability of the police to monitor detainees in their cells is an important one in terms of ensuring the safety of the detainee and others coming into contact with him or her. In Ms. Mok's case specifically, she was considered a high risk, health wise, because of her level of intoxication. It was important that the police were able to keep an eye on her condition.
>
> In my view, the worthiness and reasonableness of videotaping everything that happens in a detention cell for safety reasons does not necessitate the surveillance and recording of the use of the toilet in the cell. The use of a

> modesty screen that protects the lower part of a person's body while using the toilet would not significantly hamper the ability of the police to monitor the health and safety of anyone inside the cell. At the same time, it would preserve the dignity and bodily integrity of the detainee."

(*R v. Mok*, Tab 6 of the BOA, ¶75)

27. The expectation of privacy in the context of the jail setting and the need for a prisoner to be watched by a member of the same sex is also a long-standing principle in law. In 1987 the Canadian Human Rights Tribunal looked at the issue of gendered policies in observation of prisoners, and adjudicator Robin Elliot found the following:

> Superintendent Barker indicated that the reason for the same-sex guarding policy was the need to respect community standards relating to personal privacy. He said that the R. C. M. P. was concerned that if it not live up to these standards, it would be subject to complaints and criticism. He stated that he has always believed that personal privacy and human dignity must be respected to the greatest degree possible in the lock-ups.

(*Stanley v. RCMP*, Tab 7 of the BOA, pg. 9, ¶1)

28. Later in the Judgement it was ruled:

> If the general interest in personal privacy is an important one to us, the specific interest in not being viewed while in states of undress and using the toilet by strangers of the opposite sex must be said to be of particular importance. At the core of this aspect of the interest in personal privacy is a concern about "the inherent dignity of the human person", respect for which Chief Justice Dickson says in R. v. Oakes (1986), 1986 CanLII 46 (SCC), 26 D. L. R. (4th) 200, at p. 225 is a principle "essential to a free and democratic society". The "dignity and worth of the human person" is declared in the preamble to the Canadian Bill of Rights, R. S. C. 1970, App. III to be one of the governing values of this country. And the preamble to the International Covenant on Civil and Political Rights begins with an assertion that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".
>
> What goes into the definition of "the inherent dignity of the human person" may be a matter of dispute, and may vary somewhat front society to society and from one age to another, but no one can deny - and I do not understand Ms. Greckol to deny - that in this society at this time the definition would include the interest in not being viewed while in states of undress or using the toilet by strangers of the opposite sex.

(*Stanley v. RCMP*, Tab 7 of the BOA, pg. 44, ¶2)

29. In addition to the option of simply granting Ms. O'Shea's requests to be watched over by a female guard, and providing a private washroom facility, it is clear that Ms. O'Shea's problems were primarily as a result of anxiety and not intoxication. Had the Defendants followed the appropriate policies in place for intoxicated prisoners, Ms. O'Shea would have been seen by a nurse shortly after her arrival, and her anxiety could have been addressed. According to section 1.12.10 of the VPD's Regulations and Procedures Manual (Found at 2nd Tab 7 of *Exhibit 1,* pg. 7), jail staff are to inform the nursing staff that an intoxicated prisoner has arrived upon their arrival at the jail. It also states that intoxicated prisoners shall be medically assessed on arrival to the jail or shortly thereafter, with nursing staff assessing the prisoner every hour. A copy of the EHS report is also meant to be delivered to the nursing staff. For the entirety of the time Ms. O'Shea was in custody she was not seen by a nurse, despite numerous policies directing she should be. Had jail staff followed these policies and Ms. O'Shea was given medical treatment the use of force by placing Ms. O'Shea into a restraint device could have been avoided.

30. After Ms. O'Shea was moved to a separate cell and placed in handcuffs for covering the window of her cell to avoid being watched by a male guard, she acknowledged that twice she moved her handcuffs from front to back in order to blow her nose, explaining the medical condition she has regarding her windpipe and how her crying was creating a need to keep her esophagus clear. Her explanations for why she took the actions she did were again ignored, and medical staff was not notified of Ms. O'Shea's condition.

