IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Ribeiro v. Vancouver (City) et al.,***
2005 BCSC 828

Date: 20050606
Docket: C992466
Registry: Vancouver

Between:

Jose Augusto Ribeiro

Plaintiff

And

The City of Vancouver, Police Sergeant Lacon, Police Sergeant Boutin, Police Constable Dimock, Police Constable Bezanson, Police Constable Gibson, Police Constable Chu, Police Constable Stewart, Police Constable Scally, Police Constable Jackson, Police Constable Alfred, Police Inspector Greer and Police Acting Staff Sergeant S. Miller

Defendants

Before: The Honourable Madam Justice Kirkpatrick

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:	F.G. Potts C.D. Martin
Counsel for the Defendants:	B.S. Parkin T. Zworski
Date and Place of Hearing:	May 18 and 19, 2005 Vancouver, B.C.

[1] Mr. Ribeiro applies to amend his statement of claim filed on July 24, 2001 and his reply to the amended statement of defence filed on February 3, 2004.

[2] The trial is scheduled to begin before a jury on September 19, 2005 and is set for 30 days.

[3] The defendants do not oppose certain of the proposed amendments. However, as to the remainder of the proposed amendments, the defendants argue that they either:

(a) do not disclose a "proper" cause of action;

(b) are statute barred; or

(c) are unnecessary, embarrassing and prejudicial.

[4] The general circumstances of this case were described in my Reasons for Judgment (reported at 2005 BCSC 395) which dealt with the application by the defendant, the City of Vancouver (the "City"), to strike out portions of Mr. Ribeiro's statement of claim pursuant to Rule 19(24)(a). The City's application was allowed because

I found that Mr. Ribeiro could not establish that the City or the Vancouver Police Board owed him an independent duty of care. An uncontentious finding in that application was that the City is jointly and severally liable for a tort committed by a member of the Vancouver Police Department (the "VPD"), pursuant to s. 20 of the ***Police Act***, R.S.B.C. 1996, c. 367 (the "***Police Act***").

CHRONOLOGY

[5] On December 17, 1998, Mr. Ribeiro was shot by a member of the VPD. Mr. Ribeiro was in hospital recovering from his injuries from December 17, 1998 until February 15, 1999.

[6] On February 4, 1999, Mr. Ribeiro was charged under the ***Criminal Code*** with three counts of aggravated assault.

[7] On April 1, 1999, Mr. Ribeiro's counsel notified the City of Mr. Ribeiro's position that a cause of action arose out of the December 17, 1998 incident. The letter does not mention an incident that occurred on December 15, 1998, in which it is alleged that the police entered Mr. Ribeiro's home without a warrant, searched the home, including his locked bedroom, and seized and disposed of certain of his property.

[8] Mr. Ribeiro filed a writ of summons on May 14, 1999. The endorsement reads as follows:

> On or about December 17, 1998 at 5465 Dundee Street, Vancouver, British Columbia, the Defendants wrongfully assaulted and beat the Plaintiff, wrongfully arrested and falsely imprisoned him. By reason of the matters aforesaid, the Plaintiff sustained personal injuries and has suffered loss, damage and expense. In addition, the Defendants caused extensive damage to the Plaintiff's property. The Plaintiff claims against the Defendants for trespass and trespass to chattels. The City of Vancouver is vicariously liable for the acts of the personal Defendants and the Plaintiff pleads and relies on s. 20 of the Police Act. Further, and in the alternative, the Plaintiff says that the actions of the personal Defendants were grossly negligent, dishonest, malicious or wilful misconduct.

[9] A preliminary inquiry in respect of the criminal charges against Mr. Ribeiro was conducted over four days between December 14, 1999 and January 21, 2000. The preliminary inquiry judge noted in his reasons:

> This is an extraordinary case. Perhaps the police meant well, but there is reason to think that the accused's delusions could not have been made more real and substantial had they set out to work him into a frenzy. There appears to have been a serious failure of communication between the police on the one hand and professionals in the field of mental health on the other, which had it not happened might have avoided the near disastrous events of that afternoon.
>
> I think that the decision to continue with the prosecution of such a case must involve the most careful consideration. Nevertheless, I am satisfied that the evidence needed to take these charges to trial is present and so I order that the accused stand trial on the three counts with which he is now charged.

The Crown entered a stay of proceedings on April 5, 2000.

[10] On May 5, 2000, Mr. Ribeiro served the writ of summons. The defendants entered their appearance on May 9, 2000.

