

THE HIGH COURT**2004 16311 P****BETWEEN****MICHAEL SAGE****PLAINTIFF****AND****THE MINISTER FOR JUSTICE, THE GOVERNOR OF CORK PRISON, IRELAND AND THE ATTORNEY GENERAL AND PATRICK HOGAN****DEFENDANTS****Judgment of Ms. Justice Mary Irvine, dated the 1st day of March, 2011**

1. The plaintiff in these proceedings is Michael Sage, who was born on the 1st June, 1976. He brings this claim seeking damages for negligence against the first, second, third and fourth named defendants arising from a vicious assault that was perpetrated upon him on the 31st July, 2002, on what was his second day as a prisoner at Fort Mitchell Prison, Cork, a prison formerly known as Spike Island. The fifth named defendant is sued as one of the two individuals who perpetrated that assault.

Background to the Assault

2. On the 26th July, 2002, the plaintiff was sentenced to a ten year term of imprisonment for the manslaughter of a Mr. John Carroll. Mr. Carroll had been beaten to death by being struck repeatedly over the head with an iron bar. The plaintiff and a man by the name of William Roche ("Roche") were tried separately for this murder. Roche, a Limerick man, was convicted of murder, whilst the plaintiff was convicted of manslaughter. In the course of their respective trials, each had accused the other of perpetrating the fatal assault.

3. Prior to his trial, the plaintiff had been on remand in Limerick Prison. Whilst there his bed was set on fire. He believes that this attack was orchestrated by Roche who believed that the plaintiff had "grassed" on him.

Facts on the Plaintiff's Evidence

4. Following his conviction and sentence, the plaintiff was taken to Mountjoy Prison ("Mountjoy"). He knew that Roche was an inmate there and this, allied to what had happened to him whilst in Limerick Prison, made him very afraid for his own safety. On his arrival, he told the prison authorities that he wanted to be taken into protective custody. This was afforded to him with immediate effect. He was put in the basement area of the prison with a number of other prisoners who required like protection. However, the following day, when returning to the basement area after a visit from his family, a fellow prisoner advised him that the "Limerick lads upstairs" wanted to know why he was not going up to the upper levels of the prison. This intervention made him feel that he was not safe anywhere in Mountjoy and that Roche had connections with those who were being held with him in protective custody.

5. The plaintiff claims that he discussed his concerns about Roche with the prison authorities. He maintains that he was told that Roche was not allied to any prisoners in the Midland Prison and that that would be the safest place for him to go. He says he accepted the advice of the relevant prison officer and based on that conversation believed that he would be transferred to the Midlands Prison. The same evening he was told to get his kit ready and that he was to be transferred with immediate effect. Contrary to his expectations, he was informed that he was not going to the Midlands Prison but he was going to Fort Mitchell Prison ("Fort Mitchell") in Cork. He was advised that Fort Mitchell was a relaxed place and he was comforted by this fact. However, he told the court that he still believed that he would be in protective custody there because of what he had told the authorities in Mountjoy.

6. When he arrived at Fort Mitchell, after his formal admission, the plaintiff was put in a cell with four country lads and he had no difficulty with them on his first night there. Nothing untoward happened. On the second day he was in the exercise yard with a good number of other fellow prisoners and was in the process of rolling a cigarette when, without any warning, he was savagely attacked from the rear. The plaintiff was hit over the head several times. The weapon was never found but the parties are agreed that it is highly likely that it comprised part of a metal chair leg which had been fortified with batteries to give it added weight. When he put his hand up to protect his head, a bone in his hand was smashed by another blow and he received a significant laceration to his flank. The plaintiff was rendered unconscious immediately and has no idea how long it took for prison staff to come to his assistance.

7. The plaintiff was taken to Cork University Hospital. He had three significant wounds to the scalp which were closed with the use of staples. He was noted to have had bruising of the chest and a large linear wound to the right flank believed to have been caused by a sharp instrument. X-rays revealed a fracture to the second metacarpal bone of the left hand, which was subsequently stabilised under general anaesthetic by the use of a K wire.