31. It must also be emphasized in this case that at any time Ms. O'Shea could have been released from custody, or delivered to a medical facility, if after an assessment it was deemed appropriate to do so. Jail Sgt. Clarke indicated on the

stand that this determination would typically be made by the nursing staff after seeing the prisoner, and not by jail staff. Since jail staff did not allow Ms. O'Shea to see the nursing staff it is impossible to know when she would have been suitable for release. All of this undermines the assertion by the defendants that the use of a restraint device against Ms. O'Shea was necessary in the whole of the circumstances, as jail staff could not even provide clear grounds for Ms. O'Shea's continued detention in the first place.

Reasonableness

32. There is a contradiction that is inherent in the defendant's case. The stated rationale given for placing Ms. O'Shea in the restraint device by Jail Sgt. Clarke was because he felt that it would be best for her own safety given her efforts to prevent the officers from viewing her in her cell. Furthermore, the reason why Ms. O'Shea was originally arrested and taken to jail in the first place was again under the guise of her own safety and protection. When asked under cross-examination how placing an individual in a device that ends up causing them significant pain and distress accomplishes the stated goal of protecting them from harm, Mr. Clarke could not provide an answer.

33. Ms. O'Shea's testimony in this case that the device both physically and emotionally harmed her by placing her in a pain position for an hour, and in the Claimant's submission the bench should view the justification of the infliction of such pain and harm to someone as being for their own good with great skepticism. On its face, by the VPD's own policies, this is not an accepted reason to use force against a detainee, and it is an inherently unreasonable position. The Claimant submits that it is likely one of the reason why Ms. O'Shea was placed in the restraint device was not for her own safety, but to create a "change in behaviour" as stated by Jail Guard Jennifer Fontana, who was one of the officers who physically placed Ms. O'Shea in the device. In any event, none of the

justification that have been offered for placing Ms. O'Shea in the restraint device provides reasonable grounds for causing her such harm.

34. Given the alternatives to use of force that existed, including providing Ms. O'Shea with medical support pursuant to the VPD policy, moving her to a more appropriate location of the jail staffed by female guards, or simply providing her with use of a private washroom, the Claimant submits that the grounds advanced by the defendant for placing Ms. O'Shea into the restraint device do not constitute "reasonable grounds" to use force pursuant to section 25 of the *Criminal Code*, and that the force used was excessive. Under the principled analysis in *Nasogaluk* the Claimant submits that the forced used against Ms. O'Shea was neither proportional, necessary, or reasonable, and cannot be justified by section 25 of the *Criminal Code*.

- *Even if the initial use of the restraint device was justified under section 25, did the length of time the Claimant was kept in the device amount to excessive force?*

35. Restraint device cases are unique in that unlike most types of use of force, where an individual is struck with a body part or a weapon, and the application of force occurs over a relatively short period of time, individuals who have been placed in a restraint device are essentially at the mercy of the jail staff in how long they will remain in the device. While there is no specific test in Canadian law for determining the length of time someone should be restrained, and every case must be analyzed under its specific circumstances, the principles of *Nasogaluk* continue to apply throughout a detention, which must remain reasonable, necessary, and proportionate.

36. In the case at bar the Defendants continued to observe the Claimant while in the device, and noted that she was continually screaming. There was no observation made on the reason for why Ms. O'Shea was kept in the device for an hour, nor

was there any mention of a change in behaviour that warranted Ms. O'Shea's relsease from the device.

37. The length of time Ms. O'Shea was detained appears quite arbitrary. Upon release Ms. O'Shea is noted to be cooperative, and is not only removed from the cell but is also removed from her handcuffs and placed in a different cell. No explanation was given for why Ms. O'Shea was allowed to be unrestrained and without handcuffs after the use of the restraint device, nor was there an explanation given for why Ms. O'Shea was kept in the device for an hour. By both Ms. O'Shea's account and the testimony of the Defendants her behaviour was ordinary after being released from the device, and she presented no problems. At this time she was then allowed to use a private washroom, and after release from the device she was watched over by a female guard before ultimately being released without incident. There appears to be a total disconnect between the amount of time Ms. O'Shea was restrained in the device, and the stated purpose for why she was restrained.

