

BETWEEN

**JOSEPH POWER
RESPONDENT**

AND

THE GOVERNOR OF CORK PRISON, THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/APPELLANTS

Judgment of Mr.Justice Herbert delivered the 20th day of July, 2005

1. By virtue of the provisions of s.3(2) of the Occupiers Liability Act, 1995, the defendants owed a duty to the plaintiff to take reasonable care in the circumstances to ensure that he did not suffer injury or damage by reason of a danger existing on the property occupied by them, he taking reasonable care for his own safety.
2. I accept the expert evidence of Mr.Vincent O'Hara, of the firm of Tony O'Keeffe and Partners, Consulting Engineers, Kanturk, who was called in evidence on behalf of the plaintiff, that the floor of the toilet on the second floor of B Wing of Cork Prison though safe when dry, is extremely dangerous when wet.I find that the defendants were fully aware of this danger and I accept the evidence of prison officer Hennessy that a sign in words and symbols warning that the surface was slippery was fixed on a wall in a prominent and highly visible location at the entrance to the toilet.
3. I accept the evidence of prison officers Murphy, Hennessy and, Abbott, that the toilet was constantly checked by prison officers throughout the day and that a prisoner was designated to clean this toilet each day, after breakfast, after lunch, after tea and at 20.00hrs.and, on any other occasion an officer considered that it required cleaning.I accept the evidence of the plaintiff, which was not in anyway challenged by the prison officers, that the wash-hand basins in this toilet were in constant and daily use by prisoners on this floor to wash their drinking and eating utensils.I accept the evidence of the plaintiff, which was not challenged by the prison officers, that no towels, paper rolls, napkins or electronic dryers were provided in this toilet.I accept the evidence of prison officer Murphy, which was not contested by the plaintiff, that all prisoners are issued weekly with a tea towel and hand towel in their cell.
4. It was accepted by prison officers Murphy and Abbott that occasionally water would get on the floor of this toilet and the cleaner would be ordered to dry the floor.In cross-examination prison officer Abbott accepted that this occurred quite frequently.This is scarcely surprising when one considers the evidence that there are 16 or more cells on this landing of B Wing.On the evidence, the only other place where prisoners could wash their eating and drinking utensils is the, "slop-out" area where chamber-pots are emptied and cleaned as this prison has no in-cell sanitation.
5. I accept the evidence of Mr.O'Hara, which was not contradicted or challenged, that without replacing the existing square 12 inch ceramic floor tiles with more appropriate non-slip tiles, the hazard created by the presence of even an almost imperceptible film of water on the floor of this toilet cannot be entirely eliminated.Mr.O'Hara gave the floor dimensions as 9ft x 13½ft and, I accept his evidence that the replacement of this floor could be accomplished easily and at relatively little cost.I accept the evidence of Mr.O'Hara that the absence of any form of drying equipment in this toilet must inevitably and foreseeably result in the floor becoming wet and therefore dangerous to persons using the toilet.I accept the evidence of Mr.O'Hara that while not very hygienic, the laying of non-slip mats on the floor of this toilet would go considerably towards preventing prisoners from slipping, even though such mats could themselves present a possible tripping hazard if not very carefully maintained.
6. I find on the evidence that a sufficient and effective cleaning routine was operated by the defendants with respect to this toilet.I am satisfied that a breakdown of this housekeeping system did not occur on 5th February, 2001.I find that in accessing the W.C.cubicle the plaintiff traversed without difficulty the same area of the toilet floor where he claims he subsequently slipped.He stated that he was in the W.C.cubicle with the door closed for a couple of minutes: in cross-examination he was prepared to accept about 2 minutes.He stated in evidence that he heard a number of other prisoners enter and leave the toilet in this time.He stated that he heard the taps running in the two wash-hand basins which are directly opposite the door of the W.C.cubicle and just over 4ft away.He told the court that when he emerged from the W.C.cubicle he was alone in the toilet.He said that he did not cross to the wash-hand basins but turned immediately to his left in the direction of the entrance to the toilet.
7. The plaintiff told the court that before he had completed this turn both his legs suddenly and without warning slipped from under him and he fell helplessly forward and in falling struck the left side of his forehead at the hairline above his left eye against a radiator panel which was affixed to the wall next to the wash-hand basins.This was the side of his forehead which would have been most remote from the radiator.The plaintiff told the court that as he was picking himself up he noticed that an area of the floor, which he described as being almost 3 tiles square and lying, between the door of the W.C.cubicle and the wash-hand basins, was covered with a layer of water.He did not say, as is alleged in the Replies to Particulars that the, "floor was waterlogged".He described the patch of water as the equivalent of the contents of a glass which had fallen on the floor and spread.He told the court that after this fall his clothes were, "ok", but that he was bleeding heavily and was afraid that blood would stain his clothes, of which he did not have many.He said that blood from his forehead was dripping onto the floor so that he re-entered the W.C.cubicle which he had just left and there made a wad of toilet tissue and pressed it to his forehead to try to staunch the bleeding.He told the court that during this time he saw no other prisoner inside or outside the toilet but that when he got to the entrance door to the toilet, - which is really only a swinging panel, - prison officer Abbott arrived on the landing side of the door coming from the plaintiff's left.
8. B.Wing, second floor of Cork Prison, consists of a rectangular open well surrounded by landings with individual cells opening unto the long axes, only, approximately eight cells on each side.On the right of the entrance to the toilet as the plaintiff emerged onto the landing, and about three feet distant, was a steel grill closing off the entire of the Wing.There are two doors in this grill, one facing each landing.Outside this grill is an area containing a Medical Station and stairs leading down to the first floor of B.Wing.There is a similar system of grill and gates on the opposite side of this area closing off access to A.Wing.Prison officer Murphy recalled that on 5th February, 2001 at about 16.20hrs.She was stationed between these grills supervising the access gates.Prison officer Hennessy told the court that all the prisoners whose cells were on the landing on the opposite side of the central well to this toilet were secured in their cells and having their tea and she was carrying out a head count.Prison officer Abbott told the court that he was securing prisoners in the cells on the landing on the same side as this toilet.The evidence of the prison officers and of the plaintiff was that it was tea time and prisoners in B.wing second floor, having obtained their food and tea on a lower floor and carried it upstairs to their cells, were being secured in their cells while they partook of the meal.Prison officer Abbott told the court that the landing outside this toilet was about twice the length of the court, or approximately seventy feet, while prison officer Murphy