8. The plaintiff has made a good recovery from his injuries. However, he has been left with a large scar on the right-hand side of his back and he has some deformity of the second metacarpal bone of the left hand. He experiences a cracking sensation on performing certain movements of the left hand and it is sensitive to weather conditions. In addition, many physical activities generate pain in the hand and wrist. These include weight training.

The Defendant's Evidence

9. Teresa McCormack was the assistant chief officer at Fort Mitchell at the time when the plaintiff sustained his assault. She told the court that at all relevant times on arrival at Fort Mitchell a new prisoner would be brought to the reception area where they would be fully briefed on the prison and its rules. It was routine procedure to ask such a prisoner if they had any issues of concern that they wanted to bring to the attention of the prison management. At times a new prisoner might query the presence of another prisoner who they were afraid of. At other times they wanted to know if a particular friend was an inmate and if so whether they could share a cell with them. Any concerns expressed by a prisoner about their potential safety were always brought to her attention as she was the person designated to deal with those concerns. She never received any communication indicating that the plaintiff had concerns for his potential safety in Fort Mitchell.

10. Ms. McCormack stated that Fort Mitchell did not have facilities to provide protective custody for its inmates. It did not have high

profile prisoners. Accordingly, if a prisoner on admission expressed concern that they might be at risk of assault from another prisoner the practice was to place them temporarily in one of the singles cells in the prison and keep them separated from other inmates until they could be transferred to another prison. This would probably happen within 24 hours but did not arise in the case of the plaintiff as he did not express any concerns.

11. Ms. McCormack stated that the plaintiff's transfer from Mountjoy to Fort Mitchell would have been discussed in advance between the chiefs of both prisons. She told the court that they must have considered that the transfer of the prisoner to Fort Mitchell would adequately deal with the concerns which the plaintiff had expressed when in Mountjoy where Roche was a prisoner. She did not accept that there was an onus on the prison authorities in Fort Mitchell, because of the circumstances in which the prisoner was transferred, to make enquiries as to whether or not there were any known associates of Roche in the prison. Roche was in Mountjoy and he was not in Fort Mitchell and the plaintiff had not expressed any concerns for his safety on his arrival. She advised the court that at the time of the plaintiff's assault, the two men who assaulted him were not known to be associates of Roche.

12. In relation to security within the prison, Ms. McCormack gave evidence that every cell and every bathroom and all of the recreation areas were searched everyday. She said that random searches were continuously done within the prison and it also operated a system of locking down the entirety of the prison from time to time to carry out ever yet more intensive searches. There were a number of wings within the prison. There were 42 prisoners on "A" wing where the plaintiff was detained. Each wing has its own recreation area and yard. The totality of such an area was seen as one unit and prisoners were not bodily searched once they remained in that unit. However, on leaving a unit to go to a workshop or to see visitors, prisoners would be searched on their way out and on their return. Likewise, if a prisoner had been outside the prison for some reason they would be searched on their return. Occasionally, prisoners from two separate wings might be in the recreation yard at the same time. They would not be searched on entering the yard on such occasions.

13. As to her knowledge of the assault upon the plaintiff, Ms. McCormack told the court that on the day in question there were four prison officers covering the recreation period for the men from A wing. There were 17 men in the indoor recreation area and 17 men in the yard at the time the assault was perpetrated. Two prison officers were positioned at the door into the recreation area. The distance between the men at the door and the location of the assault was less than the length of the courtroom. When it was suggested to her that the prison officers should therefore have been able to intervene with immediate effect she stated that such an incident presented a significant potential danger having regard to the number of prisoners in the yard. Standard practice called for the deployment of an alarm and the immediate attendance of security and medical personnel. She believes that this practice was complied with. She herself was present at the scene of the assault within one minute of the alarm being raised. When she arrived the medical officer and other security staff were already in attendance and the situation was fully under control. Finally, Ms. McCormack confirmed that the weapon was never found. She believes that it may have been thrown over the wall and into the moat outside the prison. Whilst the moat was subsequently drained and searched, the weapon was never found.

