THE HIGH COURT

[2014 No. 6642 P.]

BETWEEN

GARY SIMPSON

PLAINTIFF

AND

GOVERNOR OF MOUNTJOY PRISON, IRISH PRISON SERVICE, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice White delivered on the 13th of September 2017

1. This is a plenary action claiming damages for alleged breach of the Plaintiff's constitutional rights when a sentenced prisoner in Mountjoy Prison, Dublin 7, between 13th February, 2013, and 30th September, 2013. The action was heard over 30 days from 31st May, 2016 to 8th December, 2016, when judgment was reserved.

2. The Plaintiff issued a High Court plenary summons on 30th July, 2014, seeking various declarations and claiming damages including exemplary and punitive damages or, in the alternative, damages pursuant to s. 3 of the European Convention on Human Rights Act 2003, arising from his imprisonment.

3. The declarations sought by the Plaintiff were:-

> (i) A declaration that the conditions and circumstances of the Plaintiff's detention on D1 wing at Mountjoy Prison amounted to a breach of his right to dignity and his right not to be subjected to inhuman and degrading treatment, as guaranteed by Articles 40.3.1 and 40.3.2 of the Irish Constitution and Article 3 of the European Convention on Human Rights.
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> (ii) A declaration that a practice of slopping out and using a chamber pot in the context of shared cell occupancy amounted to a breach of the Plaintiff's right to dignity and to respect for his private life as guaranteed by Article 40.3.1 and 40.3.2 of the Constitution and Article 8 of the European Convention on Human Rights.
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> (iii) A declaration that the conditions and circumstances of the Plaintiff's detention on D wing at Mountjoy Prison amounted to a breach of his rights to bodily integrity and to protection of his health as guaranteed by Articles 40.3.1 and 40.3.2 of the Irish Constitution and Article 3 of the European Convention on Human Rights.
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> (iv) A declaration pursuant to s. 3 of the European Convention on Human Rights Act 2003, that the failure of the first and second named Defendants to minimise the negative effects of the lack of in-cell sanitation on D wing in Mountjoy Prison amounted to a failure to perform their functions in a manner consistent with the obligations of the State under Articles 3 and 8 of the European Convention on Human Rights.
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> (v) A declaration pursuant to s. 3 of the European Convention on Human Rights Act 2003, that the failure of the second, third and fourth named Defendants to adequately address the problem of prisoners having to share cells without toilets or running water amounted to a failure to perform their functions in a manner consistent with the obligations of the State under Articles 3 and 8 of the European Convention on Human Rights.

4. The Statement of Claim was delivered on 7th August, 2014, when the claim was particularised.

5. The following is a summary of the Plaintiff's allegations in the Statement of Claim

> "(7) Due to double cell occupancy the dimensions of the cell breached the recommended minimum of 11sq. meters.
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> (8) There was no in cell toilet and running water in the cell.
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> (9) The chamber pot was too small to be used more than twice without being emptied. The Plaintiff had to urinate into empty milk cartons for this reason. He was obliged to defecate into a refuse bag because the chamber pot was too small for defecation. Urine would splash onto his feet and legs and onto the cell floor while urinating and defecating. He had to defecate on a newspaper placed on the floor of the cell.
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> (10) He had to plead with staff to let him out and was also denied access to the slopping out area as other inmates were using it. He did not have a set time when he was allowed out of his cell and he did not know in advance when he would be released and that he experienced stomach cramps while waiting.
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> (11) On occasion the Plaintiff was confined in a cell for 30 hours without being let out to the landing or yard. Exercise could be from 9am to 10am, one day, but the Plaintiff would not be released then to the following evening. On some occasions he was only let out for ten minutes to use the toilet. Sometimes he did not have time to slop out when released from lockup so bags and bins would be left in the cell for longer than a day.
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> (12) The Plaintiff would have to run to and from the toilets and slop out area as prison officers were anxious to speed up the process. The toilets were sometimes filthy and they were frequently blocked. There was usually urine on the ground in the cubicles and the whole toilet area stank terribly. The toilets and urinals were meant to be cleaned by inmates from D2 and D3 but this service was not reliable as the cleaners were usually heavy drug users. Sometimes the toilet area was so dirty that they refused to clean it.
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> (13) Showering was unpleasant due to atrocious conditions in the toilet and shower area. In June/July 13 the Plaintiff was twelve days without a shower. He could not walk in bare feet in the shower. Wash towels and bed sheets were not changed frequently enough and the Plaintiff used the same towel for a period of weeks for all purposes.

