Neutral Citation Number [2009] IEHC 466

THE HIGH COURT

2005 4041 P

BETWEEN

JOSEPH CASEY

PLAINTIFF

AND

THE GOVERNOR OF MIDLANDS PRISON AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Mary Irvine delivered on the 27th day of October, 2009

1. The plaintiff is a carpenter, by trade, who was born on 23rd May, 1974. He brings this claim seeking damages for negligence against the defendants arising from an assault which he sustained whilst a prisoner at the Midlands Prison, Portlaoise on 21st January, 2005. At that time, the plaintiff was serving a four month sentence for assault.

The facts

2. In the early afternoon on 21st January, 2005, the plaintiff participated in the second recreation period of the day at the Midlands Prison. He went to the area in which the prisoners played pool. He was playing pool with a fellow prisoner when another inmate announced that it was his turn next. In response to this intervention, Mr. Egan, a fellow prisoner of plaintiff, asserted that it was he who was next play at the table and plaintiff was asked to confirm that this was so. The plaintiff refused to confirm Mr. Egan's statement indicating that he was only concerned with his own game. Mr. Casey was not impressed that the plaintiff did not support his account of events and he told Mr. Egan not to be smart or he would "break his face".

3. There is a dispute as to what occurred next. The plaintiff alleged that Mr. Egan, following his outburst, broke a cue by slamming it on the pool table before storming off. These facts were disputed by the defendants who were only made aware of this detail when the case opened. The breaking of the cue had not been referred to in the pleadings. Neither had this event been made known to Mr. Tasker, the plaintiff's expert witness, when he was instructed in the matter.

4. As far as the plaintiff was concerned, he did not expect any repercussions to arise as a result of what had happened at the pool table. He believed the incident was over. He had not previously known Mr. Egan. Later that evening, the plaintiff participated in the third recreation period of the day. He chose, along with approximately ten or twelve of his fellow prisoners, to go to the recreation yard attached to B wing. The rest of the prisoners went to the indoor recreation area or remained in their cells.

5. The yard in which the plaintiff was assaulted is attached to B wing and is within its secure perimeter. The yard is solely for the use of prisoners from that wing. Each wing in the prison has its own exercise yard. Access to the yard from the cells involves prisoners going from various landings through a number of gates, two of which are manned. Prisoners are not searched before entering the yard.

6. The plaintiff was in the yard for some minutes, talking to one of his friends when suddenly and without any warning he was set upon by a number of other prisoners. One of those prisoners was subsequently identified as the Mr. Egan with whom he had had the verbal exchange earlier in the afternoon. Mr. Egan hit the plaintiff over the head several times with what the court was told was the standard white delft cup issued to all prisoners. The plaintiff sustained several lacerations to his head and numerous kicks and blows to other parts of his body. The plaintiff managed to escape his attackers by running to the gate of the yard which was manned by two prisoner officers. They called for reinforcements. The plaintiff was not permitted to leave the yard until assistance arrived. It is accepted that the plaintiff was not at any risk of assault during the short period it took for help to arrive but the plaintiff was distressed by the fact that he was not allowed out of the yard with immediate effect. The plaintiff accepted that the assault was over before anyone realistically could have been expected to intervene to help him.

7. Following the assault the plaintiff was seriously shocked and upset. He was taken to the Accident and Emergency Department of the Midlands Regional Hospital bleeding from several lacerations. X-rays to the skull and chest were carried out. The multiple lacerations to the plaintiff's forehead and head were stitched with nylon sutures. Approximately 20 sutures were inserted in the plaintiff's head and these were removed some five days later. The plaintiff complained of tenderness in his abdomen and shoulder and he was found to have blood in his urine. Fortunately no adverse sequelae resulted from the soft tissue injuries. The plaintiff, however, has been left with scaring to his forehead and head. He experiences feelings of numbness and discomfort when showering or combing his hair. This is due to damage to the underlying nerve endings.

Prison regime

8. Mr. Kennedy, Assistant Governor of the Midlands Prison, was called as a witness on behalf of the plaintiff. This undoubtedly occurred due to the fact that the plaintiff wished to prove the content of certain documentation pertaining not only to the assault, the subject matter of the present proceedings but also documentation pertaining to the plaintiff's assailant, Mr. Egan. This being the case, the evidence adduced by Mr. Kennedy must, of course, be considered as part of the evidence adduced by the plaintiff.

9. Mr. Kennedy had extensive knowledge of the Irish prison system having also worked in Mountjoy, Wheatfield, Limerick,

Cork and Fort Mitchell Prisons. He gave the court substantial detail regarding the operation of the Midlands Prison and its security system. He also, where appropriate, referred to the security regimes in other prisons with which he was familiar in Ireland.