The Plaintiff's Case

14. The only evidence adduced on the plaintiff's behalf was his own evidence. The principal case made by him when giving evidence was that he had made known his concerns regarding Roche and his allies to the prison authorities in Mountjoy. They had acknowledged the reasonableness of his fears in agreeing to move him from Mountjoy and in advising him that the safest place for him was in the Midlands Prison. Having transferred the plaintiff to Fort Mitchell, the plaintiff contends that the prison authorities were under a duty to ensure that he was afforded protective custody whilst there, to ensure that he would not be permitted to come into contact with other prisoners who might have associations with Roche and whom it was foreseeable might assault him. In addition, he maintained that enquires should have been made to ascertain if any prisoners in Fort Mitchell were associates of Roche and that their failure to conduct such enquiries amounted to negligence on the part of the prison authorities.

15. Counsel for the plaintiff also submitted that there was adequate evidence from which the court might conclude that there was inadequate security in the prison yard at the time of the assault and/or that the system of searching prisoners was defective such that I should conclude that the first to fourth named defendants were guilty of negligence. He also submitted that the fact that the assault had occurred with the use of such a vicious instrument was strong evidence which would support the later conclusion. The fact that no expert evidence was called did not detract from the right of the court to reach such a conclusion and in this regard the plaintiff relied upon the recent decision of O'Donnell J. in *O'Neill v. Dunnes Stores* [2010] I.E.S.C. 53, (Unreported, Supreme Court, 16th November, 2010).

Duty of Care

16. In *Casey v. Governor of Midlands Prison & Ors* [2009] I.E.H.C. 466, (Unreported, High Court, Irvine J., 27th October, 2009) ("*Casey*"), a case involving an assault to a prisoner in a yard at the Midlands Prison, having reviewed the available authorities, I set out the duty of care owed by prison authorities to those in their custody. At para. 12 of that judgment I summarised the position as follows:-

"(i) Prison authorities are required to take all reasonable steps and reasonable care not to expose prisoners to a risk of damage or injury, but the law does not expect the authorities to guarantee that prisoners do not suffer injury during the course of their imprisonment. (*Muldoon v. Ireland* [1988] I.L.R.M. 367)

(ii) The duty of care owed by prison authorities to its prisoners must be tested in the context of the balance to be struck between the need to preserve security and safety on the one hand and their obligation to recognise the constitutional rights of prisoners and their dignity as human beings on the other hand. (*Bates v. Minister for Justice & Ors* [1998] 2 I.R. 81)

(iii) In determining what is an appropriate standard of care, regard should be had to the hardship that any proposed system might impose on prisoners and whether any such system would place an excessive burden upon the prison authorities (*Bates v. Minister for Justice & Ors* [1998] 2 I.R. 81)

(iv) Cases of assault upon prisoners whilst in custody in general are likely to be decided upon by reference to what should have been anticipated by their custodians. (*Bates v. Minister for Justice & Ors* [1998] 2 I.R. 81)"

17. In *Casey* I made reference to the constitutional rights enjoyed by prisoners as citizens and the requirement that where possible their dignity as human beings should be respected. I did so having heard extensive evidence from a number of witnesses who had spent most of their working lives within the prison service grappling with the problem of trying to provide a humane method of detaining prisoners, whilst also affording them with reasonable protection against unwarranted assaults. It is undoubtedly the case that the task faced by prison authorities in seeking to balance the prisoner's rights to bodily integrity against their competing right to a model of confinement, which will protect their dignity, will generate the notion of citizenship and avoid unnecessary dehumanisation

is very difficult. In *Casey* I was told that the latter right was difficult to achieve in a prison that subjects its inmates to ongoing and regular body searches.

18. In *Creighton v. Ireland and Attorney General* [2010] I.E.S.C. 50, (Unreported, Supreme Court, 27th October, 2010) ("*Creighton*"), Fennelly J. also set out the duty of care owed by prison authorities to prisoners whilst dealing with an appeal from a decision of White J. relating to a prisoner who was assaulted in a knife attack at Wheatfield Prison. At paragraph 4 of this judgment he stated as follows:-

"Prisons may, as an inevitable consequence of the character of persons detained, be dangerous places. Prisoners are entitled to expect that authorities would take reasonable care to protect them from attack by fellow prisoners. What is reasonable, will as always, depend on the circumstances. As the cases recognise, prison authorities may have to thread a delicate line between the achievement of the objective of protecting the safety of prisoners and the risks of adopting unduly repressive and inhumane measures. They must balance the protective function and possible demand for instructive searches against the need to permit prisoners an appropriate degree of freedom of movement and human dignity."