38. When asked on cross-examination about the length of time an individual should be restrained, Sgt. Milligan noted that in the *Kinloch* case the Plaintiff was detained for four hours, and that this length of time would typically be seen as excessive. The training video introduced in evidence (*Exhibit 1,* 2nd Tab #6), and manual used by Mr. Milligan to train the jail guards, are both silent as to the appropriate length of time someone should be restrained, and appear to focus on the transitory nature of the device being used to transport a prisoner to the jail, not on the use of a suspect once they have already arrived in jail.

39. The Claimant contends that the Defendants bear the burden of proof in justifying the level and duration of force used by police, and have failed to offer an appropriate justification for why the Claimant needed to be restrained in a hobble device for an hour. Even if the initial placement of Ms. O'Shea in the restraint device to prevent her from obstructing the guard's ability to observe

her is seen as reasonable and necessary, the Claimant submits that her continued detention in the device for an hour was excessive and un-warranted in the circumstances.

- ***Did the Defendants negligently deploy the restraint device against the Claimant in a manner which caused her harm?***

40. The Defendant's two primary witnesses, Sgt. Clive Milligan and Jail Sgt. Matt Clarke, both testified about the training and proper application of the hobble restraint device. Both testified that the device was typically uncomfortable, but not necessarily meant to cause the subject any pain. The two witnesses did however testify that the device has the capability of causing pain, especially if the metal buckle on the device was placed against the bone of the subject, and both witnesses agreed on cross-examination that over-tightening of the device could also potentially cause pain. Ms. O'Shea was unequivocal that the initial application of the device was not painful, but after being run underneath the cell door it was tightened to the point of excruciating pain. This court must answer the question of whether or not the manner the device was placed on the Claimant, regardless of the reasons for doing so, breached the appropriate standard of care and constituted negligence.

Standard of Care:

41. The case of *Roy v. British Columbia*, where an intoxicated individual passed away in police custody, the B.C. Court of Appeal examined the procedure for determining the appropriate standard of care in policing cases. Justice Southin firstly established that the existence of a duty of care between a police officer and prisoner is to be presumed:

> "I take the following propositions to be established:
>
> A peace officer owes a duty to his prisoner to take reasonable care for the prisoner's safety but he is not an insurer."

(*Roy v. British Columbia*, Tab 8 of the BOA, ¶35)

42. The Court in *Roy* analyzed the difference between a police officer making a mistake related to their duty and training versus an ordinary individual acting with ordinary care, finding:

> "[A]n error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence." [*Whitehouse v. Jordan, [*1981] 1 All E.R. 267 (C.A.) at 281, adopted by Craig J.A. in *Smith v. British Columbia (Attorney General)* (1988), 1988 CanLII 3140 (BC CA), 30 B.C.L.R. (2d) 356 (B.C.C.A.) at 363.]

(*Roy v. British Columbia*, Tab 8 of the BOA, ¶36)

43. The court also found that existing policies of the police department may influence the appropriate standard of care, but noted that it should not be seen as determinative, and relied upon as if it were statute:

> The policy of a police force is an important factor in determining the standard of care a peace officer must observe, but it is not determinative, nor is it to be treated as if it were a statute imposing civil obligations.
>
> 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."

(*Roy v. British Columbia*, Tab 8 of the BOA, ¶36)

44. Following the *Roy* case the Court of Appeal clarified in the *Radke* decision that the Court in Roy did not mean there was a requirement that expert evidence be given in order to determine the standard of care. In fact, the court noted:

> "it was not necessary for there to be expert evidence, much less expert evidence, on 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 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.
>
> (*Radke v. M.S.*, Tab 9 of the BOA, ¶13)

45. In the case at bar aspects of the use of the hobble restraint device are relatively specialized skills taught to jail guards who are authorized in law to use force against individuals when it is appropriate to do so, and generally speaking the appropriate use of the device is not a matter in which ordinary citizens should not be expected to have direct knowledge. However, the device is not a complicated one, and in that regard the determination of the standard of care is also a matter of common sense and simple fact. While the determination of the Standard of Care is strongly influenced by the testimony of those carrying out the training and the use of the device, which in this case is primarily Sgt. Clive Milligan and Jail Sgt. Matt Clarke, the Claimant submits that the court should also look to applicable policies and the specific facts of this case, with the ultimate question on the standard of care being one of mixed law and fact.