10. According to Mr. Kennedy, prisoners when admitted to the Midlands Prison are thoroughly searched for any potential weapons. Thereafter, they are only searched if going outside the security perimeter of their wing. By way of example, if a prisoner was leaving their wing to go to the workshop they were searched on their way back into the wing. Similar searches were carried out if a prisoner attended any other facility beyond their own wing such as the medical centre. Whilst prisoners remained within the perimeter of their own wing the defendants, Mr. Kennedy advised the court, tried to operate a regime which was as humane as possible whilst also trying to ensure that the prisoners remained safe. As far as Mr. Kennedy was concerned, the deprivation of the prisoners' liberty was their punishment and he told the court that the defendants accordingly believed that prisoners should not be subjected to any additional unnecessary dehumanising treatment and that this included unnecessary body searches, whilst they were serving their sentences.

11. Mr. Kennedy told the court that all prisoners, on arrival, were given their own delft mug and plate which thereafter they kept in their cell. They were issued also with heavy duty plastic cutlery and were supplied with a kettle and television for their cell. Prisoners were advised of the rules which prohibited delft being taken outside their cell other than for the purpose of collecting food which was served in another area of the prison. Food was taken back to the cell and eaten there during a period when the prisoners were locked up. Several cells had single occupancy whilst others cells were occupied by two or four prisoners. Giving prisoners a delft mug and plate was an effort on the part of the defendants to humanise the environment in which the prisoners were living. There had never been an incident, according to Mr. Kennedy, where delft had been used as a weapon against another prisoner.

Relevant case law: the duty of care

12. The parties to this action relied upon a number of decision arising from incidents of assault in various prisons. Each of these cases turned on their facts. However, the principles that emerge therefrom are of real import and they can succinctly be summarised 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] ILRM 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.)

(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.)

(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)

Liability

13. Apart from the evidence of Mr. Kennedy, the plaintiff's liability case was made through the evidence of Mr. Ronald Tasker. Mr. Tasker has had over 40 years experience in the United Kingdom Prison Service. He has been the Governor of five different prisons, all of which he stated were maximum security prisons. These prisons, whilst designed to deal with high security prisoners were often not full. Hence, ordinary prisoners were often sent there. He agreed that the ordinary prisoners were subjected to the standard regime in such prisons which was somewhat harsher than in non-high security prisons. However, he stated that the incidents of assault that occurred in high security prisons were, in his opinion, no more frequent nor severe than those which occurred in ordinary prisons.

14. Mr. Tasker was also familiar with a significant number of non-high security prisons in the United Kingdom and other parts of the world. Since 2004, he has worked as a consultant in the custodial field in England, Wales, Scotland and Northern Ireland, where has been involved in investigating the circumstances in which a number of prisoners have died whilst in custody. Mr. Tasker was not afforded an opportunity of inspecting the Midlands Prison and he accepted that he had no direct experience of prisons in the Republic of Ireland. For the purposes of his evidence, he had prepared an expert report on 22nd September, 2009.

15. The defendants, in these proceedings, did not call any evidence themselves. They relied upon the evidence that had been given by Mr. Kennedy, Assistant Governor of the Midlands Prison, when he was called as a witness on behalf of the plaintiff. Mr. Kennedy, as already advised, had worked not only in the Midlands Prison but also in several other prisons in this country.

16. Whilst many potential areas of negligence were canvassed with Mr. Tasker in the course of his evidence, the plaintiff's claim was ultimately reduced to the two principal allegations of negligence which had been canvassed in the pleadings, namely:-

(i) The failure on the part of the defendants to carry out a search of prisoners entering the prison yard thus exposing prisoners to the risk of an assault from a weapon that could thereby be concealed on the person of another prisoner. In this case, the defendant's alleged default permitted to the delft mug to be brought into the yard where it was used to attack the plaintiff. Had there been a search of a patting down nature, this potential weapon would have been detected and the plaintiff's injury avoided.

(ii) The defendants failed to act, on the day of the assault, with due regard to the known propensities of Mr. Egan.

His alleged propensity for troublesome behaviour when taken together with the incident that had occurred in the pool room earlier in the day, warranted the authorities engaging with Mr. Egan to find out what was going on or to at least "think about" the potential upshot of that event.