19. Save for the nature of the duty of care owed by the prison authorities to its prisoners, the decision in *Creighton* is not of great significance to the determination of the issues that present in the present case. The Supreme Court sent that case back to the High Court for a rehearing, principally on the basis that the trial judge made certain findings in the absence of an evidential basis for so doing, and in reaching his conclusions on liability he did so without resolving a number of disputed matters which had a bearing on that finding, namely the number of prisoners in close proximity to the plaintiff at the time of his assault and the nature of the weapon used. I will return briefly to the facts of *Creighton* later in this judgment as they are of some assistance in dealing with one of the arguments made by counsel for the plaintiff.

Findings of Fact

20. Whether or not a prison authority is responsible for a vicious assault perpetrated by one inmate on another must be decided upon by reference to the facts of each individual case. Hence, I will briefly set out my findings of fact before resolving the liability issue.

21. I am satisfied that the plaintiff made known to the prison authorities his concerns that he was at risk of being attacked whilst in Mountjoy Prison by Roche or those associated with him. I accept that he made it clear to the prison authorities that he felt he would be at risk even if he remained in Mountjoy in protective custody and that it was for this reason that he was transferred to Fort Mitchell.

22. Having regard to the pleadings to which I will later refer, I think it is unlikely that the plaintiff was ever told by the prison authorities that the safest place for him would be the Midlands Prison, but even if he was, that fact makes no difference to the legal position. On his own evidence he does not say that he was told that he would be transferred to the Midlands Prison or that it was the only prison where he would be safe. There was no obligation on the prison service to transfer the plaintiff to what they considered to be the safest prison. Their obligation was to take reasonable care for his safety having regard to concerns which he had expressed irrespective of wherever they sent him, whether to Fort Mitchell, the Midlands Prison or any other prison.

23. I accept Ms. McCormack's evidence that the reasons underlying the plaintiff's transfer to Fort Mitchell would have been discussed by the two relevant governors prior to the plaintiff's arrival, that when he arrived he was afforded an opportunity to raise any concerns he might have had regarding his potential safety and that he did not express any concerns about his potential safety. I reject the plaintiff's evidence that he thought he would be in protective custody whilst serving his sentence in Fort Mitchell. If he had expected this I believe he would have raised it at interview on his arrival or immediately after he was taken to A wing, where it must have been immediately clear to him that he was to be detained as a regular inmate on that wing and not in protective custody. Further, the plaintiff spent his first night in Fort Mitchell in a cell with four other lads and thereafter participated in the daytime routine for A wing prisoners without complaint, albeit for the brief period prior to his assault. If he believed that he needed to be in protective custody, or that he had expected to have been admitted to Fort Mitchell on that basis, surely he would at least have brought this fact to the Governor's attention on the second morning of his stay in the prison?

24. I am satisfied, as a matter of fact, that at the time of the assault the recreation area, including the yard at Fort Mitchell, was being supervised in accordance with standard practice, that the four supervisory staff were at their appropriate stations when the plaintiff was attacked and that they responded in accordance with the procedure as outlined by Ms. McCormack. I accept her evidence that the full panoply of emergency staff were with the plaintiff and that the incident was under control less than one minute from its commencement.

