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#### Citation Details

Efrat Arbel, "Devalued Liberty and Undue Deference: The Tort of False Imprisonment and the Law of Solitary Confinement" (2018) 84 Sup Ct L Rev 43.

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# Devalued Liberty and Undue Deference: The Tort of False Imprisonment and the Law of Solitary Confinement

Efrat Arbel\*

## I. INTRODUCTION

Despite numerous calls for reform and restraint, solitary confinement continues to be both misused and overused in Canadian prisons. The practice, formally known as administrative segregation under the *Corrections and Conditional Release Act*, confines prisoners to isolation in a cell for up to 23 hours a day.<sup>1</sup> The nature of the confinement is harsh: prisoners are kept in hostile conditions with no meaningful human contact or support. The cells are bare and small, often “painted with the excrement, blood, and tortured writings of previous occupants.”<sup>2</sup> The culture is predominantly one of hostility, humiliation, and abuse.<sup>3</sup> Segregation wages war on body, mind, and soul. Its psychological impact is profound, and ranges from psychotic disturbances to depression to cognitive disruptions, hallucinations, and perceptual distortions.<sup>4</sup> Segregation also drives prisoners toward hopelessness,

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<sup>1</sup> S.C. 1992, c. 2 [hereinafter “CCRA”].

<sup>2</sup> Donald Best, “Solitary confinement is pure torture. I know, I was there”, *The Globe and Mail* (October 30, 2016), online: <<https://www.theglobeandmail.com/opinion/solitary-confinement-is-pure-torture-i-know-i-was-there/article32577649/>>.

<sup>3</sup> *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, [2018] B.C.J. No. 53, 2018 BCSC 62 (B.C.S.C.) [hereinafter “BCCLA”]. at para. 247; Interview #4 (June 19, 2015), at 5, line 15-18; Interview #8 (July 23, 2015), at 10, line 9.

<sup>4</sup> *Id.*

suicide, and other forms of self-harm.<sup>5</sup> The practice is so harmful in its effects that the United Nations Special Rapporteur on Torture has declared that solitary confinement amounts to torture when its duration exceeds 15 consecutive days.<sup>6</sup>

For decades, scholars, advocates, and commissions of inquiry have identified core problems with the law and practice of administrative segregation, and outlined proposals for reform.<sup>7</sup> In January 2018, the Supreme Court of British Columbia issued a landmark decision in *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, declaring the CCRA's administrative segregation provisions unlawful under sections 7 and 15 of the *Charter of Rights and Freedoms*.<sup>8</sup> The decision marks a sea change in Canadian prison law, for a number of reasons. Perhaps most significantly, the Court broke from what Lisa Kerr refers to as a "tradition of judicial reticence" that has characterized much of prison law to date, by not showing extreme deference to the discretionary authority of prison officials.<sup>9</sup> Instead, the Court engaged in a detailed assessment of the rich evidentiary record presented in this case, and recognized the measurable and well-documented harms waged by segregation. The Court also identified several

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<sup>5</sup> See generally: Office of the Correctional Investigator, "Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women" (September 30, 2013), online: Office of the Correctional Investigator <<http://www.oci-bec.gc.ca/cnt/rpt/index-eng.aspx>> [hereinafter "Risky Business"]; Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2010-2011*, online: <<http://www.oci-bec.gc.ca/cnt/rpt/index-eng.aspx>>.

<sup>6</sup> Juan E. Mendez, United Nations Office of the High Commissioner for Human Rights, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2011). Online: <<http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>>, at para. 76 [hereinafter "Mendez"].

<sup>7</sup> See, e.g., Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983); Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48 (2) *Canadian Journal of Criminology and Criminal Justice* 157-196; Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, Catalogue No. JS42-73/1996E (Ottawa: Public Works and Government Services Canada, 1996) [hereinafter "Arbour"]; Correctional Service of Canada, *Coroner's Inquest Touching the Death of Ashley Smith* (Ottawa: CSC, 2013); Lisa C. Kerr, "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) 40:2 *Queen's L.J.* 483-530 [hereinafter "Kerr, 'Chronic Failure'"]. See also *BCCLA*, *supra*, note 3, at para. 40.

<sup>8</sup> *BCCLA*, *id.*, at paras. 609-610 (also granting a 12-month suspension of invalidity) citing *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"]. See also *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, [2017] O.J. No. 6592, 2017 ONSC 7491 (Ont. S.C.J.) (declaring aspects of the administrative regime unconstitutional).

<sup>9</sup> Lisa Kerr, "B.C. solitary ruling: A bold move that may finally bring about change", *The Globe and Mail* (January 18, 2018), online: <<https://www.theglobeandmail.com/opinion/bc-solitary-ruling-a-bold-move-that-may-finally-bring-about-change/article37656159/>>.

important criteria for ensuring the constitutionality of administrative segregation, including the fundamental need for independent oversight and clear time limits.<sup>10</sup>

Even with these safeguards firmly in place – assuming they are effectively implemented and adhered to – potential for misuse will still exist. Correctional Service Canada (CSC) has long been criticized for its non-compliance with basic rights safeguards in the administration of corrections, as well as for its hostile corporate culture and disregard for the rule of law, particularly in matters of segregation.<sup>11</sup> It is therefore likely that even if the *BCCLA* decision is upheld and the government enacts a new, constitutionally sound legislative regime, prisoners will continue to suffer rights violations in segregation. In this paper, I chart a path through which to address such violations.

To do so, I turn away from Charter law and toward the law of torts, and the tort of false imprisonment in particular. This analysis is new: while some scholars have examined how other branches of tort law can address harms caused by solitary confinement, none have examined the application of this tort.<sup>12</sup> I argue that when advanced against the backdrop of *BCCLA*, the tort of false imprisonment provides segregated prisoners with an effective means through which to seek compensation for individual harm. I restrict my analysis to the tort of false imprisonment for two main reasons. First, as an intentional tort that is actionable *per se*, false imprisonment does not impose onerous evidentiary burdens on plaintiffs. Rather, the heavy lifting must be done by government: once the plaintiff proves complete confinement, it falls on CSC to demonstrate that the confinement was legally justified. This evidentiary distribution is well-suited to address the profound imbalance of power between plaintiffs and defendants in the prison setting. Second, since the tort of false imprisonment is designed to prevent unwarranted intrusions on liberty, dignity, and personal autonomy, it can effectively respond to the harms that are typically suffered in segregation. The tort allows prisoners to bring individualized evidence of harm, and to seek remedies for both tangible and intangible losses.<sup>13</sup> If substantial awards are issued, the

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<sup>10</sup> *BCCLA*, *supra*, note 3, at paras. 410 and 566.

<sup>11</sup> See, e.g., Arbour, *supra*, note 7, at 39. See also *BCCLA*, *id.*, at paras. 37-40.

<sup>12</sup> For an analysis of how the law of negligence can apply in the prison setting, see Adelina Iftene, Lynne Hanson & Allan Manson, “Tort Claims and Canadian Prisoners” (2014) 39:2 *Queen’s L.J.* 655-683.

<sup>13</sup> For a thoughtful analysis of how victims of violence might benefit from bringing tort claims, see Elizabeth Adjin-Tettey, “Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery” (2006) 39 *U.B.C. L. Rev.* 3-61, at 3-4 [hereinafter “Adjin-Tettey, ‘Protecting the Dignity’”].

financial burden might compel much needed change in culture and daily management of segregation.

Despite this promise, the tort's progressive potential has yet to be realized. As currently applied, the tort does not subject CSC to rigorous scrutiny. In fact, the courts have shown significant deference to CSC's discretionary authority, even in the face of evidence that such authority was improperly exercised. In addition, even in successful cases, the courts have issued only paltry general damage awards, generally set at \$10 for every day of unlawful segregation. The courts have justified this approach by stating that a prisoner's liberty interests are simply not worth as much as those of the free. This approach is problematic not only for its failure to appreciate the profound harm caused by segregation, but also, as I explain in more detail below, for its unprincipled departure from the doctrine that governs the tort of false imprisonment.

In what follows, I sketch the law and practice of administrative segregation in Canadian prisons to provide context for discussion. This sketch builds on key findings made by the Court in *BCCLA*. It also incorporates data obtained from interviews with advocates, lawyers, and other professionals who have worked with segregated inmates in Canadian federal prisons, all conducted in the course of this research.<sup>14</sup> My goal in incorporating this data is to present a more realistic picture of the lived experience of segregation, including the contours and dark corners that are rarely visible from an analysis restricted to cases alone. This is critical for understanding the harms at issue in such cases, and tort law's ability to address them. I then turn to examine the tort of false imprisonment, analyzing six decisions that have applied this tort to claims involving administrative segregation. Highlighting the two central problems noted above, I develop my critique by analyzing the prison cases *vis-à-vis* false imprisonment cases involving the unincarcerated. I conclude by highlighting the tort of false imprisonment's immense progressive potential to effectively respond to the harms caused by segregation, and urge the need for reform.

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<sup>14</sup> This project focused only on administrative segregation in federal prisons, and did not consider segregation in provincial prisons. Interviews were conducted with a total of 20 advocates and legal professionals in British Columbia and with representatives of the Office of the Correctional Investigator in Ottawa. Interviews were conducted in accordance with ethics criteria established by the University of British Columbia Office of Research Services, Behavioural Research Ethics Board. See Ethics Approval Certificate H15-00995. Research ethics review is a process of initial and ongoing review and monitoring of research involving human participants. The process requires the independent evaluation of all proposed research by an independent committee. For more information, see online: <<http://www.rise.ubc.ca/content/human-ethics>>.

