

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

SHELLY LEWIS

Plaintiff

and

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
(MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL),
ATTORNEY GENERAL OF CANADA, AND DUNCAN MCDONALD**

Defendants

RESPONSE TO CIVIL CLAIM

Filed by: the Minister of Public Safety and Solicitor General of British Columbia, the Attorney General of Canada, and Duncan McDonald (collectively, the “Defendants”).

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1—Defendants’ Response to Facts

1. The facts alleged in paragraphs 3 to 7 of Part I of the notice of civil claim (the “Claim”) are admitted.
2. The facts alleged in paragraphs 8 to 16 of Part I of the Claim are denied.
3. The facts alleged in paragraphs 1 and 17 of Part I of Claim are outside the knowledge of the Defendants.

Division 2—Defendants' Version of Facts

1. Owen Shepherd ("Cst. Shepherd") and the Defendant Duncan McDonald ("Cst. McDonald") were, at all material times, police officers and regular members of the Royal Canadian Mountain Police ("RCMP") posted at the Burns Lake RCMP detachment.
2. On December 6, 2020, a civilian called the Burns Lake RCMP to complain of an impaired male operating a snowmobile up and down Tchesinkut Lake Road and Vollan Road in Burns Lake. The complaint included an observation that the male had a large bottle of vodka.
3. At approximately 12:17 pm, Cst. Shepherd and Cst. McDonald (collectively, the "Attending Members") responded to the complaint and arrived on scene. Upon patrolling the area, the Attending Members located a snowmobile on the driveway of a residential property matching the description in the complaint, with fresh snowmobile tracks leading to it from the front lawn of the residential property.
4. Cst. Shepherd knocked on the front door of the residence, and a male matching the physical description in the complaint answered the door. The male exhibited multiple physical signs of intoxication, and was wearing wet winter gear.
5. Based on these observations, the Attending Members believed that the male operated a motor vehicle while impaired, and escorted the male from the residence to their police vehicles.
6. As the Attending Members escorted the male away, the Plaintiff appeared at the front door of the residence, demanding to know what the Attending Members were doing.
7. The Attending Members observed that the Plaintiff exhibited multiple physical signs of intoxication including: slurred speech, unsteady balance, glossy eyes, and difficulty forming sentences or understanding the Attending Members' responses.

8. The Plaintiff approached the Attending Members and continued yelling at them.
9. At one point, the Plaintiff asked what would happen if she were to back her vehicle into the police vehicle. When Cst. McDonald responded that the Plaintiff would be arrested for assault with a weapon, the Plaintiff returned toward her residence but remained outside, continuing to yell at the Attending Members.
10. When the Attending Members explained that they would process the snowmobile then have it towed, the Plaintiff stated that the snowmobile was hers and the police could not tow it.
11. Cst. Shepherd departed the scene to transport the male to the Burns Lake RCMP detachment, while Cst. McDonald remained on scene.
12. At approximately 1:27 pm, Cst. McDonald returned to his police vehicle to complete paperwork. While inside his police vehicle, Cst. McDonald observed the Plaintiff walk toward the snowmobile.
13. Cst. McDonald exited his police vehicle and began walking toward the snowmobile, while instructing the Plaintiff to back away from it.
14. Cst. McDonald observed the Plaintiff open the back compartment of the snowmobile, make eye contact with him, retrieve a large bottle of vodka from the compartment, and place the bottle inside her jacket. The Plaintiff then quickly walked away toward the residence.
15. Cst. McDonald shouted at the Plaintiff to stop or she would be placed under arrest. The Plaintiff failed to comply, and instead quickened her pace.
16. Cst. McDonald placed both hands on the Plaintiff's shoulders and pulled her toward him. Both the Plaintiff and Cst. McDonald then fell onto the snow-covered ground, with Cst. McDonald on his knees, beside the Plaintiff.
17. The Plaintiff, lying on her stomach, attempted to pull away from Cst. McDonald, and tucked her arms under her body. For personal safety purposes, Cst. McDonald