Conclusions

25. The thrust of the case made by the plaintiff in his evidence, which was one principally based on his alleged fear that Roche or his associates might attack him in Mountjoy or elsewhere, was substantially different to the case made on his behalf in the pleadings. This casts significant doubt on the truth or weight to be attached to his oral evidence. Whilst there is a passing reference in the statement of claim to the plaintiff's brief period in protective custody in Mountjoy prior to his transfer to Fort Mitchell, there is no mention whatsoever of Roche or his associates. There is no assertion that he expected to be transferred to the Midlands Prison or that when he arrived in Fort Mitchell he understood that he would be afforded protective custody there. Neither is there a plea that the prison authorities should, because of concerns he expressed in Mountjoy, have carried out inquiries in Fort Mitchell about the presence there of known associates of Roche. Similarly, there is no allegation that the assault perpetrated upon him in the yard was orchestrated by Roche or anyone associated with him. All of this suggests to me that the plaintiff was satisfied that he would be safe once he was transferred to a prison where Roche was not an inmate, particularly where the prison to which he was transferred was one which did not house high profile prisoners.

26. The case made in the statement of claim is that the plaintiff was assaulted because of the failure of the prison authorities to adequately monitor the prison yard, to prevent inmates from bringing weapons into the yard, to spot potential trouble makers in the yard and their failure to intervene early enough when the assault commenced to protect him from an ongoing attack. There is only one particular of negligence which even comes remotely close to the principal case made in evidence and that is an alleged failure on the part of the prison authorities to organise yard time in such a manner that known aggressors did not share the yard with those against whom they were orchestrating a campaign of fear and intimidation.

27. It was in the replies to the particulars sought by the defendants' solicitors that mention was made for the first time of Roche. At para. 4 of the replies to particulars, it was pleaded that the defendants were aware of Roche's animosity towards the plaintiff. On his behalf it was stated "he was moved from Mountjoy to Cork and he believed that protection would be afforded to him in Cork Prison also". The replies to particulars then went on to allege that the plaintiff was attacked on the day in question as a result of the animosity of Roche. Even in these updated particulars, there was no mention of any representation having been made to him by the

prison authorities that the plaintiff would be best protected by a transfer to the Midlands Prison or that he was to be transferred there.

28. The question to be answered in the present case is whether, on the facts known to the prison authorities, they discharged their duty of care to the plaintiff by transferring him to Fort Mitchell as an ordinary prisoner, or whether they knew or ought to have known of factors at play that required them to make special enquiries regarding the presence of any known associates of Roche in that prison, or to maintain him in isolation until he could be transferred to another prison where he could be afforded protective custody.

29. I am satisfied that the defendants were not in breach of their duty of care to the plaintiff. They are not and cannot be expected to be the insurers of the safety of their prisoners. They clearly headed the concerns expressed by the plaintiff when in Mountjoy and acted upon them immediately by putting him in protective custody there until he could be moved to another prison. I accept Ms. McCormack's evidence that both prison governors would have considered the safety of the plaintiff against the backdrop of the concerns expressed by him whilst in Mountjoy and that it was reasonable for them to assume that, in moving him away from Mountjoy where Roche was an inmate to a prison that had no high profile prisoners, he would be reasonably safe. The plaintiff called no evidence to establish that the practice adopted by the prison authorities in Fort Mitchell, having regard to the complaints made by the plaintiff in Mountjoy Prison, was to fall short of the standard of care to which the plaintiff was entitled. No evidence was led to suggest that the fears outlined by the plaintiff regarding Roche and his associates whilst in Mountjoy mandated those in authority in Fort Mitchell to carry out enquiries as to whether there were any prisoners in the prison who were known associates of Roche. However, even if there had been such evidence the plaintiff could not succeed on this point in any event by reason of the uncontradicted evidence of Ms. McCormack to the effect that the men who perpetrated the assault upon the plaintiff were not at that time known to be associates of Roche. This being so, even if enquiries had been carried out prior to the plaintiff being permitted to mingle with other inmates on A wing, there would have been no reason found to preclude the plaintiff from associating with those who later assaulted him.

30. As to the assertion that it was negligent of the defendants not to place the plaintiff in protective custody following his transfer to Fort Mitchell, I accept the defendants' evidence that it was reasonable, on the facts known to them for the prison authorities, to believe that once he was removed from the precincts of Mountjoy he would be reasonably safe in Fort Mitchell, unless alerted by the plaintiff of some specific concern or the subsequent occurrence of some adverse event that might demonstrate a potential risk to his safety. The assault happened on the plaintiff's second day at the prison. Nothing untoward happened between the time of his arrival and his assault such that the prison authorities ought to have been on notice of a possible attack upon the plaintiff which would have justified them placing him in isolation until he could be transferred elsewhere.