[11] On June 25, 2001, Mr. Ribeiro's counsel advised the City that Mr. Ribeiro intended to proceed with his action and provided a notice of intention to proceed, as well as a copy of the statement of claim to be filed. In his letter to the City, Mr. Ribeiro's counsel stated:

> We have also recommended, and are instructed to, seek damages as against Inspector Greer, Sgt. Miller, Sgt. Boutin, Sgt. Lacon, and Constables Dimock and Jackson for, inter alia, wilful misconduct and/or gross negligence. We are also instructed to seek punitive damages as against them, as well as against the City, in respect of inadequate policies and procedures and funding relating to Vancouver Police Department and ERT dealings with mentally ill persons.

[12] The statement of claim was filed on July 24, 2001. The statement of defence was filed on August 9, 2001.

[13] The litigation was stalled on August 27, 2001, when the defendants alleged that Mr. Ribeiro's counsel was in a conflict of interest in that either he or his firm were also solicitor of record for the City and a member of the VPD in

other actions. Mr. Justice Fraser held, on January 7, 2002, that counsel for Mr. Ribeiro was restrained from acting. Almost a year later, on December 19, 2002, the Court of Appeal overturned Mr. Justice Fraser's decision. Leave to appeal to the Supreme Court of Canada was refused on September 11, 2003.

[14] Shortly thereafter, on September 17, 2003, Mr. Ribeiro's counsel notified the City that Mr. Ribeiro intended to proceed with the litigation "with all available dispatch." He notified the City's solicitors of Mr. Ribeiro's intention to file a jury notice and requested cooperation in obtaining an expedited trial date.

[15] From September 2003 to March 2005, there were at least 67 steps taken in respect of various procedural matters (including further applications by the City to the Court of Appeal for leave to appeal an order of Mr. Justice Masuhara concerning document production), not including the two days' of hearing in respect of the City's Rule 19(24) application. That application was served on September 21, 2004, by which time the City had known of Mr. Ribeiro's claims to which the City had taken objection for more than three years.

[16] I was appointed the case management judge of the action on October 25, 2004. Various orders were made at case management conferences to permit the trial to proceed on September 19, 2005.

[17] The City's Rule 19(24) application was heard on February 8 and 9, 2005. I handed down Reasons on March 18, 2005 and struck out 11 paragraphs of the statement of claim as not disclosing a cause of action against the City or, potentially, the Vancouver Police Board. At a further case management conference held on March 24, 2005, Mr. Ribeiro's counsel advised that Mr. Ribeiro intended to amend his statement of claim. He delivered the amendments to the City on April 13, 2005. A further delineated amended statement of claim was delivered to the City on May 5, 2005.

ISSUE

[18] The only question before me is whether I should permit the proposed amendments to the statement of claim.

THE LAW

[19] Rule 24(1) provides that:

> A party may amend an originating process or pleading issued or filed by the party at any time with leave of the court, and, subject to Rules 15 (5) and 31 (5)
>
> (a) once without leave of the court, at any time before delivery of the notice of trial or hearing, and
>
> (b) at any time with the written consent of all the parties.

[20] In ***McNaughton v. Baker*** (1988), 25 B.C.L.R. (2d) 17 (C.A.), the Court of Appeal held that it is not open to the court to consider evidence in support of a pleading. The Court confirmed that the function of pleading is to outline the claim or defence which is of course not to be confused with the purpose of trial, namely whether, on the evidence, the claim or defence is made out. At p. 25, the Court held:

> As a general proposition, a party should not be required to adduce evidence in support of a pleading before trial. ("Trial" includes, of course, a proceeding under Rule 18A). It is sufficient that his pleading discloses reasonable cause of action or defence. The courts take a liberal approach to pleadings. Before the courts will strike out a pleading or refuse an amendment on the ground that it discloses no reasonable cause of action or defence the case must be perfectly clear. In *Minnes v. Minnes, supra*, it was stated that the power to strike out a pleading on the ground that it discloses no reasonable cause of action "should be exercised only where the case is absolutely beyond doubt." This view is supported by the decisions in *Pilkington Glass Ltd. v. Burnaby School District, No. 41 et al.* (1961) 36 W.W.R. 34 (B.C.S.C.); *Masse et al. v. N. Hoolsema & Sons Ltd. et al.* (1977), 2 B.C.L.R. 345 (B.C.S.C.); and *Alcan Smelters and Chemical Ltd. et al. v. Canadian Association of Smelter and Allied Workers, Local No. 1 et al. (No. 1)* (1977), 3 B.C.L.R. 163 (B.C.S.C.).