(14) the slopping out regime was very chaotic and the process itself was extremely unhygienic. The Slop hoppers were frequently blocked or were broken and urine and faeces spilled onto the floor. Disinfectant sprays were rarely provided and the Plaintiff had no time to clean pots and buckets properly.

(15) Inmates would on occasion empty chamber pots into sinks or down the shower.

(16) There was bad lighting in the shower and an atrocious smell and green mould in the ceiling. Water leaked from the roof and razor blades could sometimes be found sticking up. Walls were covered in dust and dirt. There were plastic bags and boxer shorts strewn on the floor and the downstairs shower area was filthy.

(17) the ventilation was completely inadequate and there was no air conditioning and little air circulating. It was freezing in winter time and stiflingly hot in summer and there was no window pane in some of the cells and inmates would use cardboard and duvets to block holes. The smell was overpowering when someone defecated and urinated in the cell.

(18) The washing facilities were inadequate, the water was easily contaminated and had to be filled from taps located directly over the slop hopper.

(19) the floor of the cell was always filthy and there was insufficient access to cleaning products. The Plaintiff rarely received a clean mop and had to use towels to clean spillages and only got a new bottle of disinfectant spray every two months and had to buy cleaning spray in the shop.

The Plaintiff frequently saw cockroaches on the floor of the cell and mice on the landing.

(20) Inmates of D2 and D3 landing had the use of D1 landing for recreation and were free to throw the contents of chamber pots under the Plaintiffs cell door. When this happened as it did on three occasions prison officers were very slow to assist the Plaintiff and he had to clean it up himself. Non protection inmates on D2 and D3 would also throw urine down onto protection prisoners from their own landing and little effort was made to punish them for doing this.

(21) During lock down the Plaintiff would have to plead to be let out and the red light in the cell was ignored and never answered by prison staff. Sometimes it would be turned off without bothering to enquire what was wrong.

(22) The Plaintiff had to eat his meals while enduring the smell of faeces and urine. Servers would not wear gloves, the food invariably was cold and the Plaintiff felt as if the food and utensils were all tainted and amounted to the leftovers after D2 and D3. He lost one stone in weight.

(23) The Plaintiff alleges that his complaints were minimised or laughed off and he sought to be moved to a location were conditions were better but this was not done. The Plaintiff made several complaints about staff and about conditions through his solicitors Fahy Bambury McGeever.

(24) Te Plaintiff alleged that the majority of prison staff were very unsympathetic in respect of his concerns and that they were usually unhelpful and often replied to him in a contemptuous way. The Plaintiff alleged that one officer, Officer Murphy was particularly difficult and that he assaulted him on one occasion after a verbal altercation on the landing by grabbing him by his throat and saying "I'm sick of you", and that this officer would regularly seek to undermine and upset inmates including himself and it was he who denied the Plaintiff and a cellmate Jason Walsh a shower for a period of twelve days. The Plaintiff also believed that Officer Murphy went through his belongings when he was out in the yard.

(26) He alleged that because of the effect of prison conditions on him he did not want to go on visits and he was denied the opportunity to shower before visits.

(27) The Plaintiff alleges that the defendants breached their obligations under the Prison Rules 2007.