46. In determining the Standard of Care it is helpful to start with what would clearly be an unlawful use of the device. Sgt. Milligan testified that use of the restraint device as a punitive tool would clearly be inappropriate, and that the device is not designed to cause pain. In the training video for the hobble device (*Exhibit 1*, 2nd Tab #6) it states "in 2007 the VPD introduced the modified restraint device, commonly referred to as a "hobble" as a means of controlling the legs of a

suspect who is violently resisting. The modified restraint device is an excellent tool for law enforcement. It's important for officers to remember to use the device correctly and properly to avoid injury to themselves, and the suspect". This statement implies that use of the device in a manner which injures the suspect is neither correct nor proper.

47. The training video goes on to state: "When the device is applied to the ankles, it is important to keep the buckle away from the front of the shin, or on the back of the achilles tendon, as there is potential for injury there". The video notes that the device should be tightened so that the feet of the subject are against the door, and Jail Guard Jennifer Fontana, who was one of the guards responsible for physically placing the Claimant in the device, also indicated that in her understanding the feet of the subject should be "touching the door" to prevent movement. None of the Defendants indicated that proper tightening of the device should lead to physical pain.

48. In the public hearing which was called into the conduct of the police officers in the *Kinloch* matter, mentioned above, presiding Judge Filmer briefly touched on the need for a policy governing the use of the hobble restraint device, noting that the subject police department, Victoria PD, did not have a policy in place at the time. Judge Filmer opined:

> "If it was felt necessary by the officers involved to restrain her, there should have been a policy present, and that policy should read something like this: Restraints should only be used with regard to children in custody as a last resort. If used, the most senior officer present should be notified forthwith, and the child should be monitored constantly. The restraint should be removed as soon as possible".

(*Kinloch Public Hearing*, Tab 5 of the BOA, Pg. 4, lines 24-25 and Pg. 5, lines 1-8)

49. The above statements by Judge Filmer and the VPD's own training video regarding the use of the hobble restraint are common sense precautions to avoid unnecessary and unjustified injury to a subject placed in the device, which

should be followed by any competent peace officer trained in the use of the device. Likewise, after placing an individual into a hobble restraint device the subject should be constantly monitored to ensure the subject is safe, and the subject should be removed as soon as possible. Accordingly, the Claimant submits the following Standard of Care should be applied when an individual is placed in a modified restraint device:

Peace officers placing an individual into a modified restraint device have a duty of care to the subject, and must:

1. Apply the device in a manner which does not cause unnecessary physical pain to the subject.

2. Constantly monitor a subject who has been placed in a device and not leave that subject unattended at any time.

3. Remove a subject from the modified restraint device as soon as possible, avoiding prolonged restraint of the subject.

- *Was the Standard of Care Breached?*

50. If the above Standard of Care is followed, the Claimant submits that the Defendants have breached the requisite standard by administering the device in a manner which caused considerable physical pain to the Claimant, and by failing to remove the Claimant from the device as soon as possible. The Claimant acknowledges that after being placed in the device the VPD appropriately monitored the Claimant by engaging in 15-minute in-person checks, and by maintaining a continual video feed of the cell that the Claimant was placed in, fulfilling the second requirement to constantly monitor the Claimant.

51. The Claimant submits that any reasonable and competent individual in the position of the Defendant guards, having the standard and type of skill that the Defendants have held themselves out as having, would not have made the

mistakes which led to the injury of the Claimant had they been acting with ordinary care.

52. Despite the tightening of the device being important to its proper use, all of the Defendants indicated that they were never themselves placed into the device in a way that was used against the Claimant, and had never experienced what it felt like to be in a hobble device that had been run underneath a door and tightened. The Defendants have not taken reasonable steps to avoid injury to subjects being placed in the modified restraint device, and should be found negligent in their application of the device in this case.

- ***Does the application of s. 294 of the Vancouver Charter exempt the defendant City of Vancouver from liability, and if so did the actions of the individually named defendants constitute gross negligence or willful misconduct?***

53. Section 294 of the Vancouver Charter (Tab 10 of the BOA) sets out the requirement for a Claimant to send a notice letter to a municipality about a potential claim, but also provides a possible exemption if that requirement is not met.