considered it to be three times the length of the court or approximately 105ft.

9. Prison officer Abbott told the court that he had secured about one half of the cells on his landing and was about 35ft from the entrance to the toilet, moving in that direction, when he noticed three prisoners in the area of the toilet door whom he considered to be acting suspiciously. Pressed on the matter in cross-examination, he said that his suspicions had been aroused by the fact that these men appeared to be taking an unnecessary and undue interest in his whereabouts. These men were between him and the security gate in the steel grill behind which prison officer Murphy was standing. Prison officer Abbott said he did not see them entering or leaving the toilet. He could not recall their names and he agreed that they could have been returning to their cells from a lower floor, from classrooms or work assignments. In any event, he decided to investigate. He told the Court that as he walked towards the entrance to the toilet prison officer Murphy called to him and said, "someone is bleeding in the toilet". His evidence in this regard is supported by that of prison officer Murphy. She told the court that at about 16.30hrs. a prisoner had come out of the toilet, approached the security grill and said to her, "Miss. there is a fellow bleeding in the toilet". In cross-examination she corrected this account to say that she had not in fact seen this prisoner actually coming out of the toilet but as she had first noticed him standing at the door of the toilet she had assumed that he had come from there. She told the court that it was a very busy time with lots of prisoners moving about and she was fully absorbed in opening and closing the four security gates and had not noticed the prisoner before this. She accepted, as did prison officer Abbott that the interior of the toilet is clearly visible, viewed from above and below the swinging panel entrance door. Prison officer Murphy told the court that she asked this prisoner, whose name she could not recall, what had occurred. She said he just shrugged and walked away in the direction of the cells. Prison officer Abbott told the court that when he arrived at the entrance door to the toilet the three or four men who had attracted his attention had passed by. He said that when he met the plaintiff at the entrance door to the toilet the plaintiff was holding a bloodied wad of toilet paper to his forehead. He asked the plaintiff, "did you get a belt or something?". The plaintiff replied that he had fallen. Prison officer Abbott in cross-examination admitted that he had not heard any noise coming from the toilet as he approached. He believed, he said, that if there had been any commotion in the toilet, prison officer Murphy would have heard it as she was standing only two or three feet away from the toilet door. Prison officer Abbott said that he again asked the plaintiff had he, "got a belt" and, the plaintiff replied that he had not but had fallen. Prison officer Abbott said that he decided to take the plaintiff to the medical station which was immediately outside the steel grill.