6. The Defendants raised Notice for Particulars on 6th January, 2015, and these were replied to on 27th March, 2015.

7. The defence was filed on 6th January, 2015.

8. As a preliminary issue, the Defendants pleaded that the claim for damages pursuant to s. 3 of the European Convention on Human Rights Act 2013, was statute barred by reason of s. 3(5) of the Act and secondly that the Plaintiff's claim pursuant to s. 12 of the Personal Injuries Assessment Board Act 2003, should have been referred to PIAB for consideration.

9. The general traverse of the defence stated that there was no general mandatory obligation to provide a cell of recommended size pleaded.

10. The Defendants further pleaded that,

The chamber pot was not too small.

(11) I the Plaintiff could not access the slopping out area it was necessitated by the overriding requirement that the prison and in particular the landing in question was operated in a safe secure and orderly manner having regard to staff availability and operational requirements. There was no mandatory requirement that a prisoner be released from a cell upon demand.

(12) There was no statutory or mandatory requirement for the Plaintiff to be afforded priority over other prisoners for recreation.

(14) The in-cell ventilation was adequate.

(16) It was denied that there was any breach of the Prison Rules.

(22) It was also pleaded

(d) that any interference with the Plaintiff's rights was necessary and proportionate having regard to the operational need to run the prison in a safe secure and orderly manner and having regard also to the financial resources and staffing levels available to the Defendants.

(e) the cumulative effect was not such as to warrant granting relief.

(f) The First and Second Defendants actively engaged in various programmes of renewal, refurbishment and improvement works in the campus and facilities of Mountjoy Prison as funded by the third Defendant to take reasonable steps to improve the campus facilities.

(g) Such matters of resources and spending of the First to Third Defendants, are apportioned to the Third Defendant from central funds as approved by the Executive, and accordingly are non justiciable at the instance of the Plaintiff.

(25) That relief by way of declaration is wholly otiose and unnecessary in circumstances where relief by way of damages is sought.

11. A Notice to Admit Facts was served on 17th November, 2015, which sought to admit certain reports from the Council of Europe and reports of the Inspector of Prisons.

12. Notice of Trial was served on 9th April 2015.

13. The court heard the following witnesses called on behalf of the Plaintiff:-

- Mr. Gary Simpson, the Plaintiff
- Mr. Barry Tennyson, Consulting Engineer
- Prof. Martin Cormican, Consultant Microbiologist
- Prof. David V. Canter, Environmental Psychologist
- Dr. Patrick Randall, Clinical Psychologist
- Hamza Abdullah, Inmate in Mountjoy Prison at the time of the Plaintiff's imprisonment.
- Jason Walsh, Inmate of Mountjoy Prison at the time of the Plaintiff's imprisonment.

The following witnesses were called on behalf of the Defendants,

- Governor Greg Garland,
- Prison Officer, Declan McBearty,
- Assistant Governor, Jean Carey,
- Assistant Governor Mal O'Sullivan,
- Class Officer Kevin Fagan.
- Chief Officer Paul Burke
- Edward Whelan, now retired, Campus Governor of Mountjoy from 2010.
- Prison Officer Pauline Doyle.
- Assistant Chief Officer Susan Foley.
- Mr Noel Reilly IT section Irish Prison Service.
- Prison Officer Tom Murphy.
- Assistant Chief Officer David Treacy
- Paul Romeril, Consulting Engineer,
- Prof. Ronald Russell, Microbioligist.
- Jimmy Martin, Assistant Secretary, Department of Justice and Equality and Officer in Charge of the Prison and Probation Policy Division of the Department of Justice and Equality from 2004 to 2009.
- Prof David John Cooke Clinical Psychologist.
- Ronan Gallagher Dept of Public Expenditure.
- Brian Purcell former Dirctor General of Irish Prison Service.
- Mr. Colm McCarthy, Economist,
- Mr. Patrick Dunne, Deputy Governor, Irish Prison Service, responsibility for Building Services Division.

- Michael Donnellan, present Director General of the Irish Prison Service.