## II. ADMINISTRATIVE SEGREGATION: AN OVERVIEW

The CCRA outlines two forms of segregation. The first, known as disciplinary segregation, is fairly well circumscribed: it can only be imposed for serious disciplinary offences following a hearing before an independent decision-maker and is subject to a 30-day maximum.<sup>15</sup> The second, known as administrative segregation, is more discretionary in its application and often more harmful in its effects.<sup>16</sup> Administrative segregation confines prisoners to a cell for 23 hours a day with little to no human contact, and has been recognized by the courts as a form of solitary confinement.<sup>17</sup>

In its current iteration, the CCRA grants prison officials vast discretionary leeway in virtually all matters relating to administrative segregation.<sup>18</sup> For example, the CCRA empowers institutional heads to segregate prisoners based only on a “reasonable belief” that a prisoner has acted, attempted, or intends to act in a manner that threatens the safety of the institution or any person within it; allowing a prisoner to associate with others could interfere with an investigation; or allowing a prisoner to associate with others would jeopardize the inmate’s safety.<sup>19</sup> In practice, these grounds are so broadly worded that prison officials can segregate prisoners on a whim without any meaningful accountability or oversight. Also, the CCRA does not prescribe clear time limits on segregation, and empowers prison officials to segregate prisoners for indefinite periods of time.<sup>20</sup> Notwithstanding the United Nations’

<sup>15</sup> CCRA, *supra*, note 1, ss. 44(1)(f), 41(2).

<sup>16</sup> *Id.*, ss. 31-33 and 37. See also Corrections and Conditional Release Regulations, SOR 92/620, ss. 19-23.

<sup>17</sup> *BCCLA*, *supra*, note 3, at para. 137; *Bacon v. Surrey Pretrial Services Centre (Warden)*, [2010] B.C.J. No. 1080, 2010 BCSC 805, at para. 6 (B.C.S.C.); *R. v. Hill*, [1997] B.C.J. No. 1255, 148 D.L.R. (4th) 337, at para. 18 (B.C.S.C.) [hereinafter “*Hill*”].

<sup>18</sup> CCRA, *supra*, note 1.

<sup>19</sup> *Id.*, s. 31(3)

<sup>20</sup> Bill C-56, introduced by the Federal Government in 2017 proposes non-binding time limits and independent external review. The time limits are initially to be set at 21 days and then reduced to 15 days 18 months after the amendments come into force. If an institutional head orders continued segregation beyond these limits, an independent external reviewer must review the case (s. 35.2(1)(a)). The reviewer must also review cases of prisoners who have already been segregated on three prior occasions or for 90 cumulative days in the calendar year (s. 35.2(1)(b)-(c)). The reviewer lacks real power, however, and merely makes recommendations to the institutional head. Ultimately, the warden is not compelled by law to release prisoners after the specified time limits. The warden remains the final decision-maker, and retains all of the existing powers outlined in the CCRA (s. 35.3(1)). Notably as well, while the CCRA does not impose clear time limits on administrative segregation, it does require periodic review, mandating a first review within one working day of placement, a second within five days of placement, and at least one every 30 days thereafter. See CCRA, *id.*, ss. 20-21. These reviews

position that solitary confinement amounts to torture when it extends more than 15 consecutive days,<sup>21</sup> it is not unusual for prisoners in Canada — particularly the vulnerable and the Indigenous — to be isolated for far longer periods of time. Edward Snowshoe, for example, spent 162 days in segregation before taking his own life.<sup>22</sup> Adam Capay spent over four years in segregation, isolated in a plexiglass box with lights always on, Kinew James spent six years in segregation and Timothy Nome over 12 years.<sup>23</sup> One prisoner whose identity CSC has not revealed was held in administrative segregation for over 17 years, for a total of 6,273 days.<sup>24</sup>

The Court in *BCCLA* recognized that the conditions of confinement in segregation “are vastly different” from those of the general population.<sup>25</sup> Citing a number of inmate witnesses, the Court described the cells as small and filthy, with walls “splattered with feces and smeared with food, nasal mucus, and other bodily fluid.”<sup>26</sup> Justin Piché and Karine Major paint a similar picture. Their analysis of prisoners’ writing on solitary confinement describes time spent in “the hole” as characterized by a lack of stimuli, lack of space, loss of personal possessions, limited clothing, bad and monotonous food, lack of exercise, limited fresh air, inadequate time and facilities for bathing, poor ventilation in the summer, and inadequate insulation in the winter.<sup>27</sup> The lawyers and advocates interviewed for this project described similar conditions of confinement.<sup>28</sup> According to interview participants, segregation cells in Canadian prisons are filthy, often

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are not independent in fact or in law, and are often superficial in nature. For example, in *R. v. Hamm*, [2016] A.J. No. 803, 2016 ABQB 440 (Alta. Q.B.), the Court noted that one prisoner’s fifth working day review took a mere 12 minutes and failed to “deal with the reason or basis for segregation” (at paras. 23, 73). The review was “merely perfunctory” (at para. 96).

<sup>21</sup> Mendez, *supra*, note 6.

<sup>22</sup> *BCCLA*, *supra*, note 3, at para. 44.

<sup>23</sup> Martin Patriquin, “Why Adam Capay has spent 1,560 days in solitary”, *MacLean’s* (November 2, 2016), online: <<http://www.macleans.ca/news/why-adam-capay-has-spent-1560-days-in-solitary/>> [hereinafter “Patriquin”]; Paul Darrow, “Solitary confinement: How four people’s stories have changed hearts, minds, and laws on the issue”, *The Globe and Mail* (June 20, 2017), online: <<https://www.theglobeandmail.com/news/national/solitary-confinement-canada-required-reading/article35391601/>>.

<sup>24</sup> *BCCLA*, *supra*, note 3, at para. 155.

<sup>25</sup> *Id.*, at para. 110.

<sup>26</sup> *Id.*, at 114.

<sup>27</sup> Justin Piché and Karine Major, “Prisoner Writing in/on Solitary Confinement: Contributions from the Journal of Prisoners on Prisons, 1988-2013” (2015) 4:1 *Canadian Journal of Human Rights* 3, at 22-23 [hereinafter “Piché and Major”].

<sup>28</sup> Interview #1 (June 2, 2015), at 14, lines 2-3; Interview #10 (July 20, 2015), at 19, lines 16-19.

soiled with blood or feces.<sup>29</sup> Cleaning supplies are provided infrequently, which can drive prisoners to use or destroy their own clothing to clean their cell.<sup>30</sup> While interview participants noted that CSC provides segregated prisoners with a mop and bucket on cleaning days, they also noted that by the time the bucket reaches the last person in the unit, the water is cold, dirty, and ineffective.<sup>31</sup> Others noted that CSC has also been known to keep prisoners in cells that are deemed to be a biohazard for unnecessary lengths of time, or to segregate prisoners in cells containing asbestos that have been deemed too dangerous to enter.<sup>32</sup>

Segregated prisoners are isolated in almost every way possible. Physically, segregation units are often isolated from other areas of the institution.<sup>33</sup> Socially, segregated prisoners have either no meaningful contact, or very limited contact, with other prisoners and guards.<sup>34</sup> There are few opportunities for prisoners to call loved ones or meet with family.<sup>35</sup> Often, they are reduced to communicating with guards and service providers like elders and teachers through the meal slot in their cell door, a practice the Court in *BCCLA* ruled should be “terminated forever.”<sup>36</sup> The intensity of this kind of isolation results in feelings of profound loneliness and dehumanization. Justin Piché and Karen Major cite one prisoner’s account, as follows:

Banishment to isolation is like flaking off the end of the earth. You become an inanimate object and are treated like garbage rotting at the dump. I spent five months on the fourth tier by myself, never seeing other prisoners.... Guards strictly enforce the silent treatment.... The months pile up and you begin to lose touch with reality. All you know is the hole.<sup>37</sup>

Segregated prisoners are effectively cut off from all forms of assistance. They have little access to support services and programming.<sup>38</sup> Psychiatric

<sup>29</sup> Interview #4 (June 19, 2015), at 10, lines 2-5, 12-16, at 11, lines 2-8 and 13-25.

<sup>30</sup> Interview #4 (June 19, 2015), at lines 9-17.

<sup>31</sup> Interview #2 (June 19, 2015), at 5, lines 21-25; Interview #4, *id.*, at 10, lines 1-3, 11, lines 13-25.

<sup>32</sup> Interview #4, *id.*, at 10, lines 2-5, 12-16, at 11, lines 2-8 and 13-25.

<sup>33</sup> Interview #10 (July 20, 2015), at 6, lines 21-25.

<sup>34</sup> *BCCLA*, *supra*, note 3, at para. 133. See also Piché and Major, *supra*, note 27, at 18.

<sup>35</sup> Interview #5 (June 9, 2015), at 19, line 8; Interview #6 (June 10, 2015) at 11, line 13; Interview #7 (June 24, 2015), at 9, lines 18-20; Interview #6, *id.*, at 11, lines 20-24; Interview #3 (June 18, 2015), at 5, lines 10-14.

<sup>36</sup> *BCCLA*, *supra*, note 3, at paras. 129, 138-139, 149.

<sup>37</sup> Piché and Major, *supra*, note 27, at 27.