54. The leading case on municipality notice provisions is the case of *Thauli v. Delta (Corporation).* In that case the Court of Appeal looked at not just the legal test in determining if the notice period should be waived, but discussed the purpose of the section and its fairness. The Court was clear that municipal notice periods are a rare exception to the general rule, and in the Claimant's submission the *Thauli* case severely weakened the strength of the notice provision. Madam Justice Rowles delivered a thorough history of two-month notice provisions, and noted that on two separate occasions the Law Reform Commission of

British Columbia recommended their removal or modification. The *Thauli* case also clarified the Court's ruling in *Teller v. Sunshine Coast*, noting:

> "The decision in Teller does not propound a test or establish criteria which must be met before the court may find a reasonable excuse for the failure to give notice; instead, the decision invites a determination informed by the purpose or intent of the notice provision, taking into account all matters put forward as constituting either singly or together a reasonable excuse. The determination of whether it is a reasonable excuse is contextual. The question is whether it is reasonable for the plaintiff to be excused, having regard to all the circumstances"

(*Thauli v. Delta*, Tab 11 of the BOA, ¶50)

Reasonable Excuse:

55. In the case at bar the Claimant has given multiple reasons for why she failed to provide notice to the municipality within two-months of the events in question. Ms. O'Shea testified that she was clearly ignorant of the law, and has a very limited education, dropping out of school in grade 9. She testified extensively about the abuse she suffered growing up, and how that led to significant periods of drug use. While Ms. O'Shea testified that she was clean and sober for the five months preceding the day in question, she recounted how her slip using cocaine and her treatment in the jail led to a prolonged period of drug use. Shortly after the day in question she also lost care of her children due to that drug use, and then lost her housing provided by the government after becoming "overshoused" when her children were removed.

56. It is clear that the incident in question had a profound impact on Ms. O'Shea, and that the period that followed it was troubled and tumultuous. Ms. O'Shea testified that she was homeless for approximately a year and a half after losing her housing, and that ultimately she gained the courage to seek out assistance in making a complaint about what happened to her after being encouraged by a friend she had met in the homeless shelter she was staying at. At that time she spoke with a lawyer and filed a complaint under the *Police Act* regarding her

treatment, but a notice letter was not filed. Ms. O'Shea testified that the counsel she spoke with did not mention a notice letter, and that she was still completely unaware of the relevant provision. Most importantly Ms. O'Shea indicated that she also wished and intended to complain about her treatment, she just did not know how to do so and felt that given her social status she would not be believed.

57. In the *Thauli* case the plaintiff was excused from filing notice in part because her day to day concerns made it unreasonable to expect that she would be capable of determining her obligations, and in the Claimant's submission the plaintiff in that case was far more functional than the Claimant who suffered from addiction and homelessness following the incident. In that case the plaintiff was a paralegal, and clearly had substantially more knowledge of legal matters than the Claimant in this case. Similarly, the plaintiff in *Thauli* also spoke with lawyers about her case and was actually given erroneous advice on the relevant notice provision. In the end the court found that the plaintiff should be excused from the notice provision, and the Claimant submits that likewise in this case she had circumstances which taken as a whole and in the context of the purpose of the legislation should provide for an excuse to the filing of the notice provision.

❖ Prejudice

58. The case of *Teller v. Sunshine Coast* is one of the original higher court decisions from British Columbia which examined this section, and discusses the burden of proof for determining whether or not the municipality was prejudiced. The court stated:

> "I do not think the application of this section is a matter of burden of proof in the classic sense. The words of the section are, "If the court before whom such action is tried or, in case of appeal, the Court of Appeal

is of opinion that . . . the defendant has not been thereby prejudiced in his defence".