[21] Similarly, in ***Langret Investments S.A. v. McDonnell*** (1966), 21 B.C.L.R. (3d) 145 (C.A.), Rowles J.A. made the following observations at ¶ 34:

> Rule 24(1) of the Rules of Court in British Columbia allows a party to amend an originating process or pleading. Amendments are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the civil rules which is to ensure the just, speedy and inexpensive determination of every proceeding on the merits. See McLachlin and Taylor, British Columbia Practice (2nd Ed.) pp. 24-1 to 24-2-10, and the decision of this Court in *Chavez v. Sundance Cruises Corp.* (1993), 15 C.P.C. (3d) 305, 309-10.

In summary, therefore, the court should generally allow amendments unless it is clear that no reasonable cause of action or defence is disclosed, or the proposed amendment would be useless, or allowing the amendment would result in prejudice to the opposing party.

[22] An application to amend pleadings is routinely opposed, as here, on the grounds set out in Rule 19(24):

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[23] Of course, there can be no formal application to strike the proposed amended statement of claim under this Rule. Nevertheless, I will address each of the defendants' concerns in respect of the statement of claim notwithstanding that the defendants' opposition is effectively grounded in Rule 19(24).

PROPOSED AMENDMENTS TO THE STATEMENT OF CLAIM AND THE REPLY

- **Paragraphs 2, 62 and 65**

[24] The proposed amendment to paragraph 2 reads:

> The City is joined as a Defendant in this action pursuant to Section 20 of the Police Act, and the Plaintiff says that the City is jointly and severally liable for all such damages as may be awarded as against the other Defendants herein, including but not restricted to, aggravated and/or punitive damages.

[25] The defendants argue that paragraph 2 pleads an incorrect conclusion of law and does not plead any material facts to support a cause of action.

[26] Under s. 20 of the ***Police Act***, the City is jointly and severally liable for the torts of the police officers if the tort was committed in the performance of his or her duties. The pleading, if it is to stand, should read: "the City is jointly and severally liable for the torts of the defendant police officers".

[27] The City conceded in argument that if the torts were committed by the police officers in the scope of their duties, then the City would be liable to pay any damages awarded in relation to those torts, including aggravated and punitive damages.

[28] I conclude that the paragraph, if amended in the manner I have suggested, would not offend the principles of pleading. As a matter of law, the damages that Mr. Ribeiro claims would flow from s. 20 of the ***Police Act*** if the police officers are found to have committed a tort while acting within the scope of their duties. The pleadings, taken as a whole, contain sufficient material facts to support the conclusion stated.

[29] The defendants oppose the amendments to paragraphs 62 and 65 on the same grounds as paragraph 2. The impugned paragraphs read:

> 62. Further, the Plaintiff says that the Defendants herein were, at all material times, engaged in a joint enterprise and insofar as one or some of the Defendants committed a tort, the Defendants and each of them were joint tort feasors and, in consequence, the Plaintiff says that the Defendants herein are jointly and severally liable for all such damages, including aggrevated [*sic*] damages, as this Honourable Court may award.
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> …
>
> 65. The Plaintiff pleads and relies upon the provisions of the Police Act including Section 20 and the doctrine of vicarious liability and says that by reason thereof, the City is liable for all such damages, including punitive and/or aggravated damages as may be awarded as against the Defendants or any of them.

[30] In respect of paragraph 62, Mr. Ribeiro relies on the principle that where two or more persons agree on common action, and in the course of or to further that action one of them commits a tort, that tort will be attributed to the others: ***Insurance Corp. of British Columbia v. Vancouver (City)*** (1997), 38 B.C.L.R. (3d) 213 (S.C.), aff'd (2000), 73 B.C.L.R. (3d) 1 (C.A.).

[31] I conclude that paragraph 62 is not objectionable. Indeed, it addresses the City's argument that it is only liable for the torts of the police acting within the scope of their duties. It is possible that, at trial, it will be found that the police officers were not acting within the scope of their duties and, if so, the City may not be jointly and severally liable for the individual officers' torts. However, there may nevertheless be a finding that certain officers were engaged in a joint enterprise outside the scope of their duties, in which case the individual officers may be personally liable for torts committed by them. This pleading addresses the possibility of such a finding.