17. In relation to the first of these issues, Mr. Tasker advised the court that there should have been a search of prisoners moving from their cells to the yard. This he described as the prisoners moving "off the wing". They should, in his opinion, have been subjected to a search which would have involved each prisoner being patted down to ensure that a potential weapon such as the mug in question was not taken out into the yard. The same search was not required, according to Mr. Tasker, if prisoners were moving from their cells to one of the indoor recreation areas. The search was required because:-

(a) The movement to the yard was, in his opinion, a movement "off the wing";

(b) Scores between prisoners were more likely to be settled in a prison yard than in an indoor recreation area. This was due to the fact that prison officers were normally in much closer proximity to prisoners when they were indoors;

(c) Prisoners going outside would often be wearing outdoor clothing making it easier to hide a potential weapon from a visual inspection.

18. As to Mr. Taker's evidence that prisoners should be searched before being admitted to the exercise yard, Mr. Kennedy stated that this was not practical. They were in excess of 120 prisoners on B wing. Any number of these might decide to go to the yard. There were three recreation periods a day. It was neither practical, necessary or humane to carry out such a search. He gave evidence that a full body search would take about seven minutes. He further disagreed with Mr. Tasker's evidence that any less intense type of physical search of persons entering the yard was warranted.

19. Mr. Kennedy in his evidence stated that in the Irish Prison Service it would be considered inhumane and a hardship for prisoners to be subjected to a search of the nature suggested by Mr. Tasker, every time they wished to go the recreation yard. He said there was no reason to distinguish the yard from any other area where prisoners might congregate such as the indoor recreation area. The yard was solely for the use of prisoners in B wing. It was not therefore "off the wing" as suggested by Mr. Tasker. Prisoners from other wings did not have access to that yard. It was within the secure environments of area B. Thus there was no justification for searching inmates going into that yard. In this regard, the Midlands Prison he believed may have been different from some of the prisons being relied upon by Mr. Tasker where prisoners from different wings might use the same exercise yard.

20. In relation to this issue, the court heard that only three incidents had occurred in the recreation yard attached to B wing in the twelve months prior to this assault. Twelve assaults had taken place in the indoor recreation area over the same period. None of the three incidents in the yard, according to Mr. Kennedy, involved the use of a weapon.

21. Finally, Mr. Kennedy in his evidence stated that the system adopted in the Midlands Prison in relation to the movement of prisoners between their cells and in the outdoor recreation yard was similar to that used in Wheatfield Prison, Mountjoy, Fort Mitchell, Cork and Limerick. Only if a prisoner was moving to a communal yard would prisoners be searched.

Conclusion on the issue of the foreseeability of an assault on the plaintiff by Mr. Egan

22. In relation to this first issue, I conclude that the defendants were not in breach of the duty of care which they owed to the plaintiff. The defendants are not the insurers of the safety of their prisoners. They must use reasonable care to avoid foreseeable injury occurring. I accept Mr. Kennedy's evidence that a balance has to be struck between the safety of prisoners on the one hand and the need to avoid a regime which may dehumanise and punish other prisoners who, as citizens, are entitled to be treated with dignity and respect. An assault of the type that occurred in this case by one prisoner on another using a prison mug could have happened in any cell shared by two or four inmates. Such an assault could equally, on Mr. Tasker's evidence, have occurred in an indoor recreation area or on the way back from the area where food is served. In respect of such an assault, the defendants would not have been culpable given that Mr. Tasker advised that it was not necessary for the prison authorities to search prisoners leaving their cell other than when they were going to the recreation yard.

23. As to the foreseeability of injury from a weapon brought into the yard, no evidence was produced to show that delft was ever used in any assault in the Midlands prison. Similarly, there was no evidence that any other type of weapon was used in such assaults. If assaults with weapons were occurring in the recreation yard, and these were denied by Mr. Kennedy, I am convinced that some evidence in this regard would have been obtained on discovery and made available to the court. In the absence of such history, I cannot accept that the defendants were mandated to implement a system whereby each prisoner moving to what was described by Mr. Kennedy as the exercise yard designated for the use of prisoners in B wing, would have to be searched. I accept Mr. Kennedy's evidence that no weapons had been used in the only three episodes of reported fighting in the yard in the twelve months prior to the assault upon the plaintiff. In this regard, I simply cannot infer, as I have been invited to do by counsel for the plaintiff, that weapons were used in these incidents merely because of the fact that in the P.19 report dealing with the plaintiff's assault, there was no mention of the weapon used to inflict the plaintiff's injuries.