(Teller v. Sunshine Coast, Tab 12 of the BOA, ¶389*)*

59. There are two facts of importance in determining if the City was prejudiced in this case. Firstly, the fact that Jail Sgt. Matt Clarke testified that the video footage from the jail would have been destroyed after 30 days. The City therefore cannot claim that it was unable to preserve video of the incident without notice, as the provision allows 60 days to provide a notice letter. The Claimant, and any other individual in a similar situation, could have provided notice within the 60 days and the VPD would have still destroyed the video if it was delivered after 30 days but before 60. Secondly, the fact that the jail guards in question testified that the only report created of the incident at the time were the notes made by the individual guards and by Jail Sgt. Matt Clarke. The Defendant officers failed to create an adequate written record of the incident despite their existing policies, which specified that every time a use of force occurs each officer involved should create a report and notify the NCO, and that the acting Jail Sgt., shall carry out a preliminary investigation into the matter (Exhibit 3, pg. 3-pg.4). The policy specific to the use of the hobble restraint device also specifies that "an officer must articulate in each circumstance the reasons why they applied a particular restraint device to a prisoner" (*Exhibit 1*, 2nd Tab #7).

60. In the case of *Thauli* the court found that one of the important factors was the fact that a report of the incident had been created at the time it happened, and that report was viewed by management and could later be relied upon. The Court found in deciding that Ms. Thauli should be excused from the notice requirement, that the Accident Report Form was "a matter that cannot be ignored" (*Thauli*, Tab 11 of the BOA, ¶49). Likewise, in the case of *Khan v. City of Vancouver,* (Tab 13 of the BOA, ¶11), the claimant in that matter filed a complaint regarding the officer's conduct, and had the intent to take action from the beginning. While filing a police complaint under the *Police Act* should not be

taken to be a fulfillment of the notice provision, the Claimant submits that it is a factor which weighs in favour of the excusal from the notice provision when the Defendant was effectively notified and a written account of the events in question was created which the Defendants then relied upon at trial.

61. In the case at bar, most of the Defendants were tasked with making a "duty report" of the incident after Ms. O'Shea filed a complaint regarding the application of the device. While those reports are not admissible as evidence in this proceeding pursuant to section 102(1) of the *Police Act* (Tab 14 of the BOA), the witnesses confirmed on the stand that they had the ability to review these reports before testifying. While some of the Defendant witnesses had little memory of the events in question, the Claimant submits that is because the nature of the incident was insignificant to those officers, and not because the Claimant failed to file a notice letter within 60 days of the incident. In any event the witness who was ultimately responsible for the deployment of the device, Jail Sgt. Clarke, presented a clear and detailed account of the events in question.

62. In the case of *Grewal v. Saanich (Dist.)* the court defined the object of notice provisions, stating:

> "The object of the section, like the provisions contained in section 23(2) of the Insurance (Motor Vehicle) Act, 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 or not to settle or contest the matter."
>
> (*Grewal v. Saanich*, Tab 15 of the BOA, ¶23)

In the *Thauli* case, the court clarified:

> "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 municiapality 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 condition 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 any prejudice".
>
> (*Thauli*, Tab 11 of the BOA, ¶48)

63. This is not a case where the injury was incident happening was unknown to the Defendants, as it would be if a claimant slipped and fell on City property and nobody was there to see it. There are no witnesses or evidence that were lost due to the failure to provide notice, and the scene has not been altered in a way that prevents analysis of the issues at hand. The Claimant submits that on the whole of the evidence, and taking into account the object of the notice provision, that Defendant City has not been prejudiced in mounting its defence. Consequently on whole of the evidence the Claimant submits that she should be excused from the notice provision, and the City maintained as a Defendant.

- Gross Negligence and Wilful Misconduct:

64. In the event that your honour finds that the Claimant should not be excused from the notice provision of the Vancouver Charter, and the Defendant City of Vancouver is free of liability, the Claimant submits there is still evidence to support a finding of gross negligence or willful misconduct against the individually named Defendants.