[32] Paragraph 65 cannot stand because it pleads vicarious liability. The City's liability is statutory, not vicarious. The amendment in this paragraph is therefore not allowed.

- **Paragraph 47**

[33] Paragraph 47 reads:

> 47. The Plaintiff says that had the Defendants and the VPD adequately and properly investigated the Incident, and fully and fairly communicated the true state of affairs to the judicial officials who issued the Search Warrants and to Crown Counsel, no Search Warrants would have been issued and the Charges would not have been authorized.

[34] The defendants object to this amendment essentially on the basis that the VPD (Vancouver Police Department) is not a legal entity.

[35] Mr. Ribeiro's counsel is prepared to substitute "the VPD" with "and other unknown members of the VPD". That is a satisfactory substitution, in which case the pleading may stand as amended.

- **Paragraphs 20, 29, and 38**

[36] These impugned paragraphs read as follows:

> 20. Further, or in the alternative, the Plaintiff repeats and relies upon allegations contained in paragraphs 11 to 19 herein and says that the Defendant, Sgt. Boutin, owed a duty to the Plaintiff to adequately supervise the actions of the Defendants, Bates, Cook, and Duggan and to ensure that their actions were lawful, and the Plaintiff says that in breach of that duty, and negligently, he failed to do so and the Plaintiff has suffered damages thereby.
>
> …
>
> 29. Further, the Plaintiff repeats and relies upon the allegations contained in paragraphs 22 to 28 herein and says that the Defendants, Greer, Boutin, Miller, and Lacon, owed a duty to the Plaintiff to reasonably take care for the Plaintiff's safety and to adequately supervise the actions of each Defendant subordinate to them and to ensure that the actions of each such subordinate were lawful, and the Plaintiff says that in breach of the duty, and negligently, the Defendants, Greer, Boutin, Miller, and Lacon, failed to do so and the Plaintiff suffered damages thereby.

…

38. The Plaintiff says that in breach of these duties, and contrary to the Police Act Regulations and the VPD Regulations and Procedures Manual, and negligently, the Defendants, Greer, Boutin, Miller and Lacon, failed to take reasonable care for the Plaintiff's safety and failed to adequately supervise the Defendants subordinate to them, and in particular:

a) had no effective chain of command and instead delegated various functions to various persons such that nobody was in charge and nobody ensured that effective and proper steps were taken to protect the well-being and safety of the Plaintiff;

b) failed to distinguish between mental illness and criminal activity, and failed or refused to consult with the Medical Specialists on an ongoing basis, or at all;

c) failed to call in Car 87 personnel and failed to take proper and/or inadequate steps to obtain details of recent Car 87 involvement with the Plaintiff;

d) failed to establish and communicate with each other and the other Defendants as to the reasons for their involvement and failed to advise the Plaintiff of the reasons for the Defendants' armed invasion of his home and the intended arrest;

e) directed, caused, and/or allowed the deliberate destruction of the Plaintiff's property and continual escalation of the level of violence in an attempt to "communicate" with the Plaintiff when they knew or ought to have known that such actions were wholly uncalled for and, given the Plaintiff's mental state, which state the Defendants and each of them were well aware of, and the Plaintiff's defensive posture, would frighten and provoke the Plaintiff into a frenzy and thereby enflame the situation;

f) directed, caused, and/or allowed the use of a hooligan tool, a battering ram, a sniper rifle, Arwen 37 guns, chemical agents, and MP5 machine guns when they knew, or ought to have known, that had they consulted with the Medical Specialists no force would have been required, or alternatively that substantially less force, of a non-life threatening nature, would have been wholly adequate in all the circumstances.

[37] The defendants contend that these paragraphs constitute allegations of a new cause of action of negligent supervision by superior officers of subordinate officers in relation to the events of December 15 and 17, 1998. The defendants say that the allegations are bound to fail because there is no tort of negligent supervision available to Mr. Ribeiro in the context alleged.

[38] I disagree. Mr. Ribeiro's claim sounds in negligence. The allegations contained in paragraphs 20, 29 and 38 are an amplification and particularization of the manner in which the defendants were allegedly negligent in regard to Mr. Ribeiro. Mr. Ribeiro is entitled to allege in his statement of claim alternative bases upon which the same factual circumstances raised in the statement of claim could be established: ***Rotvold v. Rocky Mountain Diesel Ltd.*** (1994), 100 B.C.L.R. (2d) 391 (S.C.) at ¶ 19.