- lifted the Plaintiff's elbows off the ground, one at a time, to apply pressure and create momentary discomfort only until he was able to control the Plaintiff's arms and place her in handcuffs.
18. Cst. McDonald photographed and seized the large bottle of vodka, which was on the ground.
 19. At approximately 1:53 pm, Cst. McDonald arrested the Plaintiff for obstructing a peace officer, contrary to section 129 of the *Criminal Code of Canada*, and transported the Plaintiff to the Burns Lake RCMP Detachment in his police vehicle.
 20. During transport, the Plaintiff complained that Cst. McDonald had broken her arm. The Plaintiff further stated that Cst. McDonald needed to release her because she did not do anything wrong, since she was merely retrieving the spare key for the snowmobile so she could park it in the garage where it could not be towed.
 21. During this time, Cst. McDonald observed the Plaintiff to be able to use her left arm freely and without difficulty. The Plaintiff also changed her complaint several times, from stating that her elbow was broken, to stating that it was her shoulder instead.
 22. Cst. McDonald did not observe any deformations or other physical signs that the Plaintiff's arm was broken.
 23. At approximately 2:20 pm, Cst. McDonald arrived at the Burns Lake RCMP detachment and the Plaintiff was placed into custody. While in a jail cell and out of view from any other individuals in the detachment, a female jail guard supervised the Plaintiff and directed that she remove her underwire bra from under her clothing, since it constituted a safety hazard for both the Plaintiff and others given her prior conduct and statements.
 24. During her time in custody at the Burns Lake RCMP detachment, the Plaintiff was observed to freely move and use both her arms, and her arms exhibited no deformations, discolouration, or other physical signs of injury.

25. At approximately 5:55 pm, the Plaintiff was released from the Burns Lake RCMP detachment.

Division 3—Additional Facts

1. At all material times there was an agreement between the province of British Columbia and the government of Canada pursuant to section 14 of the *Police Act*, RSBC 1996, c 367, as amended (the “*Police Act*”), and section 20 of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, as amended (the “*RCMP Act*”) authorizing the RCMP to carry out the powers and duties of a provincial police force.
2. At all material times the Attending Members were provincial constables pursuant to section 14(2) of the *Police Act*.
3. At all times the Attending Members were acting in the course and scope of the execution of their duties as peace officers and members of the RCMP in accordance with the common law and sections 9 and 18 of the *RCMP Act*, which duties included the preservation of the peace, the prevention of crime, and the prevention and investigation of offences against the laws of Canada and of British Columbia and the apprehension of criminals and offenders and others who may be lawfully taken into custody.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendants consent to the granting of the relief sought in NONE of the paragraphs of Part 2 of the Claim.
2. The Defendants oppose the granting of the relief sought in ALL of the paragraphs of Part 2 of the Claim.
3. The Defendants take no position on the granting of the relief sought in NONE of the paragraphs of Part 2 of the Claim.

Part 3: LEGAL BASIS

Liability

1. The Defendants say that the Minister of Public Safety and Solicitor General of British Columbia (the “Minister”) is jointly and severally liable for torts committed by provincial constables in the performance of their duties within the Province of British Columbia, pursuant to section 11(1)(a) of the *Police Act*, section 29 of the *Interpretation Act*, RSBC 1996, c 238, and Order in Council 762/2015.
2. The Defendants plead and rely upon sections 11 and 21 of the *Police Act*, and say that no action for damages lies against the Defendants, since at all material times they were acting in the performance of their duties and in the exercise of their powers.
3. The Defendants deny that they committed any torts against the Plaintiff as alleged in the Notice of Civil Claim.
4. The Defendants say that at all times, in the course of their dealings with the Plaintiff, the Attending Members, other RCMP officers, and their agents used a reasonable amount of force as necessary.
5. The Defendants deny that Cst. McDonald, in using a reasonable amount of force necessary to carry out his duties, did so without any justification, when he was in fact stopping the Plaintiff from removing evidence from the scene.
6. The Defendants deny that the arrest was unlawful, as Cst. McDonald formed reasonable and probable grounds to arrest the Plaintiff for obstructing a peace officer, contrary to section 129 of the *Criminal Code*. As such, the plaintiff was lawfully held in the RCMP’s custody from the time of her arrest to her release.
7. The Defendants say that they met the requisite standard of care owed to the Plaintiff at all material times.