<sup>38</sup> *BCCLA*, *supra*, note 3, at paras. 130-132. See also: Interview #4 (June 19, 2015), at 21, lines 21-23, at 22, lines 7-8.



support is either unavailable, or is sporadic and superficial.<sup>39</sup> Requests for mental health support often go unanswered due to indifference or limited resources.<sup>40</sup> The lawyers and advocates interviewed for this project also described such support as being principally aimed not at care, but at risk assessment.<sup>41</sup> As a result, prisoners are often reluctant to disclose their true feelings or conditions, for fear that their candour would be used against them.<sup>42</sup> Some prisoners may be cut off or denied medication while in segregation for security reasons.<sup>43</sup> Spiritual support and other programming is either forbidden or difficult to access.<sup>44</sup> The isolation is intense and extreme, and can turn people “into ghosts”.<sup>45</sup>

The harmful effects of administrative segregation have been well-documented.<sup>46</sup> As Piché and Major maintain, segregation “reduces human beings to a brutalizing, degrading, dehumanizing, lonely and meager existence.”<sup>47</sup> Juan Mendez, the United Nations’ Special Rapporteur on Torture has stated that “solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions”.<sup>48</sup> Mendez explains that the practice can lead to psychotic disturbances, anxiety, depression, anger, cognitive disturbances, hallucinations, and perceptual distortions.<sup>49</sup> Segregation can drive prisoners towards aggressive and anti-social behaviour, including psychosis, panic, rage, insomnia, self-mutilation, and other forms of self-harm.<sup>50</sup> The research,

<sup>39</sup> *Id.*

<sup>40</sup> Interview #4 (June 19, 2015), at 24, lines 6-25; Interview #9 (July 24, 2015), at 31, lines 22-23.

<sup>41</sup> Interview #2 (June 2, 2015), at 10, lines 5-10; Interview #6 (June 10, 2015), at 5, line 25, page 10, lines 5-10. See also *BCCLA*, *supra*, note 3, at para. 595.

<sup>42</sup> *BCCLA*, *id.*, at para. 295. See also: Interview #1 (July 20, 2015), at 32, lines 2-5; Interview #6 (June 10, 2015), at 5, lines 8-10.

<sup>43</sup> Interview #6 (June 10, 2015), at 4, line 18, at 14, lines 21-24; Interview #4 (June 19, 2015), at 21, line 7.

<sup>44</sup> Interview #4, *id.*, at 30, lines 1-9; Interview #6, *id.*, at 5, lines 8-19; Interview #9 (July 24, 2015), at 22, lines 23-25, at 23, lines 5-6, 15-24; Interview #10 (July 20, 2015), at 25, lines 7-8.

<sup>45</sup> Michael Jackson, “Reflections on 40 Years of Advocacy to End the Isolation of Canadian Prisoners” (2015) 4:1 *Canadian Journal of Human Rights* 57, at 85.

<sup>46</sup> *BCCLA*, *supra*, note 3, at para. 247.

<sup>47</sup> Piché and Major, *supra*, note 27, at 23-24.

<sup>48</sup> Mendez, *supra*, note 6, at para. 79.

<sup>49</sup> *Id.*, at para. 62.

<sup>50</sup> As the Court concluded in *BCCLA*, *supra*, note 3, at para. 247, administrative segregation places prisoners

at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. Some of the specific harms include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability,

as well as the Court in *BCCLA*, has found that suicide is “proportionately more prevalent amongst inmates in segregation.”<sup>51</sup>

As the Court further recognized in *BCCLA*, the harms of segregation are particularly egregious when the practice is waged against the mentally ill.<sup>52</sup> The lawyers and advocates interviewed for this project stated the same, and further noted that long-term segregation can often aggravate mental health problems.<sup>53</sup> These accounts are consistent with the findings of the Office of the Correctional Investigator, which noted in its 2009-2010 Annual Report that segregation often exacerbates underlying mental health issues.<sup>54</sup> Prisoners who struggle with mental illness in segregation “are often viewed as manipulative and malingering, and their behaviours contrived attempts to compromise security.”<sup>55</sup> As a result, mental illness is perceived as a heightened risk that can be used to justify further segregation.<sup>56</sup> As Kerr notes, for this reason, mentally ill prisoners are more likely to be targeted for, rather than protected from, administrative segregation. In Kerr’s analysis, segregation is a technique that “is often used by prison officials to punish and contain the irritating and the unwell.”<sup>57</sup>

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aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour.

See also, e.g.: Stuart Grassian, “Psychiatric Effects of Solitary Confinement” (2006) 22:3 J.L. & Pol’y 325; Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement” (2003) 49:1 *Crime & Delinquency* 124; Craig Haney & Mona Lynch, “Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement” (1997) 23 N.Y.U. Rev. L. & Soc Change 477; Stuart Grassian & Nancy Friedman, “Effects of Sensory Deprivation in Psychiatric, Seclusion and Solitary Confinement” (1986) 8 Int’l J. L. & Psychiatry 49.

<sup>51</sup> *BCCLA*, *id.*, at para. 264.

<sup>52</sup> *Id.*, at para. 247.

<sup>53</sup> Interview #1 (June 2, 2015), at 13, lines 6-13; Interview #2 (June 2, 2015), at 11, lines 3-19; Interview #4 (June 19, 2015), at 23, lines 8-12; Interview #5 (June 9, 2015), at 6, lines 11-25; Interview #6, (June 10, 2016), at 16, lines 8-25; Interview #7 (June 24, 2015), at 5, lines 3-5; Interview #9 (July 24, 2015), at 15, lines 5-10 and 34, lines 10-14; Interview #10 (July 20, 2015), at 21, lines 14-17. See also Lisa Coleen Kerr, “The Origins of Unlawful Prison Policies” (2015) 4:1 *Canadian Journal of Human Rights* 89; Craig Haney, *supra*, note 51.

<sup>54</sup> Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2009-2010* (June 30, 2010), online: Office of the Correctional Investigator <<http://www.ocibec.gc.ca/cnt/rpt/index-eng.aspx>>, at 13. For federally sentenced women in particular, segregation placements made in response to incidents of self-harm often exacerbate distress, which leads to an increase in self-injury or to resistive and combative behaviours. See *Risky Business*, *supra*, note 5, at 20.

<sup>55</sup> Naomi Moses and Amy Carter, *Solitary Confinement in Canadian Prisons: Tort Law as a Platform for Change* (2015), Unpublished, on file with the Author, at 9 [hereinafter “Moses and Carter”]. See also Interview #2 (June 2, 2015), at 12, lines 7-12; Interview #6, (June 10, 2016), at 3, lines 2-7.

<sup>56</sup> Interview #9 (July 24, 2015), at 26, lines 10-15.

<sup>57</sup> Kerr, “Chronic Failure”, *supra*, note 7, at 496-97.

The psychological impact of segregation is compounded by the indeterminacy of segregation placements. In *BCCLA*, the Court noted that the indeterminacy of segregation “is a particularly problematic feature that exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in the restrictive environments that characterize segregation.”<sup>58</sup> The lawyers and advocates interviewed for this project similarly described the sense of extreme hopelessness and desperation prisoners experienced as a result of not knowing when — or whether — their segregation placement will end.<sup>59</sup> One stated:

I think that is actually the most torturous part of that experience is just not being able to look ahead. Not being able to plan. Not being able to see a future. We really need that as human beings. We want to know, you know what’s going to happen today and then what’s going to happen tomorrow and what choices to make. Without having any future which you can cope or count on with anything to do, just unravels you as a human being.<sup>60</sup>

These accounts are consistent with research suggesting that the indeterminacy of segregation does violence to the mind.<sup>61</sup> Michael Jackson describes segregation’s indeterminacy as the “ultimate horror”, stating that people “cannot tolerate a situation in which there seems to be no escape”.<sup>62</sup> BobbyLee Worm, who was segregated for over three years, described this time as a blur of depression and psychological deterioration. In her words, segregation makes you feel like “you are losing your mind.... Days turn into nights and into days and you don’t know if you’ll ever get out”.<sup>63</sup>

Time spent in segregation is characterized by “mindlessly boring inactivity, and a lack of stimulation.”<sup>64</sup> The mental strain is so severe that many turn to self-harm as a pastime.<sup>65</sup> While legislation entitles segregated prisoners to at least one “hour out” for every 24-hour

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<sup>58</sup> *Supra*, note 3, at para. 248.

<sup>59</sup> Interview #2 (June 2, 2015), at 17, lines 23-25; Interview #3 (June 18, 2015), at 14, lines 21-25; Interview #8 (July 23, 2015), at 35, line 20; Interview #9 (July 25, 2015), at 31, line 6.

<sup>60</sup> Interview #1 (June 2, 2015), at 40, lines 7-17.

<sup>61</sup> See, e.g., Lisa Guenther, *Solitary Confinement: Social Death and its Afterlives* (Minneapolis: University of Minnesota Press, 2013), at 196.

<sup>62</sup> Michael Jackson cited in Marion Botsford Fraser, “Life on the Installment Plan: Is Canada’s penal system for women making or breaking Renée Acoby”, *The Walrus* (March 2010), online: <<https://thewalrus.ca/life-on-the-installment-plan/>>.

<sup>63</sup> Patriquin, *supra*, note 23.

<sup>64</sup> Moses and Carter, *supra*, note 55, at 8. See also Interview #1 (June 2, 2015), at 28, lines 7-10.