[39] The defendants further contend that, by means of this pleading, Mr. Ribeiro is attempting to establish vicarious liability on the part of senior officers for the acts of subordinate officers. However, there is no reference to vicarious liability in the proposed paragraphs. If there were, it would be a novel claim, but not one that would necessarily be bound to fail. I read the pleading as merely a particularization of the negligence action and, as such, it is inoffensive.

[40] The defendants go further and say that these paragraphs are "embarrassing" in the sense that the allegations are irrelevant to Mr. Ribeiro's claims and to allow them to stand would involve useless expense and would prejudice the trial of the action, relying on ***Keddie v. Dumas Hotels Ltd. (c.o.b. Cariboo Trail Hotel)*** (1985), 62 B.C.L.R. 145 (C.A.).

[41] "Embarrassing" was defined in ***Keddie*** by reference to ***Mahoney v. Coca Cola Ltd.***, unreported (February 21, 1967), No. 1612/64 (B.C.S.C.) and ***Maddison v. Donald H. Bain, Ltd.*** (1928), 39 B.C.R. 460 (C.A.), where the courts adopted the definition from ***Mayor of City of London v. Herner*** (1914) 111 L.T. 512 at 514:

... ["embarrassing" means] that the allegations are so irrelevant that to allow them to stand would

> involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues. In order that allegations should be struck out from a defence upon that ground ... their irrelevancy must be quite clear and, so to speak, apparent at the first glance. It is not enough that on considerable argument it may appear that they do not afford a defence.

[42] Having regard to that definition of "embarrassing", I cannot accede to the defendants' argument. I do not see the proposed amendments as obviously bound to fail or as irrelevant to Mr. Ribeiro's claim that the police were negligent in their conduct towards him.

[43] Lastly, the defendants say that the allegations are out of time. In particular, the defendants say that the events of December 15, 1998 (referred to in paragraph 20) were not referred to in the writ of summons and cannot now form a ground of complaint.

[44] Once again, I must disagree. The defendants cannot sincerely contend that they were unaware of the events of December 15, 1998, for they were active participants. Furthermore, the events of December 15 are integrally important to Mr. Ribeiro's overall allegation that the police knew or ought to have known of his paranoid susceptibilities and that their actions of December 15 would or could exacerbate his paranoia. The defendants were generally put on notice on April 1, 1999 as to Mr. Ribeiro's claim to a cause of action. The December 15 events are inextricably a part of the December 17 events to the point that the events of the two days can be seen as one event. In addition, the original statement of claim makes reference to the events of December 15 at paragraphs 10-19. The defendants therefore cannot claim to be taken by surprise by these amendments.

[45] Nor am I convinced that the defence of these allegations will unduly lengthen or delay the trial. As I see the amendments, they are a particularization of the defendants' alleged negligence and not a claim of vicarious liability against the superior officers. As such, I doubt the need for expert evidence as to the appropriate standard to be met by superior officers in the supervision of subordinate officers. The question will be one of fact: did the senior officers fail to supervise the subordinate officers and, if so, was such failure to supervise a causal factor in the shooting of Mr. Ribeiro or the improper seizure of his property.

[46] It follows that I allow the amendments to paragraphs 20, 29 and 38.

- **Paragraphs 56 through 60**

[47] These paragraphs, in their previous incarnation, were the subject of the defendants' successful application to strike under Rule 19(24).

[48] The defendants oppose all of the amendments to these paragraphs on five grounds:

(a) if there was no independent duty of care owed by the City to Mr. Ribeiro then, *a fortiori*, there can be no duty owed by the individual officers to Mr. Ribeiro;

(b) the paragraphs contain evidence;

(c) the pleading is embarrassing in that it is irrelevant, would entail useless expense, and would prejudice the trial;

(d) the allegations constitute totally new causes of action and are consequently out of time; and

(e) allowing the amendments would create actual prejudice to the defendants by requiring them to conduct further discovery; to locate the witnesses who trained the officers in question; and to obtain expert evidence on training issues.