8. Further or in the alternative, if any of the Defendants actions fell below the requisite standard of care, which is not admitted but denied, the Defendants say that those actions did not cause, and were not proximate to, the Plaintiff's damages as alleged.
9. The Defendants deny that any of the Plaintiff's *Charter* rights, as alleged, were breached.
10. The Defendants say that, pursuant to sections 3 and 10 of the *Crown Liability and Proceedings Act*, R.S.C 1985, c C-50, the Attorney General of Canada is only liable for an act or omission by its employee, servant, or agent where that act or omission would have given rise to a cause of action for liability against that employee, servant, or agent. Because the acts or omissions of the Defendants do not give rise to a cause of action, therefore no action lies against the Attorney General of Canada.

Damages

11. The Defendants deny that the Plaintiff is entitled to damages in torts, negligence, under section 24(1) of the *Charter*, or at all.
12. The Defendants deny that the Defendants committed any action as alleged in the Claim, or otherwise, that was not justified in law, and the Defendants specifically deny that the Plaintiff suffered personal injury, loss, damage, or expense as alleged in the Claim, or at all, and put the Plaintiff to the strict proof thereof.
13. Further or in the alternative, the Defendants say that if the Plaintiff did suffer any of the injuries as set out, none of the Defendants intended to cause the injuries to the Plaintiff.
14. Further or in the alternative, the Defendants say that if the Plaintiff suffered any injury, loss, damage, or expense as alleged in the Claim, or at all, which is not admitted but denied, then any such injury, loss, damage, or expense was not caused by the alleged acts of the Defendants.

15. Further or in the alternative, if the Plaintiff suffered any injury, loss, damage, or expense as alleged in the Claim, which is not admitted but denied, the Defendants say that any such injury, loss, damage, or expense is attributable in whole or in part to previous and/or subsequent accidents, assault incidents, intervening acts or omissions of others involving the Plaintiff, or congenital defects and/or pre-existing conditions, and further the acts alleged of the Defendants in the Claim did not aggravate any pre-existing injuries.
16. Further or in the alternative, and in response to the whole of the Claim, if the Plaintiff suffered any injury, loss, damage, or expense as alleged in the notice of civil claim, which is not admitted but denied, then such injury, loss, damage, or expense could have been prevented or the severity thereof reduced, if the Plaintiff had not been negligent in respect to her own actions and safety, and the Defendants plead provisions of the *Negligence Act*, RSBC 1996, c 333.
17. Particulars of the Plaintiff's negligence with respect to her own actions and safety include obstructing Cst. McDonald from fulfilling his lawful duties, and failing to comply with Cst. McDonald's orders.
18. Further or in the alternative, and in response to the whole of the Claim, if the Plaintiff suffered any injury, loss, damage, or expense as alleged in the Claim, which is not admitted but denied, then the Plaintiff could, by the exercise of due diligence, have reduced the amount of any injury, loss, damage, or expense, and the Defendants say that the Plaintiff failed to mitigate her damages.
19. If any of the Plaintiff's *Charter* rights, as alleged, were breached, the Defendants say that none of the breaches were of such a nature as to warrant any remedies under section 24(1) of the *Charter*.
20. The Defendants submit that the Plaintiff's action should be dismissed with costs.
21. The Defendants plead and rely on the following legislation, as amended:
 - i. *Police Act*, RSBC 1996, c 367
 - ii. *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, as amended

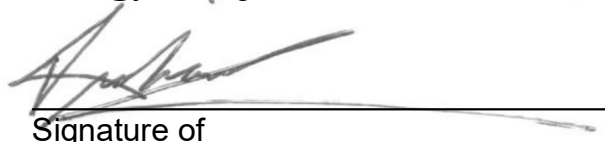
- iii. *Negligence Act*, RSBC 1996, c 333 and amendments thereto;
- iv. *Crown Liability and Proceedings Act*, RSC 1985, c C-50;
- v. *Interpretation Act*, RSBC 1996, c 238
- vi. *Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11;

Defendants' address for service: Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Attention: Richard Li

Fax number address for service (if any): (604) 666-4399

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Dated: October 7, 2021



Signature of

defendant lawyer for defendants

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
British Columbia Regional Office
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Per: Richard Li

Counsel for the Defendants

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.