<sup>65</sup> Piché and Major, *supra*, note 27.

period,<sup>66</sup> some prisoners are denied the opportunity to spend this time outdoors or in contact with others.<sup>67</sup> In some cases, CSC requires prisoners to use this time to conduct personal business such as showering, cleaning, or making phone calls, leaving little time for human contact, fresh air, or exercise.<sup>68</sup> In such circumstances, as Naomi Moses and Amy Carter explain, the hour out offers “little reprieve from the austere environment of segregation.”<sup>69</sup> On occasion, CSC takes deliberate steps to sabotage a prisoner’s hour out. One interview participant described a case in which prison staff purposefully gave a segregated prisoner coffee, turned off the heat, and left the lights on all night to prevent sleep, which caused that prisoner to sleep through their hour out the following day.<sup>70</sup>

Such conduct is not unusual in the context of administrative segregation. The lawyers and advocates interviewed for this project described the culture of segregation as one of abuse and humiliation.<sup>71</sup> Segregation is often deployed as a punitive measure or a raw exercise of power, used to degrade, demean, or control.<sup>72</sup> Interview participants recounted scenarios in which CSC staff tampered with food, left lights on or off all day, or banged on doors to aggravate prisoners.<sup>73</sup> Two interview participants described scenarios of segregation staff providing prisoners with razor blades and telling them to kill themselves.<sup>74</sup> One participant described a disturbing incident where a prisoner returned to his cell from the shower to find a noose, with staff reportedly telling him that they had “set him up”.<sup>75</sup> Another described an example of a male Muslim prisoner, who, contrary to policy, was strip-searched in the presence of a female staff member and with significant unnecessary commentary before his placement in segregation; he was then released soon after, suggesting that the experience

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<sup>66</sup> Corrections and Conditional Release Regulations, SOR 92/620, s. 83(2)(d): “The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is ... (d) given the opportunity to exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors.”

<sup>67</sup> Interview #11 (August 7, 2015).

<sup>68</sup> Interview #2 (June 2, 2015), at 18, lines 10-12.

<sup>69</sup> Moses and Carter, *supra*, note 55.

<sup>70</sup> Interview #10 (July 20, 2015), at 11, lines 13-25.

<sup>71</sup> Interview #4 (June 19, 2015), at 5, lines 15-18; Interview #8 (July 23, 2015), at 10, line 9.

<sup>72</sup> Interview #8, *id.*, at 10, lines 8-10. See also *BCCLA*, *supra*, note 3, at para. 48.

<sup>73</sup> Interview #2 (June 2, 2015), at 6, lines 2-4; Interview #3 (June 18, 2015), at 22, lines 22-24; Interview #10 (July 20, 2015), at 10, lines 8-13.

<sup>74</sup> Interview #2, *id.*, at 6, lines 17-22; Interview #4 (June 19, 2015), at 4, lines 3-8.

<sup>75</sup> Interview #3 (June 18, 2015), at 22, lines 16-17.

was designed solely to degrade.<sup>76</sup> Since segregation units are often isolated away from the oversight of other staff and fellow prisoners, segregation staff can more easily engage in abusive behaviour without consequence.<sup>77</sup>

While prison culture generally discourages prisoners from speaking out against abuse, those who wish to do so have few options available to them. The internal complaints process is largely ineffective: even when prisoners report abuse, most complaints are dismissed as incredulous.<sup>78</sup> Outside the internal process, prisoners may challenge segregation orders through *habeas corpus* applications, but this remedy only provides release and does not compensate for harm. It is also not uncommon for CSC to transfer or release segregated prisoners if a *habeas* application is advanced, which can render the matter moot.<sup>79</sup> As Moses and Carter explain, CSC's ability to "quickly shift the sands" denies a prisoner the opportunity to seek accountability, such that the "potentially empowering quality of the legal remedy is rendered hollow".<sup>80</sup> While prisoners may seek more expansive remedies through judicial review, access to justice barriers make these remedies difficult to access.<sup>81</sup> Prisoners may also face a host of additional barriers when seeking justice. As Kerr clarifies:

[n]ormal delays in court proceedings often make cases moot, and the federal Correctional Service settles viable cases before hearing and insists on non-disclosure clauses. It is also difficult to access penal institutions and even more difficult to access isolation units.<sup>82</sup>

When cases do go forward courts generally take a "hands-off" approach to reviews of correctional decision-making, and grant considerable deference to the discretionary authority of CSC.<sup>83</sup>

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<sup>76</sup> Interview #8 (July 23, 2015), at 28, lines 4-25, at 29, lines 2-10. See also CCRRA *supra*, note 1, s. 48:

A staff member of the same sex as the inmate may conduct a routine strip search of an inmate, without individualized suspicion,

(a) in the prescribed circumstances, which circumstances must be limited to situations in which the inmate has been in a place where there was a likelihood of access to contraband that is capable of being hidden on or in the body; or

(b) when the inmate is entering or leaving a segregation area.

<sup>77</sup> Interview #3 (June 18, 2015), at 20, lines 16-19; Interview #4 (June 19, 2015), at 5, lines 16-18; Interview #10 (July 20, 2015), at 6, lines 22-26, at 7, lines 1-4, at 10, line 3.

<sup>78</sup> Interview #4, *id.*, at 9, lines 9-13.

<sup>79</sup> Interview #15 (July 10, 2015).

<sup>80</sup> Moses and Carter, *supra*, note 55, at 5.

<sup>81</sup> Kerr, "Chronic Failure", *supra*, note 7.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* See also Allan Manson, "Solitary Confinement, Remission and Prison Discipline" (1990) 75 Crim. Rep. (3d) 356, at 357.

By turning to tort law, prisoners can potentially gain access to remedies that administrative and public law are ill-suited to address. A tort claim can respond to the changing circumstances of a prisoner, and will not be rendered moot by virtue of release or transfer.<sup>84</sup> Tort hearings also allow prisoners to present evidence of harm, which is critical for recognizing the lived experience of administrative segregation. The benefits of tort litigation do not end there. As Elizabeth Adjin-Tettey notes, findings of liability in tort “not only constitute a formal and public recognition of plaintiffs’ victimization and perpetrator responsibility for victimization”, they also have broader therapeutic benefits.<sup>85</sup> In the context of administrative segregation, tort litigation might provide prisoners with some measure of vindication or psychological relief. Finally, and perhaps most significantly, a tort claim can result in individualized damage rewards to compensate a plaintiff for harms suffered in segregation. As noted briefly above, however, the false imprisonment cases that have been decided to date have failed to achieve tort law’s progressive potential.

### III. APPLYING THE TORT OF FALSE IMPRISONMENT

The tort of false imprisonment is relatively easy to establish: the claim is actionable *per se* once the plaintiff proves a total confinement imposed in a direct and intentional manner without lawful justification.<sup>86</sup> There must be a “total restraint” on the liberty of the plaintiff, imposed either by physical confinement or threat of force.<sup>87</sup> As the Supreme Court of Canada explained in *Frey v. Fedoruk*, the burden is not an onerous one to discharge: the plaintiff “need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant”.<sup>88</sup> Originally designed to protect disenfranchised serfs,

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<sup>84</sup> Interview #15 (July 10, 2015).

<sup>85</sup> Adjin-Tettey, “Protecting the Dignity” *supra*, note 13, at 4. See also Elizabeth Adjin-Tettey, “Righting Past Wrongs Through Contextualization: Assessing Claims of Aboriginal Survivors of Historical and Institutional Abuses” (2007) 25(1) *Windsor Yearbook of Access to Justice* 95.

<sup>86</sup> *Bird v. Jones* (1845), 7 Q.B. 742; *Frey v. Fedoruk et al.*, [1950] S.C.J. No. 21, [1950] S.C.R. 517, at 524 (S.C.C.) [hereinafter “*Frey*”]. See also Philip Osborne, *The Law of Torts*, 5th ed. (Toronto: Irwin Law, 2015), at 272 [hereinafter “Osborne”]; Alan Calnan, *Justice and Tort Law* (Durham, NC: Carolina Academic Press, 1997), at 166.

<sup>87</sup> *Id.*

<sup>88</sup> *Frey*, *supra*, note 86, at 523-24, citing *Halsbury’s Laws of England*, 2d ed., Vol. 33, at 38.

in its contemporary application the tort acts as a check on unlawful use of power and is often used to contest improper treatment at the hands of police officers, security guards, and other similarly situated defendants.<sup>89</sup> While a number of defences can be raised to dispute liability in false imprisonment, the most common is proof of the proper exercise of legal authority, which provides a complete defence.<sup>90</sup>

While the common law has recognized that prisoners can make claims of false imprisonment since 1835, Canadian courts only began to apply the tort in the prison context in the early 1990s.<sup>91</sup> The courts initially refused to allow segregated prisoners to bring false imprisonment claims, on the rationale that the tort should only protect the liberty of those who are already free. The British Columbia Court of Appeal definitively rejected this proposition in *R. v. Hill*,<sup>92</sup> reasoning that administrative segregation does more than simply confine a prisoner to one part of the prison. Rather, in keeping with the Supreme Court of Canada's statements in *Martineau v. Matsqui Institution*, the Court recognized that administrative segregation constitutes a "prison within a prison" and deprives prisoners of residual liberty interests.<sup>93</sup> *Hill* provides that where lawful authority is lacking or where negligence is found, administrative segregation amounts to false imprisonment and is actionable as such.

Despite the fact that annual segregation placements number in the thousands, there are only eight reported decisions involving false imprisonment claims arising from placement in segregation.<sup>94</sup> Of those, two

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<sup>89</sup> Robert M. Solomon *et al*, *Cases and Materials on the Law of Torts*, 8th ed. (Toronto: Carswell, 2011), at 70-73.

<sup>90</sup> Halsbury's Laws of Canada, "Tort" (2012 Reissue).

<sup>91</sup> Early cases, such as *Osborne v. Angle*, [1835] 2 Scott 500 and *Yorke v. Chapman*, [1839] 10 Ad 38, noted that a false imprisonment claim could be sustained by a lawfully imprisoned person. The first reported Canadian case to apply the tort in the prison context. But see *Hague & Weldon v. Home Office*, [1992] 1 AC 58, at 744, in which the House of Lords found that since the "essence of the tort is the imprisonment of someone who is otherwise free", a convicted prisoner "cannot sue in this tort for the interference with his 'residual liberty'", a liberty which the court later stated is "quite illusory".