10. Prison officer Murphy said that she had also asked the plaintiff what had happened and he replied that he had fallen in the toilet. She said that she did not question him further and allowed the plaintiff, accompanied by prison officer Abbott, to exit through the security gate and enter the medical station. She said that she then called to prison officer Hennessy and informed her that, "Joe Power said he fell in there", pointing to the toilet. Prison officer Hennessy was the ranking officer on this occasion. Prison officer Murphy accepted that there could have been two or three prisoners between her and prison officer Abbott as he approached the entrance door to the toilet. Prison officers Murphy and Abbott agreed that the toilet was not a suitable place for washing eating and drinking utensils but said that there was no other facility available for that purpose except the slopping out area at the other end of the landing which they considered far less suitable. Prison officer Murphy agreed in cross-examination that there was no Prison Regulation requiring prisoners to bring their issued tea towels or hand towels to the toilet and she felt that such a regulation would in any event be unworkable, – a sentiment with which I entirely agree.

11. Prison officer Hennessy told the court that on 5th February, 2001, she had twelve years experience in the Prison Service. She said that when prison officer Murphy had told her that the plaintiff had injured himself in the toilet she immediately entered the toilet and visually examined the entire area conscious of the fact that she would have to complete an Incident Report Form and also report on the matter to her Supervising Officer. She said that she saw no evidence of any liquid, including droplets of blood on any part of the toilet floor. In her opinion every part of the toilet floor was completely dry. It was put to her in cross-examination that as the floor tiles were an off-white colour with multiple random dark specs it would be very difficult to see water on the floor, especially a thin film of water. Prison officer Hennessy disagreed. She accepted that she did not know where on the floor the plaintiff claimed he had fallen. The plaintiff said that he had seen the water only because he had fallen and while on the floor had looked to see why he had slipped. The plaintiff did state in evidence that he believed that anybody looking very carefully would see the water. However, there was no evidence before the court that the plaintiff had told either prison officer Murphy or prison officer Abbott exactly where or why he had fallen. Prison officer Murphy had said no more to prison officer Hennessy than, "Joe Power said he fell in there".

12. I find on the evidence, that unless she knew exactly what area of the toilet floor to examine and had then squatted or bent down very close to the surface of the tiles even an observer of prison officer Hennessey's experience could have been deceived by a visual examination into believing that the surface of the floor was dry, especially in the absence of directional light. I am satisfied that the general off-white colour and dark speckled surface of the tiles could without difficulty conceal blood spots unless one was very carefully looking for them. On the evidence, no one had advised prison officer Hennessy that the plaintiff was bleeding and she did not see him herself. In the circumstances, while fully satisfied that prison officer Hennessy did in fact carry out a careful visual examination of the toilet area including the floor, I am not satisfied in the circumstances above mentioned that the court could unquestioningly accept her conclusion that the floor was completely dry and free from blood spots so that the plaintiff's account of what he claimed had occurred to him must be rejected as false.

13. This plaintiff has never deviated from his account of having fallen on this toilet floor and struck his forehead on the radiator. He said that this was what he told Mr. Stack in the prison medical station and this was not challenged or contradicted by the defendants. Mr. Stephen Cusack, Consultant in Accident and Emergency Medicine in his report of 30th October, 2001, admitted into evidence, records that the patient on 5th February, 2001, at the accident and emergency department of Cork University Hospital gave a history of having fallen on a toilet floor and struck his head resulting in a wound on the left side of his forehead. Mr. Cusack recorded that the plaintiff had confirmed this history at review on 26th October, 2001. Mr. Cusack was of the opinion that the injury and scalp wound suffered by the plaintiff were consistent with this history. The plaintiff related evidence that when he gave this history he was in the immediate close presence of two prison officers.