31. Counsel has asserted that based on the decision of O'Donnell J. in *O'Neill v. Dunnes Stores* [2010] I.E.S.C. 53, (Unreported, Supreme Court, 16th November, 2010), I can and should in the present case, notwithstanding the absence of any expert evidence criticising the adequacy of the defendant's system of searching prisoners and their cells, because of the nature of the weapon used in the assault, make a finding of negligence against the first to fourth named defendants.

32. The facts in *Creighton* are of some assistance in relation to this argument. In *Creighton* the assault took place in an area of the prison where prisoners were administered methadone. The defendants gave evidence that prisoners were searched in a variety of circumstances. These included times when prisoners left or returned to the prison and also on their way into the area within the prison where they received their methadone. There had been strong evidence to suggest that the knife that was used in the assault was a commercial Stanley knife and, that this being so, it did not have its origins in the prison. Central to the plaintiff's case was the evidence of the plaintiff's expert, Mr. Outram. He gave evidence to the effect that if the weapon was a Stanley knife it had to have been smuggled into the prison and also taken into the unit where the methadone was being administered without detection, thus suggesting that the searches carried out may have been inadequate. He contrasted such a commercial weapon with weapons commonly made by prisoners themselves from items available within their unit. By way of example, he referred to a weapon comprising a blade that might be melted into a toothbrush. Given that prisoners were not searched when they remained on a unit, those weapons, unlike the Stanley knife, could not be eradicated from the system through search procedures.

33. I reject the plaintiff's submission that the nature of the weapon and the circumstances of the assault could allow me on the facts of this case, in the absence of expert evidence, to conclude that the plaintiff's injuries were due to a defective system of security in Fort Mitchell. Indeed, the plaintiff's submission is one which effectively asks me to apply the doctrine of *res ipsa loquitur* to the facts of the present case. This is clearly impossible in circumstances where I cannot be satisfied that the assault could not have happened absent negligence on the part of the relevant defendants.

34. In *Creighton*, if the knife used was a Stanley knife it came into the prison having escaped detection at the point of entry after which it later smuggled into the area where the methadone was administered, avoiding detection for a second time. Those facts are in stark contrast to the evidence in this case, all of which suggests that the offending weapon was not brought into the prison. It did not therefore escape detection in the screening of those entering the prison. Also, the weapon was made from apparently innocuous items readily available in the prison, namely a metal leg from a chair and batteries. There was no evidence to suggest that these items were not available in the unit containing A wing. Thus it cannot be stated that the weapon should have been discovered in the course of one of the other search procedures in the prison, for example those conducted on prisoners moving to and from the workshop etc. There is no evidence to suggest that the weapon was made a long time before the assault such that it should have been discovered on the daily search of the prison cells. There was no suggestion that it could not have been assembled in minutes and taken into the yard secreted beneath clothing to be immediately used to assault the plaintiff. Thus the existence of the weapon does not necessarily connote negligence on the part of the relevant defendant. Accordingly, this aspect of the plaintiff's claim must also fail.

35. It is regrettable that the plaintiff was a victim of such a vicious assault in the course of his incarceration at Fort Mitchell. The fact that he was convicted of manslaughter for a vicious crime perpetrated by him on Mr. Carroll does not in any way negate the culpability of those who inflicted this assault upon the plaintiff. His deprivation of liberty is his sentence and it is not open to others for any reason to visit retribution upon a prisoner such as the plaintiff, irrespective of their wrongdoing if this is what occurred in the present case. In this regard, the court notes that the plaintiff has obtained judgment against one of the two individuals who perpetrated this attack, namely Patrick Hogan, the fifth named defendant. Accordingly, if requested at a later date and on notice to the fifth named defendant, the court will assess the damages to which the plaintiff is entitled in respect of the injuries sustained by him as a result of the assault.

36. For all of these reasons, the plaintiff has not discharged the burden of proof and I will dismiss the action against the first to fourth named defendants.