<sup>92</sup> *Hill*, *supra*, note 17.

<sup>93</sup> *Id.*, at para.18, relying on *Martineau v. Matsqui Institution [Disciplinary Board]*, [1979] S.C.J. No. 121, [1980] 1 S.C.R. 602, at 622, 625 (S.C.C.).

<sup>94</sup> These are: *Abbott v. Canada*, [1993] F.C.J. No. 673, 64 F.T.R. 81 (Fed. T.D.) [hereinafter "*Abbott*"]; *Canada (Attorney General) v. McArthur*, [2010] S.C.J. No. 63, 2010 SCC 63 (S.C.C.) [hereinafter "*McArthur*"]; *Grenier v. Canada*, [2005] F.C.J. No. 1778, 2005 FCA 348 (F.C.A.) [hereinafter "*Grenier*"]; *Caron v. Canada*, [1999] F.C.J. No. 1145, 172 F.T.R. 181 (Fed. T.D.) [hereinafter "*Caron*"]; *aff'd* [2001] F.C.J. No. 879, 2001 FCA 173 (F.C.A.); *Hill*, *supra*, note 17; *Robinson v. Canada*, [1996] F.C.J. No. 1524, 120 F.T.R. 157 (Fed. T.D.) [hereinafter "*Robinson*"]; *Brandon v. Canada (Correctional Service)*, [1996] F.C.J. No. 1, 105 F.T.R. 243 (Fed. T.D.) [hereinafter "*Brandon*"]; *Saint-Jacques v. Canada (Solicitor General)*, [1991] F.C.J. No. 306, 45 F.T.R. 1

were decided on the basis of jurisdictional matters, and only six were decided on substantive grounds.<sup>95</sup> While this data set is small, the cases articulate several principles that shed light on the legalities of solitary confinement. *Brandon v. Canada*, for example, establishes that CSC must provide valid justification both for the initial placement decision and the decision to keep the prisoner segregated.<sup>96</sup> *Saint Jacques v. Canada* prescribes that the reasons given for placing a prisoner in segregation must be substantiated by evidence or documentation, and that a failure to periodically review the segregation order will lead to a finding of liability in tort.<sup>97</sup> *Hill* reaffirms the principle that prison officials may be liable for negligence and false imprisonment for failing to review an inmate's segregation order.<sup>98</sup> This case also reinforces the long established principle that false imprisonment does not require bad faith and is actionable *per se*.<sup>99</sup> *Canada (AG) v. McArthur*, the only case from this data set to be heard at the Supreme Court of Canada, held that prisoners can advance civil claims in provincial superior courts rather than seek judicial review to overturn administrative orders.<sup>100</sup> While these principles are valuable in marking the legalities of administrative segregation, two far more striking patterns emerge from the few reported cases decided to date, as noted briefly above. First, when applying the tort, courts have shown remarkable deference to the decision-making authority of prison officials, even when facing evidence indicating that such authority was improperly exercised. Second, courts have awarded only paltry general damage awards to compensate for unlawful and excessive segregation placements. I examine each of these in turn.

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(Fed. T.D.) [hereinafter "*Saint-Jacques*"]. Five of these cases combine false imprisonment claims with negligence (*Abbott, Caron, Hill, McArthur, Robinson*). Of these five cases, one (*McArthur*) includes a claim of negligent infliction of emotional and mental distress. Two of these eight cases also involve Charter claims (*Robinson* and *McArthur*), and one (*Grenier*) also involves assault. One case also combines defamation, conspiracy, abuse of authority claims (*Robinson*); and one (*Abbott*) includes claims of battery, assault, and cruel and unusual punishment (non-Charter). Five of these cases were decided in favour of the plaintiff (*McArthur, Abbott, Brandon, Hill, Saint-Jacques*). In *McArthur*, the Supreme Court of Canada upheld the Ontario Court of Appeal's finding that the plaintiff could pursue his claim through the Ontario Superior Court, rather than by judicial review at the Federal Court. The remaining three were decided in favour of the Government (*Caron, Robinson, Grenier*). Note that *Grenier* was initially decided for the plaintiff, but was overturned on appeal.

<sup>95</sup> These cases are: *Abbott, id.; Brandon, id.; Grenier, id.; Hill, id.; Saint-Jacques, id.;* and *Caron, id.*; though *Caron* did not conceptually separate the claims in negligence and false imprisonment. Two cases were decided based on jurisdictional issues (*Robinson, id.,* and *McArthur, id.*).

<sup>96</sup> *Brandon, id.*

<sup>97</sup> *Saint-Jacques, supra*, note 94.

<sup>98</sup> *Hill, supra*, note 17.

<sup>99</sup> *Id.*

<sup>100</sup> See *McArthur, supra*, note 94.



#### IV. EXTENDING UNDUE DEFERENCE TO PRISON AUTHORITIES

While *Brandon* prescribes that CSC must provide valid justification for an initial segregation placement decision, the reported cases have shown remarkable deference to the discretionary whims of prison officials when applying this standard.<sup>101</sup> In *Abbott*, for example, the plaintiff was maced and shot by guards after placing a butter knife into a garbage can during an altercation between a guard and another inmate.<sup>102</sup> CSC segregated the plaintiff for his alleged “involvement” in the incident, despite not having any evidence that linked him to the altercation at hand. In its review of the evidence, the Federal Court found that CSC had no basis to suspect the plaintiff’s involvement, stating unequivocally: “Literally from day one the prison authorities knew that Abbott was not involved.”<sup>103</sup> Nonetheless, the Court found that his segregation placement was justified, since “no clear determination could be made” while the investigation into the incident was in progress.<sup>104</sup> The decision not to impose liability in this case is striking, as it seems to contradict the court’s own evidentiary finding. Similarly, in *Hill*, which involved a prisoner held in remand and placed in segregated custody under the British Columbia legislative scheme, the prison authorities segregated the plaintiff for his alleged involvement in a prison riot.<sup>105</sup> As with *Abbott*, there was no specific evidence that the plaintiff had participated in the riot.<sup>106</sup> Remarkably, in both these cases, the courts did not endorse the outcome that the law and the evidence mandated: they accepted that prison officials acted wrongly, but declined to impose liability. Put another way, they refused to hold CSC accountable for the harms caused by their conduct despite evidence that prison officials segregated plaintiffs for unsubstantiated reasons.

These decisions stray from the approach taken in other false imprisonment settings. At its core, the legal authority defence asks for

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<sup>101</sup> See *Brandon*, *supra*, note 94. This pattern is not unique to tort law. In the context of constitutional claims, Kerr describes how prison officials who are challenged in court tend to cloak their impugned treatment of prisoners in claims of expertise. See: Lisa Kerr, “Contesting expertise in prison law” (2014) 60(1) McGill L.J. 43, at 74. See also: Debra Parkes, “Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic” (2017) 32(2) Can. J. Law and Society 165, at 166.

<sup>102</sup> *Abbott*, *supra*, note 94.

<sup>103</sup> *Id.*, at para. 168.

<sup>104</sup> *Id.*, at para. 156.

<sup>105</sup> Specifically, the plaintiff was placed in segregated custody pursuant to s. 38.1 of the Correctional Centre Rules and Regulations, B.C. Reg. 284/78 (repealed by B.C. 58/2005), enacted pursuant to the *Correction Act*, R.S.B.C. 1979, c. 70.

<sup>106</sup> *Hill*, *supra*, note 17, at para. 9.

concrete proof that authority was properly exercised. Outside the prison context, this standard has been applied with rigour. In the case of police arrests, for example, the defence requires police to demonstrate that the arrest was made on the basis of reasonable and probable grounds that are objectively justifiable.<sup>107</sup> In other words, a reasonable person placed in the officer's position must be able to conclude that there were in fact reasonable and probable grounds for the arrest. This test is applied with a fair degree of precision: the courts have held that it is unacceptable to arrest a person in the company of someone committing a crime;<sup>108</sup> in the vicinity of a crime or in a high-crime area;<sup>109</sup> for speaking out of frustration in a way that does not constitute a threat;<sup>110</sup> engaging in an activity a police officer could not identify as a crime;<sup>111</sup> or on the basis of an unsubstantiated, uninvestigated tip from a private citizen.<sup>112</sup> The courts have also held that it is not acceptable to keep a person in investigative detention longer than is needed to secure evidence,<sup>113</sup> and have stressed that police officers must exercise their legal authority within strict boundaries.<sup>114</sup> It would follow that some limitations on the exercise of legal authority should also apply to segregation placements. Such limitations, however, are rarely considered in the prison context.

By extending deference to prison authorities on matters of placement, the courts not only permit CSC to circumvent liability for unlawful or unwarranted segregation placements, they also obscure the institutional structures of power at play. In practice, CSC rarely provides adequate reasons for placing prisoners in segregation. Placement decisions are often made on the basis of anonymous and unsubstantiated source information, even when this information is questionable or unreliable.<sup>115</sup> When CSC provides written reasons for segregation placements, these reasons are often vague and imprecise.<sup>116</sup> Piché and Major describe an account in which an

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<sup>107</sup> See, e.g., *R. v. Storrey*, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241, at 251 (S.C.C.).

<sup>108</sup> *Ernst v. Quinonez*, [2004] O.J. No. 556, [2003] O.T.C. 847 (Ont. S.C.J.).