14. The plaintiff accepted that he had made no complaint to the Prison Authorities at the time of this alleged accident. He explained that he had not done so as he was uncertain how such a complaint might be received and he was concerned that it might in some way delay his release from prison. However, on 15th May, 2001, he wrote from Cork Prison to Mr. Michael Buggy, Solicitor, of Michael Buggy and Company Solicitors, Kilkenny, asking him to:-

"deal with a claim that I wish to make here in Cork Prison. I had an accident here in February. I slipped in the toilet on the landing and hit my forehead on a radiator..."

15. Acting on this letter Michael Buggy and Company wrote to the first named defendant making a claim on behalf of the plaintiff on 4th September, 2001.

16. In cross-examination it was put unequivocally to the plaintiff that he had in fact been assaulted in the toilet area by the men

prison officer Abbott considered to have been acting suspiciously and, that he was falsely claiming to have sustained the injuries complained of as a result of slipping on the floor. The plaintiff accepted that he had three convictions for assault and that on 4th April, 2001, just four weeks prior to the alleged accident, he had been summoned before the first named defendant for fighting with a fellow prisoner. The plaintiff told the court that each of the assaults of which he had been convicted had occurred when he was under the influence of drink. He said, and it was not contradicted by the defendants, that the incident on 4th April, 2001 was a verbal altercation only relating to the delivery of mail to his cell and, that he and the other prisoner involved had shaken hands before the Governor of the prison. The plaintiff told the court that if he had been attacked by other prisoners in the toilet he would have vigorously defended himself and that it would have been impossible for prison officer Murphy, who was standing only a few feet away, not to have heard that something unusual was going on in the toilet.

17. While I accept that it is not unknown for prisoners to attack and inflict injuries on each other while in prison, I find that it is altogether improbable that this plaintiff was assaulted on this occasion in this toilet. The alleged assailants would have had to have carried out a very vicious assault, with almost certain serious consequences for themselves, at a time when they were completely surrounded by three prison officers and with scarcely any chance of escaping detection and recognition. Prison officer Murphy was just a few feet away from the toilet in one direction, which, in addition, was closed off by a steel grill. Prison officer Abbott was rapidly approaching along the landing from the other direction and prison officer Hennessy was on the opposite side of the open central well with totally unimpeded visibility. In addition, on the evidence of prison officer Hennessy, all the prisoners on the landing on her side of the open central well were secured in their cells. Prison officer Abbott stated that he had secured more than half of the cells on the landing on his side. I find it improbable, in the absence of some compelling evidence, that even the most strongly motivated assailant would choose to carry out a vicious assault in such circumstances. I think it also meaningful that no assault investigation was conducted by the Prison Authorities following this event.

18. The plaintiff in cross-examination asserted that he was 100% sure that the notice in black and yellow warning, "danger slippery surface", shown on photograph No.8 taken by Mr. O'Hara and proved in evidence by him, was not there on 5th February, 2001, or even when he left the prison on 3rd October, 2001. Photographs produced on behalf of the defendants, admitted into evidence and accepted to have been taken on 7th September, 2001, show the same or an identical notice in place in what appears to be the same position on the wall at the entrance to the toilet. On the balance of probability, given this evidence and the evidence of prison officer Hennessy that a notice of this type had been in place for at least two years prior to 5th February, 2001, I find that this warning notice was in place on the afternoon of 5th February, 2001. The plaintiff in cross-examination admitted that he knew that the toilet floor became wet when prisoners washed their eating and drinking utensils in the wash-hand basins. He admitted that he had heard other prisoners washing their eating and drinking utensils in these wash-hand basins while he was occupying the W.C. cubicle.

19. I find on the evidence to which I have adverted, on the balance of probabilities, that the plaintiff did in fact slip and fall as he alleges and in falling somehow struck the more remote side of his upper forehead against the radiator affixed to the wall next to the wash-hand basins. No expert or technical evidence was offered to show that this was impossible and, I am satisfied, given the very confined area in which this fall occurred, that it would require a very minor rotation of the plaintiff's upper body as he fell to bring his left forehead into contact with the edge of the radiator.

20. I find that it was reasonably foreseeable by these defendants that if they did not discharge the duty of care, which I find they owed to all prisoners including this plaintiff obliged to use this toilet, to take reasonable care to ensure that the floor was either kept dry or was covered with non-slip mats, that an injury of the type of which the plaintiff complains could occur. I find that the plaintiff was a person whom the defendants should have had in their contemplation as someone likely to be injured if they did not properly discharge this duty of care. I find that the plaintiff suffered the injury of which he complains as a direct consequence of having slipped and fallen as a result of the defendant's breach of their duty to take care. I find that there is no overriding requirement of social utility that these defendants ought to be exempt or excused from the consequences of their breach of duty. In the circumstances I find that the defendants were guilty of negligence as alleged.