[49] It is necessary to set out the impugned paragraphs in full in order to appreciate the defendants' concerns:

> 56. Further, or in the alternative, the Plaintiff says that the Defendant members of the ERT, and each of them, were inadequately or insufficiently trained to competently and safely perform their duties in dealings with mentally ill persons and that the said Defendants knew or ought to have known that their training was deficient and dangerous in respect of ERT interaction with such persons and, in particular, the Plaintiff says the said Defendants knew or ought to have known that each:

a) lacked the necessary training to appreciate that ERT procedures for dealing with violent criminal individuals were not suitable or appropriate for dealing with mentally ill persons; **[OP 58(e)(i)]**

b) had not been trained or were inadequately trained in the use of available non-lethal resources for the application of force in respect of mentally ill persons; **[OP 59(d)(iii)]**;

c) had not been trained or were inadequately trained to maintain clear and cogent written guidelines as to the appropriate chain of command and to refrain from the gradual escalation of violence in situations involving mentally ill persons, and/or to refrain from the use of other police tactics suitable for individuals not suffering from any form of mental illness, but wholly unsuitable for dealing with mentally ill persons; **[OP 58(e)(iv)]**

d) had not been trained or were inadequately trained to utilize the expertise of Medical Specialists in circumstances where such expertise was readily available to members of the ERT;

e) had not been trained or were inadequately trained to utilize Car 87 or like Unit intervention in all situations involving ERT interaction with the mentally ill. **[OP 59(d)(vi)]**

57. Further, the Plaintiff says that the said Defendants knew or ought to have known that the techniques and procedures employed by them in their dealings with the Plaintiff were defective and inadequate and dangerous, in that in the years preceding the Incident, and subsequent to it, certain of the Defendants herein and other members of the VPD and ERT have shot and killed, and grievously wounded, other mentally ill citizens in circumstances similar to the Incident, the full particulars of which being presently unknown to the Plaintiff, but including:

a) the death of Brian Robert Shaw who was shot and killed on or about August 20, 1991 by a member of the VPD;

b) the death of William Hewer who was shot and killed on or about April 9, 1994 by a member of the VPD;

c) the death of Charles Albert Wilson on or about October 8, 1996, who was shot and killed by the Defendant, Sgt. Lacon, in company of the Defendant, Constable Dimock;

d) the death of Thomas Alcorn, who was shot and killed on or about December 3, 1997 by a member of the VPD;

e) the death of Sai Ming Wai, who was shot and killed on or about December 14, 1999, outside of the mental care facility where he resided, by a member of the VPD;

f) the wounding, on or about April 2000, by the Defendant, Gibson, of a Mr. Fernandez; which latter individual suffered from mental illness. **[OP 61]**

58. Further, the Plaintiff says that the Defendants knew, or ought to have known that the VPD and in particular, the ERT, have been repeatedly warned that their existing equipment and training, and their policies and procedures, in respect of dealing with mentally ill persons, were and are wholly defective, inadequate, and dangerous in that there have been Coroner's Inquests recommending changes, substantial media comment and news coverage to that effect, and representations to the VPD from various mental health lobby groups that the existing practices were unsafe and that change was and is required, which recommendations, media comment, and representations have been wholly ignored, or alternatively, not adequately implemented by the Defendants herein in connection with the Incident. **[OP 62]**

59. The Plaintiff says that the full particulars of such Coroner's Recommendations, media coverage, and warnings and representations from mental health groups, are not presently known to him, but include:

a) media coverage and comment in respect of the deaths and injury of the individuals identified in paragraph 57 herein;

b) Coroner's Recommendations in respect of the deaths of Brian Robert Shaw, William Hewer, Charles Albert Wilson, Thomas Alcorn, and Sai Ming Wai;

c) Warnings and Recommendations from the Coast Foundation, the Patient Empowerment Society, the Canadian Mental Health Society, and the Provincial Mental Health Advocate. **[OP 63]**

60. The Plaintiff says that had the Defendants herein taken any reasonable steps to heed such warnings and/or implement such changes as were recommended, his home would not have been invaded and damaged, he would not have been shot and injured, and he would not have faced criminal charges but instead would have received medical treatment, and the Plaintiff says that he has suffered damage and loss thereby. **[OP 64]**

[50] The essential allegation revealed in these impugned paragraphs is that the police officers knew, or should have known, that they were inadequately trained to deal with mentally disturbed people such as Mr. Ribeiro.

[51] The defendants describe the pleading as tortuous – it suggests that the police officers were so inadequately trained that they did not know that they were inadequately trained.

[52] I turn to deal with each of the impugned paragraphs.

Paragraph 56

[53] Mr. Ribeiro argues that this paragraph is merely a refinement of the previously struck paragraphs of the statement of claim that alleged that the City owed a duty of care to ensure that its police officers were adequately trained to deal with mentally ill persons. In essence, Mr. Ribeiro argues that the allegation is removed from the general (the City) to the specific (the police officers).