<sup>109</sup> *Koechlin v. Waugh*, [1957] O.J. No. 105, [1957] O.W.N. 245 (Ont. C.A.), cited most recently in *R. v. Boliver*, [2014] N.S.J. No. 578, 2014 NSCA 99 (N.S.C.A.).

<sup>110</sup> *Thornton v. Hamilton-Wentworth (Regional Municipality) Police Force*, [1999] O.J. No. 1250, 173 D.L.R. (4th) 568 (Ont. Gen. Div.).

<sup>111</sup> *Bahner v. Marwest Hotel Co. Ltd. et al.*, [1969] B.C.J. No. 440, 6 D.L.R. (3d) 322 (B.C.S.C.), affd [1970] B.C.J. No. 617, 12 D.L.R. (3d) 646 (B.C.C.A.) [hereinafter "*Bahner*"].

<sup>112</sup> *Bradley v. Town of Woodstock*, [1978] N.B.J. No. 113, 22 N.B.R. (2d) 45 (N.B.Q.B.).

<sup>113</sup> *Ward v. Vancouver (City)*, [2007] B.C.J. No. 9, 2007 BCSC 3 (B.C.S.C.), affd in part [2010] S.C.J. No. 27, 2010 SCC 27 (S.C.C.).

<sup>114</sup> *Ernst v. Quinonez*, [2003] O.T.C. 847.

<sup>115</sup> Interview #2 (June 2, 2015), at 15, line 1; Interview #3 (June 18, 2015), at 7, lines 15-25.

<sup>116</sup> Interview #2, *id.*, at 51, at lines 10-19.

83-year-old prisoner was threatened with segregation because he agreed to give another prisoner an ice cream bar if he would make his bed in the mornings, a task the older prisoner was physically unable to do.<sup>117</sup> Their study further shows that CSC has segregated prisoners for public displays of affection, refusing to be searched by prison staff of the opposite sex, and not cleaning cells.<sup>118</sup> While such infractions may warrant some measure of punishment, such punishment should not be so severe as to constitute what, if improperly enforced or lasts longer than 15 days, is a form of torture.<sup>119</sup>

The lawyers and advocates interviewed for this project noted that within the prison walls, it is well known that prison officials often provide “official” reasons that differ from the true reasons behind certain segregation placements.<sup>120</sup> When doing so, CSC frequently hides behind its lawful right to withhold information in order to preserve the safety and security of the institution, even when safety and security are not at stake.<sup>121</sup> This tactic is deployed for a variety of reasons, whether as a punitive tool or a means to pressure prisoners to provide information about others.<sup>122</sup> One lawyer recounted a situation where an assaulted prisoner refused to identify his assailant. CSC staff placed him in segregation on the basis that his safety could not be assured as the assailant was unknown. It later became clear that these same staff knew the identity of the assailant from the outset, and segregated the prisoner in order to extract more information about the incident.<sup>123</sup> This tendency has long been documented. As Debra Parkes and Kim Pate explain, for CSC, “the entitlements of prisoners, whether legislative or constitutional, can be ignored or restricted when a security concern is implicated, no matter how important or fundamental the right and how tangential or

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<sup>117</sup> Piché and Major, *supra*, note 27, at 9.

<sup>118</sup> *Id.*, at 10.

<sup>119</sup> Mendez, *supra*, note 6.

<sup>120</sup> Interview #3 (June 18, 2015), at 7, lines 24-25.

<sup>121</sup> *Id.*, referencing CCRA, *supra*, note 1, s. 27(3):

Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize

(a) the safety of any person,

(b) the security of a penitentiary, or

(c) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph

(a), (b) or (c).

<sup>122</sup> Interview #8, (July 23, 2015), at 9, at lines 18-20; Interview #2 (June 2, 2015), at 10; Interview #10 (July 20, 2015), at 23, lines 9-17; Interview #10 (July 20, 2015), at 5, lines 16-20.

<sup>123</sup> Interview #1 (June 2, 2015), at 7-9.

speculative the security concern.”<sup>124</sup> In reality, CSC almost always has final say with respect to the narrative of events that is accepted as “fact”. Where these reasons do not coincide with reality, the blanket citation of security concerns may prevent meaningful review and oversight.<sup>125</sup>

At best, the approach adopted in *Abbot* and *Hill* can be criticized for showing undue deference to CSC. At worse, it can be criticized for sanctioning the unwarranted rights violations of the plaintiffs involved. Deferring to the discretionary authority of prison officials, even where evidence shows that such authority was improperly exercised, strays from the requirements of the legal authority defence. It not only fails to hold CSC accountable for unlawful conduct, but also risks authorizing the very violations of liberty and autonomy the tort of false imprisonment was designed to protect. The legal authority defence should compel courts to meaningfully interrogate CSC’s reasons for placement. To do otherwise would be to reinforce the inequalities that plague the administrative segregation regime, and to perpetuate the already severe imbalance of power between CSC and prisoner-plaintiffs, not to mention the vast majority of unjustly segregated prisoners who do not have the chance to have their case heard by a court of law.

## V. DEVALUING THE LIBERTY INTERESTS OF THE PRISONER

The second striking pattern that emerges from this data set comes from the courts’ approach to the determination of damages. Five reported cases have issued damages in false imprisonment caused by segregation.<sup>126</sup> In each, the courts issued strikingly low sums, generally set at the paltry rate of \$10 compensation for every day of unlawful segregation. This formulation

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<sup>124</sup> Debra Parkes & Kim Pate, “Time for Accountability: Effective Oversight of Women’s Prisons” (2006) 48 Canadian Journal of Criminology and Criminal Justice 251, at 255.

<sup>125</sup> Interview #2 (June 2, 2015), at 37, lines 22-23.

<sup>126</sup> Notably, the Supreme Court of Canada acknowledged in *McArthur*, *supra*, note 94, that both the plaintiff and his family suffered severe emotional and psychological injury as a result of his prolonged segregation. The plaintiff alleged that he

suffered losses as a result of four years and six months of involuntary solitary confinement in the form of ‘severe emotional and psychological *injury* and harm’ (para. 26 (emphasis in original)). He was denied private family visits ‘routinely granted to other inmates whose circumstances [were] similar’, (para. 24) as well as schooling, rehabilitation programs, and ‘inmate leisure activities’ (para. 25). Moreover, he says the same actions caused his wife and daughter to suffer severe emotional and psychological harm, as ‘they were denied contacts and visits with [him] routinely granted to other inmates’ (para. 26).

*Id.*, at para. 6. However, the case was heard solely on administrative and procedural grounds, the Court did not factor these considerations into the assessment of damages.

comes from the Federal Court of Canada's 1987 decision in *LeBar v. Canada*, which, while not a segregation case, has nonetheless set the standard for quantifying damages in the segregation context.<sup>127</sup> *LeBar* involved a claim in false imprisonment brought by a prisoner to contest a 43-day delay in his release. On the facts, the Court found CSC liable in both false imprisonment and negligence, and assessed the quantification of damages at length. The question turned on the value to be accorded to Mr. LeBar's liberty rights, in relation to which the Court reasoned as follows:

Liberty is sweet. Some folk assert that liberty is essential for human fulfillment and happiness. ... Liberty, however, is a conditional right. One can forfeit it by personal misconduct, or waive it by the free, informed consent of oneself, or even that of the majority of Canadians in times of great and dangerous emergency. In the above cited jurisprudence all of the plaintiffs appeared to be individuals who, all their lives, prized, cherished and respected their own liberty. All were, in that regard, very differently situated from the plaintiff herein.<sup>128</sup>

In the Court's opinion, Mr. LeBar had failed to properly cherish his liberty, and had "squandered" it by engaging in criminal activities.<sup>129</sup> As such, the Court dismissed his liberty as "self-devalued", "cheap", "despised", and "self-cheapened".<sup>130</sup> Ultimately, it held that Mr. LeBar's liberty was simply not worth as much as that of the free man, concluding that his liberty "counts for something, but ... not much."<sup>131</sup> The Court therefore compensated Mr. LeBar only for lost earning potential.<sup>132</sup> At the time, this rate was fixed to \$5 a day. Doubling this quantum to \$10 a day, the Court awarded Mr. LeBar \$430 in general damages for his 43 days of unlawful confinement.<sup>133</sup> The Court also awarded \$10,000 in punitive damages to punish CSC for what it concluded amounted to oppressive and abusive conduct.<sup>134</sup>

Despite the legal and material differences between imprisonment and segregation, the courts have nonetheless applied the *LeBar* standard

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<sup>127</sup> [1987] F.C.J. No. 8, [1987] 1 F.C. 585 (F.C.T.D.).

<sup>128</sup> *Id.*, at para. 41.

<sup>129</sup> *Id.*, at para. 47.

<sup>130</sup> *Id.*, at paras. 46-48, 52.

<sup>131</sup> *Id.*, at para. 48.

<sup>132</sup> *Id.*, at para. 47.

<sup>133</sup> *Id.*, at para. 48. This displays what Debra Parkes has referred to as the "fundamental acceptance of the logic of punishment and deprivation through incarceration", *supra*, note 101, at 166.