21. I find that there was no contributory negligence on the part of the plaintiff. Even if he was or ought to have been aware of the warning notice that the floor was slippery: even if he knew that as a result of the activities taking place at the wash-hand basins which he admitted hearing while in the W.C. cubicle, the floor outside that cubicle was likely to be wet, there is no evidence that there was something which the plaintiff did or failed to do which amounted to recklessness for his own safety in the particular circumstances. It was not suggested that his footwear was unsuitable or unsafe. It is obvious from the photographs taken and proved in evidence by Mr. O'Hara and, which it was accepted showed the toilet as it had been four years previously, that there were no handrails and no alternative route which the plaintiff could have held, or taken to avoid the area of the floor on which he slipped. It was not suggested that the plaintiff was running or hurrying unduly or otherwise behaving inappropriately in anyway. I find that there was no duty on the plaintiff to scrutinise the floor with particular care before deciding where to place his feet. I accept the evidence of the plaintiff that when he exited the W.C. cubicle he immediately started to turn to his left and did not cross the floor in the direction of the wash-hand basins. I find that in the circumstances as previously outlined the plaintiff had taken all reasonable precautions for his own safety.

22. The plaintiff stated that he had slipped without any warning and had fallen heavily and helplessly forward striking the area of his left forehead above his left eye near the hairline on a radiator affixed to the wall. He said that he was dazed but was not rendered unconscious. The wound was dressed by Mr. Stack in the prison medical station only a few feet from where the accident occurred and the plaintiff was then sent by Mr. Stack to the accident and emergency department of Cork University Hospital for further investigation. The plaintiff told the court that he was slightly disorientated and had a fierce pain in his head. At the hospital a diagnosis was made of a mild head injury with a two centimetre wound on the left side of the plaintiff's forehead around the level of his hairline. The plaintiff was found to be alert and all his vital signs were stable. The wound was dressed and closed with a combination of tissue, glue and steri-strips and the plaintiff was then discharged.

23. The plaintiff told the court that for several months, up to about October, 2001, he suffered from headaches which gradually decreased in number, duration and pain intensity. He was reviewed by Mr. Stephen Cusack, Consultant in Accident and Emergency Medicine on 26th October, 2001. Mr. Cusack recorded that the plaintiff told him on that occasion that the headaches were then occasional, could occur up to three times per week and last up to three hours. He took paracetamol to relieve the pain and discomfort. Mr. Cusack formed the opinion that these headaches were consistent with post-concussional type headaches and he expected that they would improve and resolve over the coming months.

24. Mr. Cusack found that the scalp wound had healed uneventfully but that the plaintiff was left with a two centimetre livid scar and there was slight tenderness in the region of that scar. In his opinion on 26th October, 2001, this scar constituted no great cosmetic blemish. I examined this scar on 11th July, 2005. I find that this scar is at most a mild cosmetic blemish at conversation distance and is almost entirely concealed by the plaintiff's hair which he has deliberately styled to achieve this purpose. The plaintiff told the court that the scar becomes more noticeable in hot weather and was still somewhat touch sensitive.

25. In accordance with the provisions of s.22 of the Civil Liability and Courts Act, 2004, I had regard in assessing damages to the provisions of the Personal Injuries Assessment Board, Book of Quantum, but found there no indicated parameters of compensation for this type of injury. I find that the plaintiff had substantially recovered from the headaches within twelve months from the accident and that while unpleasant, these headaches were not at any time seriously disabling. Undoubtedly the plaintiff will have a permanent two centimetre scar on his left forehead at the hairline above his left eye which may well become more noticeable in very hot weather. I consider that this scar constitutes at most a mild cosmetic blemish which really could not, and, on the evidence does not, cause any real social embarrassment to the plaintiff.

26. For pain, discomfort and inconvenience to date I award this plaintiff the sum of €10,000. I award him an additional sum of €6,500 in respect of the scar. The court was advised that there is no claim for special damage in this case. There will therefore be a decree in favour of the plaintiff for the sum of €16,500.