[54] I disagree. By means of this pleading, Mr. Ribeiro is clearly attempting to litigate the issue of the adequacy of police training. However, the liability of the police officers rests not on their training, but rather upon whether their actions in respect of Mr. Ribeiro were unlawful or negligent. Whether the police officers were inadequately trained is irrelevant.

[55] Mr. Ribeiro contends that the defendants, in their own pleading, have raised the issue of the adequacy of police training, thus enabling Mr. Ribeiro to challenge that averment.

[56] Paragraph 16 of the statement of defence reads, in part:

> In further answer to the whole of the statement of claim and in particular, paragraphs 24, 25, 29, 30, 31, 32, 33 and 35, the Defendants state that if the Defendant police officers are guilty of the acts complained of, which is denied, then such acts were consistent with commonly applied police policies and procedures and were done in necessary self-defence and to prevent possible grievous bodily injury at the hands of the Plaintiff and the Defendant police officers used no more force than was reasonably necessary in the circumstances.

[57] Although I agree with Mr. Ribeiro's submission that that pleading puts in issue police policies and procedures as a component of the requisite standard of care, I do not agree that it puts in issue the matters raised in the proposed paragraphs 56 through 60.

[58] I accept the defendants' submission that the pleading in paragraph 56 is really an attack on the resources available to the emergency response team (the "ERT"). As such, it is essentially the same pleading that I ordered struck under the defendants' earlier Rule 19(24) application. The amended pleading cannot stand.

[59] In making this finding, I want to emphasize that this does not preclude Mr. Ribeiro from attacking the police officers' conduct as failing to meet the requisite standard of care. That exercise will undoubtedly include an examination of the policies and procedures that governed the police officers.

Paragraph 57

[60] The defendants characterize the proposed amendment in paragraph 57 as a blatant attempt to sidestep the result of my earlier Rule 19(24) ruling. They further say that two of the incidents referred to post-date the incidents involving Mr. Ribeiro and could not therefore be relevant to the defendants' state of knowledge and, in any event, are so dissimilar to the incidents at bar that they are irrelevant.

[61] Mr. Ribeiro says that the pleading is necessary to establish negligence and punitive damages. He says that the police officers knew or ought to have known that they were inadequately trained and the fact that, subsequent to the incident involving Mr. Ribeiro, the police killed or wounded others is pertinent to whether the police conduct is deserving of punishment through an award of punitive damages.

[62] The defendants further say that the facts alleged in paragraph 57 are prejudicial; that the police officers could not possibly be liable at law for failing to appreciate that their techniques and procedures were inadequate or dangerous; that the police officers could not possibly be held liable for the failure of the VPD to heed warnings from coroners' inquests; and that the allegations in paragraphs 57 are unnecessary.

[63] There can be no doubt that Mr. Ribeiro's aim in this pleading is to support his claim for punitive damages. While Mr. Ribeiro's objective is legitimate, I conclude that the pleading in paragraph 57 is unnecessary to achieve this purpose and would, if allowed to stand, lead to a 'roving commission' within the trial as to the allegation that the police have historically subjected mentally ill persons to abuse. That would divert the jury from its real task: the scrutiny of the defendant police officers' conduct on the dates in question and the determination of whether their conduct was negligent or unlawful. If the jury accepts that some or all of the defendant police officers acted in a high-handed or callous manner, it is open to the jury to award punitive damages as a means of punishing the police officers and deterring such conduct in the future.

[64] Furthermore, I accept that if I were to allow this amendment, it would require an analysis of each of the incidents alleged in sub-paragraphs (a) through (f). That would require the calling of evidence dating back to 1991. Conceivably, it would entail an examination of the requisite standard of care at the time of each of the alleged incidents and an analysis of whether the alleged incidents are sufficiently similar to the incidents involving Mr. Ribeiro to warrant consideration in relation to the issue of punitive damages.

[65] All of this indicates that this amendment is not only unnecessary, it would also create expense and delay contrary to Rule 1(5), which aims "to secure the just, speedy and inexpensive determination of every proceeding on its merits." The merits of Mr. Ribeiro's claim can be advanced without the cumbersome allegations in paragraph 57. I therefore refuse this amendment.

Paragraphs 58 through 60

[66] The pleading in these paragraphs elaborates on the allegations contained in paragraphs 56 and 57. As such, and for the same reasons that I refuse those amendments, I also refuse the amendments in paragraphs 58 through 60.