<sup>134</sup> *Id.*, at para. 54.

in the administrative segregation cases, with only a few exceptions.<sup>135</sup> In *Brandon*,<sup>136</sup> for example, the plaintiff was found with a female staff member in an unauthorized area. He pled guilty and was sentenced to 22 days of punitive dissociation, a form of segregation, by discipline court. After seven days, the remaining sentence was suspended, but the plaintiff was kept in dissociation for an additional 40 days. After another conversation with a female staff member some time later, the plaintiff was placed in administrative segregation for an additional 28 days. The Court held that the plaintiff was falsely imprisoned on the basis that CSC could not prove that the additional time spent in segregation was justified. The Court did not discuss the harms caused to the plaintiff, but simply awarded \$680 in general damages for 68 days of unlawful confinement.<sup>137</sup>

*Saint-Jacques* follows a similar pattern. This case involved a claim by a plaintiff who was placed in administrative segregation for 80 days after refusing to take a tuberculosis test following a transfer from another facility. The plaintiff refused to take this particular test on the basis of an allergy, and agreed to all other forms of testing. Finding in favour of the plaintiff, the Court held that CSC could not justify the segregation, as the plaintiff's refusal to take the test did not pose a threat to the order and discipline of the institution. The Court also found that CSC had failed to conduct the required 30-day reviews. It rebuked CSC for its "oppressive and arbitrary actions", and awarded the plaintiff \$2,000 in punitive damages. As for general damages, the Court awarded only a trifling \$800. In line with *LeBar*, the Court reasoned that the plaintiff's liberty was simply not worth much, on the basis that had he "not been kept in administrative segregation, the plaintiff would not have been at liberty like any law-abiding individual, but would still have been an inmate in a penitentiary."<sup>138</sup>

Since the tort of false imprisonment does not ask the court to assess whether the plaintiff's liberty is "deserving" of compensation, there is no principled basis for differentiating the liberty of the imprisoned from the

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<sup>135</sup> While *Hill* and *Grenier* stray from the \$10/day standard, both cases provide only trifling compensation: \$500 for 11 days of unlawful segregation in *Hill*, *supra*, note 17, and \$3,000 for 14 days of unlawful segregation in *Grenier*, *supra*, note 94.

<sup>136</sup> *Brandon*, *supra*, note 94.

<sup>137</sup> *Id.*, at para. 17.

<sup>138</sup> *Saint-Jacques*, *supra*, note 94, at 615. This approach stands in stark contrast to that taken by experts in the field. See, e.g., Kerr, "Chronic Failure", *supra*, note 7, noting that segregation must be understood in contrast to life in the ordinary prison setting. Prisoners in general population have some measure of free movement, social interaction with peers, access to programming and are able to spend much of the day outside of their cells. Solitary removes individuals from this ordinary constrained liberty and imposes stigma along with isolation 13th. (at 493).

liberty of the free. Since its earliest inception in the thirteenth century, false imprisonment was designed to serve an emancipatory purpose.<sup>139</sup> An instantiation of the writ of *trespass vi et armis* — or trespass on the person — it was conceived as a means by which disempowered plaintiffs would be compensated for forceful deprivations of liberty by more powerful defendants.<sup>140</sup> False imprisonment began as an action to protect the individual liberty of disenfranchised serfs in England, with the earliest cases in the thirteenth century.<sup>141</sup> Henry de Bracton, who authored the first systematic analysis of English common law, remarked in 1229 that false imprisonment was designed to protect against deprivations of liberty.<sup>142</sup>

From the late fifteenth to the early sixteenth century, false imprisonment moved from targeting lords and landowners towards the abuse of police and judicial power — an orientation that endures today.<sup>143</sup> Even in its earliest iterations the tort was actionable *per se*, and punitive damages were available in its application.<sup>144</sup> This bears out the historical logic that false imprisonment has always intended to serve compensatory, punitive, and deterring purposes. In its contemporary iteration, the tort is driven by the same underlying goals.<sup>145</sup>

To that end, the case law provides some examples of courts issuing punitive damages for the purpose of condemning or deterring inappropriate action by CSC. In *Abbot*, for example, after the initial segregation described above, CSC segregated the plaintiff for 100 additional days, several months after the incident at issue, notwithstanding that all charges against him had been dropped. The Court imposed liability in false imprisonment for these 100 days, finding “no basis in law or in fact [for keeping] the plaintiff in segregation”.<sup>146</sup> The Court’s findings are scathing: it rebuked CSC for its “bald-face lie”, noting that the paperwork used to justify this segregation placement

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<sup>139</sup> William Blackstone *et al.*, *Commentaries on the laws of England: in four books; with an analysis of the work*, (Philadelphia: J.B. Lippincott, 1858), at 108 and 465 [hereinafter “Blackstone”].

<sup>140</sup> *Id.*

<sup>141</sup> Richard W. Davis, *The Origins of Modern Freedom in the West* (Stanford: Stanford University Press, 1995), at 193.

<sup>142</sup> Blackstone *et al.*, *supra*, note 139, at 465.

<sup>143</sup> John G. Fleming, *An Introduction to the Law of Torts*, 2d ed., Clarendon law series (Oxford: New York: Clarendon Press; Oxford University Press, 1985), at 195.

<sup>144</sup> *Id.*, at 194.

<sup>145</sup> See *e.g.*, *Campbell v. S.S. Kresge Company Limited and Williamson*, [1976] N.S.J. No. 519, 21 N.S.R. (2d) 236 (N.S.T.D.); *Chopra v. T. Eaton Co.*, [1999] A.J. No. 277, 1999 ABQB 201 (Alta. Q.B.); *Hanisch v. Canada*, [2003] B.C.J. No. 1518, 2003 BCSC 1000 (B.C.S.C.); *Dr. X v. Everson*, [2013] O.J. No. 4504, 2013 ONSC 6134 (Ont. S.C.J.).

<sup>146</sup> *Abbott*, *supra*, note 94, at paras. 158, 130, 169.

was fabricated and embellished, that prison authorities were “way out of line,” and that “someone, somewhere was being malicious.”<sup>147</sup> Appropriately, the Court awarded \$10,000 in punitive damages for CSC’s “oppressive”, “abusive”, and “malicious” conduct. As with *Saint-Jacques*, however, the Court focused almost exclusively on punishing CSC, rather than compensating the plaintiff. Adopting *LeBar*, the Court awarded the plaintiff only \$1,000 in general damages for these same 100 days. The broader normative and legal effects of this award are significant. Punitive damages are non-compensatory by nature, and are awarded to “punish the defendant when his conduct has been particularly vicious, premeditated, high handed, or disgraceful”.<sup>148</sup> While high punitive damage awards send an important message to CSC, paltry general damage awards send an equally important message to plaintiffs, namely, the violations of their rights simply do not count for much.

This approach to the determination of damages is also troubling in its failure to give meaning to one of the most basic principles of Canadian tort law: that damage awards must strive to put the plaintiff in the position they would have been in had the harm not occurred.<sup>149</sup> Compensating a segregated prisoner for lost wages does little to restore them to their original position, and ignores what Adjin-Tettey refers to as “the primacy of plaintiffs’ rights under Canadian tort law”.<sup>150</sup> A growing body of literature suggests that the harms of segregation are not always alleviated upon release, and can plague prisoners forever. Summarizing this research, the Court in *BCCLA* concluded that many prisoners

are likely to suffer permanent harm as a result of their confinement. This harm is most commonly manifested by a continued intolerance of social interaction, which has repercussions for inmates’ ability to successfully readjust to the social environment of the prison general population and to the broader community upon release from prison.<sup>151</sup>

These accounts accord with Jackson’s research, which points to the severe psychological after-effects of segregation, particularly the potential for post-traumatic stress.<sup>152</sup> His research shows that segregation continues

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<sup>147</sup> *Id.*, at paras. 129-130.

<sup>148</sup> Osborne, *supra*, note 86, at 6.

<sup>149</sup> See generally, Osborne, *supra*, note 86.

<sup>150</sup> Adjin-Tettey, “Protecting the Dignity”, *supra*, note 13, at 15.

<sup>151</sup> *Supra*, note 3, at para. 249. See also Interview #7 (June 24, 2015), at 13, lines 11-14, at 14, lines 9-10. See also Interview #1 (June 2, 2015), at 21, lines 7-12.

<sup>152</sup> Michael Jackson, “The Psychological Effects of Administrative Segregation” (2001) 43:1 Canadian Journal of Criminology 109, at 112.



to impact prisoners' relationships with other inmates and staff, as well as with family members.<sup>153</sup> Piché and Major state that segregation can “permanently scar individuals”, and that its ramifications “often extend well beyond the time prisoners spend in isolation.”<sup>154</sup> They note that even after release, prisoners continue to experience “perceptual distortions and hallucinations, affective disturbances, difficulty with thinking, memory and concentration difficulties, disturbances of thought content, and problems with impulse control”.<sup>155</sup> Importantly as well, segregation may impact a prisoner's prospects for rehabilitation, be it with respect to their security re-classification status, program participation, or conditional release outcomes.<sup>156</sup> A damage award based on *LeBar*'s \$10/day standard does nothing to address the broader effects that segregation has on the life of the individual. For the law of tort to meet the goal of restoring the plaintiff's original condition, courts should weigh evidence of the long-term impact of segregation on the individual — both as regards their mental health and rehabilitation prospects — and award damages not just for harms suffered but also for cost of future care. In cases involving Indigenous plaintiffs, courts should assess such evidence mindful of the pervasive violence and systemic prejudices faced by Indigenous prisoners in corrections, and assess damages accordingly.

Outside the prison context, courts have compensated plaintiffs considerably more effectively in false imprisonment cases. In its 1969 decision in *Bahner*, for example, the British Columbia Supreme Court awarded the plaintiff \$4,000 in general damages and an additional \$2,000 in punitive damages in false imprisonment for wrongful detention and public humiliation.<sup>157</sup> The plaintiff, described by the Court as “young, lively, educated and intelligent”, was arrested for intoxication in a public place while dining at a hotel restaurant, notwithstanding the fact that he “was not in any way or at any time even slightly intoxicated.”<sup>158</sup> The arrest occurred in view of the public, after the plaintiff and his friend refused to pay for a bottle of wine they did not drink. The Court took issue with the defendants' needlessly callous conduct, and justified the high damage award on the basis that the “degradation consequent upon

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<sup>153</sup> *Id.*

<sup>154</sup> Piché and Major, *supra*, note 27, at 10.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Bahner*, *supra*, note 111, cited most recently in *Collis v. Toronto (City) Police Services Board*, [2004] O.J. No. 4037 (Ont. Sm. Clm. Ct.).