65. In the 2009 case of *Woods v. City of Vancouver*, Judge Ehrcke found that two officers who wrongfully arrested and used force against the claimant were not saved by the Police Act provisions which require willful misconduct or gross negligence. Judge Ehrcke wrote:

> This provision does not protect the two officers in this case. The use of excessive force by Constable Gies was clearly wilful. The wrongful arrest of the claimant by Sergeant Eely was also either wilful or reckless. The claimant had irritated these two officers, and they used their authority to show him who was in control. In Sergeant Eely's case, this involved an unwarranted arrest for breach of the peace, resulting in the claimant going to jail. At best,

> Sergeant Eely was recklessly indifferent to whether he really had grounds for arrest, in the language of *Ward v.Vancouver (City),* cited above.
>
> (Woods v. COV, Tab 16 of the BOA, ¶73)

66. The Claimant contends that if your honour finds that excessive force was used against Ms. O'Shea, like the *Woods* case the conduct of the officers was clearly willful. The Claimant contends that like the *Woods* case Ms. O'Shea irritated the jail guards tasked with caring for her by requesting a female guard to watch over her, and by disobeying the officer's commands not to cover the window of the cell or move the location of her handcuffs. The officers responded by using their authority to show who was in control, and forced the Claimant into a restraint device, which was then tightened to the point of excruciating pain.

67. Likewise, the actions of Jail Sgt. Clarke were recklessly indifferent as to whether or not he had the authority to detain Ms. O'Shea for Breaching the Peace, and disregarded multiple policies instructing how prisoners arrested for intoxication should be cared for, and how that care should be documented. The Claimant submits that the Defendant guards have at all times in these proceedings appeared to be nonchalant about the application of a restraint device against the Claimant, in particular Jail Sgt. Matt Clarke, and that the willingness of the guards to adhere to policies when it suited them, and disregard others when it did not, shows an air of recklessness indifference to the suffering of the Claimant.

68. Likewise, if your honour finds that the officers in question were negligent in their application of the device on Ms. O'Shea, The Claimant submits that there is evidence to support a finding of gross negligence on the part of the individually named Defendants. In the recent case of *Mason v. Turner*, the B.C. Supreme Court summarized the definition of gross negligence as follows:

> "The definition of "gross negligence" is not rigid but rather depends on all the circumstances. In *Doern v. Phillips Estate* (1994), 1994 CanLII 1869 (BC

> SC), [1995] 4 W.W.R. 1, 2 B.C.L.R. (3d) 349 (S.C.), aff'd 1997 CanLII 2433 (BC CA), 43 B.C.L.R. (3d) 53, [1997] B.C.J. No. 2625 (C.A.), Kirkpatrick J., as she then was, addressed the meaning of "gross negligence" in s. 21 of the *Police Act* and said:
>
> > In the absence of any clear legislative intent to define the concept of gross negligence, it should be given its plain meaning as it has developed under the common law. The classic test for gross negligence was reiterated by the Supreme Court of Canada in *Walker v. Coates*, 1968 CanLII 79 (SCC), [1968] S.C.R. 599 [64 W.W.R. 449]. Ritchie J. referred, at p. 601, to the Court's earlier decision in *McCulloch v. Murray*, 1942 CanLII 44 (SCC), [1942] S.C.R. 141, where Duff C.J.C., at p. 145, had defined gross negligence as:
> >
> > "All these phrases, gross negligence, wilful misconduct, imply conduct in which, if there is not conscious wrongdoing, *there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves*." [emphasis by Ritchie J.]
>
> (*Mason v. Turner*, Tab 17 of the BOA, ¶30)

69. The Claimant submits that the behaviour of the individual Defendants in placing the Claimant in a restraint device in a manner which caused her pain, and the failure to recognize that pain or rectify the situation for an hour, constitutes a marked departure from the standard in which reasonable and competent people in their position would act. It is important to recognize that the Claimant testified that she screamed in pain after the device was tightened for the entire hour, and that fact is documented by the officers in the Jail Observation Log (*Exhibit 1*, 2nd Tab #4). The individual Defendants cannot claim that they were unaware that the Claimant was in pain, but failed to take any corrective action. The failure to properly apply the device on the Claimant, and the refusal to rectify the situation in the face of obvious indications that there was a problem, constitutes gross negligence on the part of the individually named Defendants.

Damages:

70. In her Notice of Claim the Claimant has plead damages in the amount of $25,000 for General Damages, Special Damages, and Punitive/Aggravated Damages. The Claimant acknowledges that there are no identified special damages in this case, and drops that part of the claim.