- **Paragraph 61**

[67] This paragraph reads:

> 61. Further, or in the alternative, the Plaintiff says that given the number of deaths and woundings of mentally ill persons by members of the VPD and/or ERT, and given the aforesaid warnings and recommendations, the Defendants, Greer, Miller, Lacon, and Boutin, had a duty to take care for the Plaintiff's safety and to properly monitor and control the members of the ERT and prevent injury to the Plaintiff and, in breach of such duty, the said Defendants refused and/or neglected and/or failed to do so and the Plaintiff has suffered loss and damage thereby.

[68] Given my conclusions in respect of paragraphs 20, 29 and 38 and in respect of paragraphs 56 through 60, this amendment could only stand if the paragraph were edited to omit the passage which references "the number of deaths" and "the warnings and recommendations". This would render the paragraph redundant.

[69] I therefore disallow the amendment in paragraph 61.

- **Paragraph 64**

[70] This paragraph reads:

> 64. Further, the Plaintiff says that notwithstanding the injuries to the Plaintiff, the Defendant members of the ERT were each given official congratulations for the professionalism by the VPD and the Defendants, Lacon, Dimock, Jackson, and Scally, were officially commended for their bravery by the VPD and the Plaintiff says that by reason of such congratulations and commendations their conduct has been ratified and approved of by their employer.

[71] The defendants oppose this amendment on the following grounds: it does not disclose a proper cause of action; the VPD is not a legal entity; the police officers' employer is the Vancouver Police Board which is not a party to the action; the person who commended the police officers was the Chief Constable; and it is not necessary to establish ratification because, if the police officers' acts constitute torts, then the City is liable for such torts under s. 20 of the ***Police Act***.

[72] I disagree. It is not necessary that the paragraph disclose a cause of action in and of itself. The paragraph merely states an allegation of fact. That fact may conceivably bear on the issue of punitive damages, assuming that the jury finds that the police officers' conduct was not worthy of commendation but rather condemnation. I do not read the paragraph as alleging vicarious liability. Mr. Ribeiro's burden will be to prove the facts alleged. The source of the commendation, if made, is of less significance than the fact that it was made.

[73] I therefore allow the amendment in paragraph 64.

- **Amendment to the Reply to the Amended Statement of Defence**

[74] The proposed amendment is as follows:

> 3. In further answer to paragraph 11(i) of the Statement of Defence, the Plaintiff denies that the Defendants utilized commonly applied police policies and procedures, or alternatively, if they did, which is not admitted but denied, the Plaintiff repeats and relies upon paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 38 of the Amended Statement of Claim and says that the Defendants knew, or ought to have known, that such procedures were wholly unsuitable for ERT interaction with mentally ill persons and/or in the circumstances of the incident.

[75] The defendants did not address this amendment. Given my conclusions in respect of the amendments that I have allowed, I would also allow this amendment to the reply to the amended statement of defence.

[76] Mr. Ribeiro's counsel noted that, pursuant to my decision on the earlier Rule 19(24) application, both paragraphs 2 and 4 of the reply should be struck.

SUMMARY

[77] Subject to certain changes noted in these Reasons, I allow the amendments to the statement of claim in paragraphs 2, 29, 30, 38, 47, 62 and 64 and paragraph 3 of the reply.

[78] I disallow the amendments proposed in paragraphs 56, 57, 58, 59, 60, 61 and 65.

[79] The defendants, if so advised, have leave to amend their amended statement of defence. Any amendments must be filed within 14 days of receipt of the amended statement of claim herein allowed.

[80] The parties have leave to re-open their examinations for discovery, which are to be limited to the issues raised by the amendments.

[81] In the event that any of the proposed amendments were granted, the defendants sought leave to apply under Rule 18A for summary dismissal of the new claims against them. I am not disposed to granting such leave. First, the amendments as allowed do not constitute new claims. Second, I do not consider that the issues raised in the amended paragraphs are sufficiently discrete such as to warrant determination under Rule 18A. Third, the trial is scheduled to commence in less than four months. I think that counsels' energies would be better spent on trial preparation than on a summary trial that is unlikely to be appropriate for Rule 18A disposition and which will not save trial time and expense.

[82] Given the divided success, I conclude that each party should bear their own costs of the application.

"P.A. Kirkpatrick, J."
The Honourable Madam Justice P.A. Kirkpatrick