24. The fact that it might not have imposed an undue burden upon the defendants to provide for the type of search contended for by the plaintiff, is not fatal to the defendant's defence. The plaintiff must show that a failure to implement such a procedure was on the evidence, negligent. This, the plaintiff has failed to do. I am not satisfied from Mr. Tasker's evidence that searches of the nature contended for by him are routinely carried out in non-high security prisons in the United Kingdom where prisoners are moving from their cells to a recreation yard which is not "off" the prisoners wing. If this was so, every prison in the United Kingdom would have a set of written regulations or rules setting out that safety procedure. No such readily available documentary evidence was furnished to the court. Even if the court is incorrect in this regard, the fact that such searches may be routinely carried out in United Kingdom prisons does not mean that the system in this country is necessarily defective.

25. On the plaintiff's evidence, I am invited to make a finding the result of which would be to condemn as dangerous,

what I understand to be the accepted norm in Irish prisons of permitting prisoners to move within the wing to their exercise yard without a search. I am invited to conclude that every prison operating this system is failing in its obligations to it inmates and that it should now alter its practices to coincide with the model proposed by Mr. Tasker. This, I cannot accept on the basis of the plaintiff's evidence. I am satisfied that having regard to the infrequent incidents of assaults in the Midlands Prison in its yard, it would be wholly disproportionate and contrary to the humanitarian interests of the vast majority of its prisoners to require the authorities to search every prisoner who wished to avail of the recreation yard facility perhaps as often as three times a day for the whole of their sentence so as to avoid the remote risk of an assault being perpetrated against them by another prisoner using an implement that might have been found in the course of such a search. In coming to this conclusion, I have also had regard to the agreed evidence that even when body searches are routinely carried out that small weapons such as blades will rarely be detected thus leaving open, in any event, a continuing risk of significant injury to prisoners from those determined to injure others irrespective of any system of body searches as may exist.

Conclusion on the issue of the defendants alleged negligence for failing to search all prisoners accessing the recreation yard

26. In relation to the second allegation of negligence, I firstly find as a fact that the incident in the pool room did not occur in the manner alleged by the plaintiff. I do not accept his evidence that, following the exchange of words between himself and Mr. Egan, that Mr. Egan proceeded to break a cue by slamming it on the pool table. The fact that this aspect of the plaintiff's account of events was not directly challenged by counsel for the defendant is not fatal to the right of this Court to reject the plaintiff's evidence on the issue. In reaching my conclusion that Mr. Egan did not break a cue on the pool table, I have relied on the following matters:-

(i) The fact that his allegation was first mentioned by counsel for the plaintiff in the opening of the case.

(ii) That the allegation of the breaking of a snooker cue on the pool table was not referred to in any of the pleadings and neither were details of this event furnished to Mr. Tasker when he was first asked to report upon the circumstances that led to the plaintiff's injuries.

(iii) If the incident had occurred, the same would, as a matter of probability, have resulted in a paper trail being created within the prison. The incident would have generated:-

(a) a P.19 investigation record;

(b) a record of the plaintiff's liability to pay the prison authorities for the replacement of the cue.

No such documentation exists.

(iv) The P.19 disciplinary documentation generated in respect of Mr. Egan's assault upon the plaintiff, whilst referring to the verbal exchange in the snooker room, makes no mention of any pool cue being broken.

(v) Mr. Kennedy's evidence that it was unlikely that a prisoner would damage a pool cue as there was peer pressure from their fellow inmates not to damage equipment used by them for their leisure activities.

27. I reject any adverse inferences that I have been asked to draw from the fact that the defendants did not seek to investigate or call evidence from the security officers who were on duty at the pool hall on the afternoon of 21st January, 2005. I can readily understand why no such investigations or evidence was available having regard to the fact that the defendants were made aware of the allegation that a pool cue was broken for the first time on the opening of the case.

28. The second finding of fact that I make in relation to this aspect of the case is that I am not satisfied that Mr. Egan had any characteristics which justified the defendants taking any special precautions following the exchange of words between the plaintiff and Mr. Egan in the pool room. I accept Mr. Kennedy's evidence that Mr. Egan was a nuisance and somewhat of a thorn in the side of the prison service. He undoubtedly was involved in a number of incidents which generated P.19 disciplinary procedures. However, he had had none of these in the three weeks before this incident. Further, whilst he had committed two previous assaults on fellow prisoners, these incidents involved what Mr. Kennedy described as regular type fighting between inmates. No weapons had been used. I also take into account the fact that Mr. Egan was not known to the plaintiff which, I think would have been likely if he was a prisoner of some repute. Finally, I cannot infer merely because of the fact that Mr. Egan was moved to Cork and/or Limerick Prison for short periods of time that this was due to the fact that he generated any particular danger to his fellow prisoners. Even if it be the case that the plaintiff's evidence is correct that a prison officer told him that no prison wanted Mr. Egan that does not prove he had any propensity to carrying out vicious assaults on fellow inmates.