<sup>158</sup> *Bahner*, *id.*, at para. 4.

the experience suffered by the plaintiff is sore and not easily forgotten.”<sup>159</sup> In its 1975 decision in *Dalsin et al. v. T. Eaton Co. Canada Ltd.*, the Alberta Court of Queen’s Bench awarded the plaintiffs \$2,000 in compensatory and exemplary damages for being falsely accused of stealing a pair of jeans.<sup>160</sup> Both plaintiffs were held for roughly 30 minutes in the backroom of a department store, during which they were mistreated, insulted, and berated. The Court justified the high damage award in this case by noting the intense humiliation suffered by the plaintiffs, including the “stares of onlookers as they left the store.”<sup>161</sup> This pattern emerges from a number of additional cases: \$2,000 in general damages for the laying of an unsubstantiated criminal charge,<sup>162</sup> \$2,700 in general damages for being falsely accused of stealing groceries and detained for 45 minutes,<sup>163</sup> and \$4,000 in general damages for a deeply humiliating detention lasting 45 minutes on suspected shoplifting charges.<sup>164</sup>

Other courts have issued far more significant damage awards in cases involving more intense humiliation. Given the factual specificity of these cases, it is worth canvassing a few in detail. For example, in a 1997 case involving three young girls who were arrested by police in a “traumatic manner” on the basis of an unsubstantiated tip that they had stolen a teddy bear, the court awarded each plaintiff \$10,000 in damages, to compensate for the “extreme emotional abuse” and “continuing mistrust and fear of the police.”<sup>165</sup> In 1999, in a case arising from a lengthy and unlawful detention at a department store involving handcuffing, humiliation, and excessive force, the Court awarded \$23,000 in damages to compensate the plaintiff for the indignity he suffered.<sup>166</sup> In a 2012 case involving a plaintiff who was wrongly detained and handcuffed in a hospital while visiting his mother during her chemotherapy treatment, and later taken into police custody, the Court awarded \$15,000 in

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<sup>159</sup> *Id.*, at para. 24.

<sup>160</sup> [1975] A.J. No. 513, 63 D.L.R. (3d) 565 (Alta. Q.B.) (most recently relied on in *Benford v. Roy*, [1995] O.J. No. 251, 9 C.C.E.L. (2d) 117 (Ont. Gen. Div.)).

<sup>161</sup> *Id.*, at para. 3.

<sup>162</sup> *Roberts v. Buster’s Auto Towing Service Ltd. et al.*, [1976] B.C.J. No. 1386, 70 D.L.R. (3d) 716 (B.C.S.C.).

<sup>163</sup> *Sharpe v. Woolco Department Stores*, [1978] N.J. No. 134, 20 Nfld. & P.E.I.R. 283 (Nfld. Dist. Ct.).

<sup>164</sup> *Sangha v. Home Depot of Canada Inc.*, [2005] B.C.J. No. 1602, 2005 BCPC 300 (B.C. Prov. Ct.).

<sup>165</sup> *Walkey (Guardian ad litem of) v. Canada (Attorney General)*, [1997] B.C.J. No. 599, 2 P.L.R. 61, at para. 78 (B.C.S.C.).

<sup>166</sup> *Chopra v. T. Eaton Co.*, [1999] A.J. No. 277, 1999 ABQB 201 (Alta. Q.B.).

damages to compensate for trauma, suffering, and humiliation.<sup>167</sup> In a 2014 case, the Court ordered \$25,000 to a plaintiff for wrongful arrest and detention by police including handcuffing, strip-searching, and other humiliating treatment.<sup>168</sup> In perhaps the most extreme example, in a 2013 case, the Court awarded \$50,000 to a medical professional who was involuntarily detained for psychiatric care for unsubstantiated reasons.<sup>169</sup>

While the analysis in each of these cases is very fact-specific, a clear trend emerges: when compensating the false imprisonment of the free, courts are far more likely to award high general damage awards. These cases place significant value on the harm caused to the individual, even when the violations to liberty and autonomy are less extreme than in the prison setting. Courts are much more likely to compensate the unincarcerated for public embarrassment, humiliation, insult, or mistreatment, and to consider evidence of injury to feelings and reputation when doing so. On the whole, and in contrast, in the prison context courts do not fairly compensate — or even recognize — the harms suffered by prisoners in unlawful segregation, and reject the very premise that a prisoner’s liberty should count as much as the liberty of the free. Seen in this light, the damages issued in the prison cases emerge not just as callous, but also as unprincipled.

The tort of false imprisonment is designed to protect from unwarranted invasions of one’s person. It is a means by which courts can regulate social interactions, and ensure that legal authority is not used to deprive plaintiffs of liberty interests without justification. Those liberty interests are just as worthy of protection in the darkest corners of the prison, where tort law rarely goes. As Louise Arbour reminds: “When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner.”<sup>170</sup> By showing undue deference to the discretionary authority of prison officials, and devaluing the liberty interests of prisoners rights in the assessment of damages, the courts fail to heed Arbour’s important words. For the tort of false imprisonment to achieve its progressive potential, courts must “resist the temptation to trivialize the infringement of prisoners’ rights as either an insignificant

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<sup>167</sup> *Park v. British Columbia*, [2012] B.C.J. No. 807, 2012 BCPC 109 (B.C. Prov. Ct.), suppl reasons [2012] B.C.J. No. 994, 2012 BCPC 138 (B.C. Prov. Ct.).

<sup>168</sup> *V.A.S. v. Grace*, [2014] A.J. No. 1227, 2014 ABQB 666 (Alta. Q.B.), affd [2016] A.J. No. 199, 2016 ABCA 45 (Alta. C.A.).

<sup>169</sup> *Dr. X v. Everson*, [2013] O.J. No. 4504, 2013 ONSC 6134 (Ont. S.C.J.).

<sup>170</sup> Arbour, *supra*, note 7, at 183.

infringement of rights, or as an infringement of the rights of people who do not deserve any better”,<sup>171</sup> and embrace a jurisprudential shift in the determination of administrative segregation cases.

## VI. CONCLUSIONS

There are many barriers that might prevent prisoners from bringing tort claims to contest unlawful segregation. Access to justice remains a persistent problem. Prisoners often have limited financial resources, and legal aid typically does not cover legal assistance for civil remedies. Many also face additional barriers, like marginalization, poverty, low literacy, or mental illness, which might inhibit their ability to reach out for assistance.<sup>172</sup> Prisoners are also institutionally marginalized, and as Parkes reminds, profoundly “vulnerable to majoritarian indifference and excesses of state power”.<sup>173</sup> The institutional environment of the prison discourages legal action, providing few resources for self-advocacy, limited access to legal calls and visits, and, at times, further burdening would-be plaintiffs with the active dissuasion of *ad hoc* segregation terms meted out by correctional staff.<sup>174</sup> Prisoners may also view the legal system with cynicism and mistrust, and may not believe in its ability to compensate or otherwise assist them.<sup>175</sup>

Despite these barriers, tort law offers a viable means through which plaintiffs can challenge the improper use of segregation in the daily management of corrections. Even if the BCCLA decision is upheld on appeal, and the safeguards it outlines are effectively implemented, segregation will continue to be used improperly and give rise to unimaginable harms. As Adjin-Tettey notes, if tort law is to advance the goals of justice, it must value and protect plaintiff rights in ways that are attentive to their unique circumstances, as situated in larger systems of power and violence.<sup>176</sup> Against the backdrop of *BCCLA*, every new tort

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<sup>171</sup> *Id.*

<sup>172</sup> Interview #1 (June 2, 2015), at 41, lines 4-11. See also Debra Parkes, “A Prisoners’ Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms” (2007) 40 U.B.C. L. Rev. 629-676, at 667-71.

<sup>173</sup> Parkes, *id.*, at 632.

<sup>174</sup> Interview #6 (June 10, 2015), at 36, lines 9 to 12; Interview #3 (June 18, 2015), at 11, lines 14-17.

<sup>175</sup> Interview #1 (June 2, 2015), at 41, lines 4-11.

<sup>176</sup> Elizabeth Adjin-Tettey, “Sexual Wrongdoing: Do the Remedies Reflect the Wrongs” in J Richardson & E. Rackley, eds., *Feminist Perspectives on Tort Law* (Abingdon, Oxon; New York: Routledge, 2012).

case presents an opportunity for prisoner plaintiffs to provide a first-hand account of their experiences. Such evidence could trigger a judicial shift in the understanding of the lived experience of segregation, as well as broader structures that enable and perpetuate its violence. In time, this shift might enable judges to compensate plaintiffs more effectively for the harms suffered in segregation. With its broad focus on all manners of unlawful imprisonment, the tort can also be used to contest segregation-like placements that are not legally classified as solitary confinement, but that closely resemble it in practice. Substantial damage awards might compel CSC to shift its institutional culture and ensure greater adherence to the rule of law in the daily management of segregation. A judicial shift away from excessive deference and the devaluation of prisoner rights in the assessment of damages could not only bring a sea change in the law of torts, it could also advance the law's promise to protect the dignity, autonomy, and liberty interests of all persons. To do otherwise would be to risk authorizing the very violations of liberty and autonomy the tort of false imprisonment was designed to prevent.