71. The only other case involving the use of a hobble restraint device where liability was determined is the *Kinloch* decision, found at Tab 1 of the BOA. In that case a jury awarded Ms. Kinloch $60,000 for the four hours that she was placed in a hobble restraint device. While the facts in Kinloch are even more aggravating, as they involve the use of the restraint device against a youth, there are factual similarities with that case and the case at bar which help in assessing damages. Notably, Ms. Kinloch was arrested for public intoxication, and police officers failed to follow statutory guidelines which relate to how a youth in custody for intoxication should be cared for. Similarly in this case, the Claimant contends that policies relating to the care of intoxicated adults were not followed, and alternatives to the use of the restraint device were not employed. While the length of time spent in restraint was longer for Ms. Kinloch, the jury clearly felt that the damage to an individual placed in a hobble restraint device should be significant, despite the lack of long-lasting physical injury.

72. In the *Woods v. Vanouver* case, (Tab 16 of the BOA), this Court awarded the claimant $13,000 in general damages for wrongful arrest and excessive use of force. While the facts of the case are not necessarily on point, it does involve a similar degree of severity, and the claimant in the Woods case was found to have similar effects to those asserted by Ms. O'Shea. Mr. Woods was determined to have "ongoing sporadic pain", and "continuing anxiety about going downtown" as a result of the incident. In the *Woods* case however the claimant was not placed in a restraint device and was only held for four hours before being released.

73. In the case of *Bailargeon v. Clemons* (Tab 19 of the BOA), from 1996, the Court of Appeal upheld an award of $20,000 in general damages to a man who was arrested for intoxication and pushed by officers after being belligerent in his cell. The claimant in that case was injured when he struck the bed in the cell, and ultimately taken to hospital. The Court found the actions of the officers to be excessive force, and unjustified, but refrained from awarding aggravated or punitive damages. Accounting for inflation the award of $20,000 in 1996 would equate to roughly $28,000 in the present day.

74. In the case of *Pike v. RCMP*, (Tab 20 of the BOA), which again involved an intoxicated individual being arrested and taken to jail, the claimant was awarded $15,000 in general damages by the provincial court in Kamloops after one of the arresting officers used excessive force on him, breaking his arm. While the facts deviate significantly from the Claimant in the emphasis on long-term physical damage over pain and emotional suffering, it is another case of excessive force which suggests general damage awards in provincial court for abuse of authority in a jail setting should garner awards in the tens of thousands.

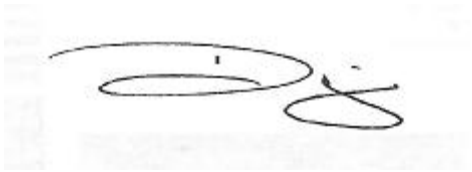
75. In the case of *Park v. Solicitor General*, (Tab 21 of the BOA), Judge Baird Ellen of the North Vancouver provincial court awarded $15,000 in general damages for a wrongful arrest which had significant and long-lasting effects on the psyche of the claimant. Judge Baird-Ellen noted:

> It is clear from the vigour with which Mr. Park has pursued his action that the effects on him are persistent, and that is a natural inference for the Court to draw. No doubt the incident has forever tainted for him the final portion of his mother ís life. Certainly he would suffer embarrassment at future attendances in the hospital. Again, these are reasonable inferences from the facts. As well it is reasonable to infer that he would have some lingering mistrust of the police.
>
> (*Park v. Solicitor General*, Tab 21 of the BOA, ¶26)

76. The Claimant contends that it is likewise a natural inference for the Court to draw in this case that this incident has had a significant effect on the Claimant, who has pursued it consistently over the 7 years since the events occurred. Given the above cases, and bearing in mind the fact that the only other decision involving the use of a hobble restraint device resulted in an award of $60,000, the Claimant submits that the appropriate award in general damages in this case lies in the range of $15,000 - $25,000.

77. The Claimant also acknowledges that in the majority of cases involving police misconduct damages are typically given out under the general damages heading. While the amount of cases where punitive/aggravated damages have been awarded due to police conduct are few and far between, the Claimant believes the conduct of the Defendants may qualify in this matter, especially if there is a finding of gross negligence or willful misconduct on the part of one or all of the officers. In the event of a punitive/aggravated damage award is made, the Claimant submits the appropriate amount would be $5,000.

All of which is respectfully submitted, this 7th day of July, 2015.



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