29. Even if I was satisfied, which I am not, that Mr. Egan broke the cue on the pool table as alleged by the plaintiff or that he had a propensity towards disagreeable behaviour, the height of Mr. Tasker's evidence was that the defendants were mandated to make inquiries of Mr. Egan as to why he had engaged in that behaviour. Mr. Tasker did not state that Mr. Egan's behaviour in such circumstances would have justified denying him access to the recreation yard that evening. Mr. Tasker stated that the onus on the defendants was to make inquiries of Mr. Egan so as to satisfy themselves that he had not any malevolent intentions as a result of the dispute with the plaintiff.

30. I am satisfied, on the balance of probabilities, that had Mr. Egan been approached by the defendants regarding the alleged incident that Mr. Egan would not have advised the prison authorities of his intention to assault the plaintiff. It is highly likely that he would have stated that the incident was over. Indeed, the plaintiff in his own evidence stated that as far as he was concerned the incident in the pool room was over and he did not anticipate any adverse consequences arising therefrom. Accordingly, I conclude that even if the events occurred as the plaintiff contends in the pool room and even if they had been investigated by the defendants that the same would not have precluded Mr. Egan attending the recreation yard later that evening where he assaulted the plaintiff. Accordingly, there is no causal nexus between any alleged negligence relating to the incident in the pool room and the events that occurred later in the day.

Conclusion

31. The assault the subject matter of this claim was not foreseeable. It is not reasonable to contend that it should have

been foreseen by the prison authorities as a result of what had happened earlier that afternoon between the plaintiff and Mr. Egan. Neither can I conclude that the authorities, because of Mr. Egan's past record, should have anticipated such an assault. He had been in no trouble for the previous three weeks and had no record of violence in prison save for two incidents of fighting which, on Mr. Kennedy's evidence, were of no particular significance. No implements or weapons had been used in the course of such fighting. The plaintiff himself thought the incident in the pool room was over, the parties to the dispute had no prior history of conflict and Mr. Egan was not even known to the plaintiff.

32. Even if I were to accept, which I do not, that a pool cue was broken in the course of the verbal exchange in the pool room, Mr. Tasker's evidence to the effect that intervention of some nature was warranted did not go so far as to suggest that the likely consequence of such intervention would, as a matter of probability, have precluded Mr. Egan from attending in the recreation yard that evening. Accordingly, no nexus has been established between any negligence arising out of the incident in the indoor recreation area and the assault which actually occurred.

33. In respect of the alleged negligence on the part of the defendants for their failure to search all prisoners moving from their cells to the recreation yard, I have assessed the plaintiff's evidence against the legal principles referred to earlier in this judgment. Having done so I am satisfied that the system contended for by the plaintiff is not warranted having regard to the anticipated risk of injury from implements such as a prisoner's mug which might otherwise be detected if all prisoners were to be searched every time they sought entry to the recreation yard. The system currently operated by the defendants is the standard practice adopted in all non-high security units in this country. The evidence in relation to the Midlands Prison was that there were only three incidents of violence in the prison yard in the twelve months prior to the assault upon the plaintiff and none of these involved a weapon. The system which the plaintiff contends is mandated, even if implemented, would not in any event prevent small and dangerous items being secreted into the yard by prisoners determined to injure a fellow inmate. Further, an injury from an implement such as a delft mug could occur in a prison cell or in an indoor recreation area even if a system of searching prisoners on entry into the yard was in place.

34. Of equal importance to the aforementioned matters is the fact that the systematic searches proposed by the plaintiff would substantially impinge upon the constitutional rights enjoyed by prisoners as citizens and the requirement that where possible their dignity as human beings should be respected. These searches, which would be visited upon all prisoners potentially as often as three times per day throughout their confinement, would I believe amount to a disproportionate interference with those rights, when weighed against the risk of foreseeable or potential injury absent such system. The plaintiff's submission, if accepted, would force the defendants to abandon much of their efforts to promote a humane model of confinement to protect against a remote risk of injury in the prison yard. To my mind, the defendants efforts to preserve dignity, generate the notion of citizenship even within the confines of prison life and avoid the unnecessary dehumanisation of prisoners by subjecting them to ongoing body searches, justifies them accepting the remote risk that occasionally some type of injury which would otherwise be avoided if prisoners were always searched on entry to the recreation yard, may occur.

35. For all of these reasons the plaintiff's claim must fail.