14. The court was furnished with substantial documentation and reports which are set out in the first schedule to the judgment. The court ruled at the commencement of the hearing that expert witnesses should furnish a written précis of their evidence a short time before giving evidence.

15. The Plaintiff served a Notice to Admit Documents and Facts seeking to admit various reports of the Inspector of Prisons, the late Judge Michael Reilly and reports of the European Committee for the Prevention of Torture of the Council of Europe and the Irish Government's responses to those reports. Reports and submissions from the Irish Penal Reform Trust. Irish Prison Chaplin's, Mountjoy's Visiting Committee, and some reports from the UN Human Rights Committee, were also received.

16. The court ruled that these documents could be admitted and considered by the court but the Defendants were not bound by or did not accept the conclusions of the report for the purposes of proceedings before the court. This was in particular reference to comments, in a number of reports that slopping out was inhuman and degrading. The Defendants do not accept that the Plaintiff was subjected to inhuman and degrading treatment as defined by law.

17. Those documents which were admitted in that context are set out in schedule 2 of this judgment. In addition, for the benefit of the court, the Plaintiff prepared a summary of extracts from these reports which he wished to rely on and also a supplementary summary of reports and commentary.

18. The Defendants were in possession of substantial written records which were prepared and retained by the management of the prison and the second Defendant. The court directed that a spreadsheet be prepared so that these records could be combined together in an easily observed format and a document was thus prepared showing

- Date.
- Cell number and no in cell.
- Cellmate.
- Slop out offered.
- Shower offered.
- Recreation offered and time, if available.
- Visit and time
- Phone call & time.
- Locations of where a phone call was made from.

Individual records retained by the first and second named Defendants were:-

- Prisoners wishing to see the Governor Journal
- Cell population chart
- Tuck transactions
- Medical records
- D-Division protection daily records which was subtitled, exercise, shower, slop out, feeding.

19. The accuracy of some of these records was challenged by the Plaintiff. I am satisfied that the record of cell number, number in cell and cellmate, visits and times of visits, and phone calls and location of phone calls are accurate. The phone records are computer generated. The records on slop out, showers, and recreation were incomplete, illogical at times, and not sufficient for the court to rely totally on same, but were of some assistance taken with other evidence.

Brief history and layout of Mountjoy and location of Defendants imprisonment

20. Mountjoy prison is a Victorian prison which was constructed in 1850 based on a design from Pentonville Prison which had been completed in 1842. The main prison has four wings, A, B, C and D, leading on to a central hub known as the circle. When constructed, the prison had five hundred cells and was designed to keep prisoners isolated and cells were designed for single occupancy. The original prison had crude in-cell sanitation as the modern flush toilet had just been developed at the time of it's construction. The original in-cell sanitation proved impractical and was abandoned as was the practice of generally keeping prisoners in total isolation. There have been many modifications and additions since construction, but the central core of the prison has always remained.

21. The campus of Mountjoy adult male prison has distinct units. The medical unit is a standalone unit with 51 cells all with in cell sanitation. It also has a high support unit.

22. The separation unit was a standalone unit at the back of Mountjoy Prison which is now closed but at the time had 31 cells on three floors. The cells had in-cell sanitation and each cell had an area of approximately 12.55sq m. Three yards abutted the unit and there were two recreation rooms and a number of small all purpose rooms.

23. The training unit is a separate physical building and has capacity for 96 prisoners. The purpose of this unit is to provide training for prisoners who are coming to the end of their sentences.

24. The issues raised in these proceedings are historic as in October 2010 a refurbishment program for the prison commenced. Initially the C wing was closed and totally refurbished and reopened in March 2012, and then subsequently A and B wings were refurbished. D Division was refurbished from December 2013 onwards and was completed in April 2015. The refurbishment has been carried out to an extremely high standard and all cells in A, B, C and D wing are single cells with in-cell sanitation. New showers have been provided on

all landings.

25. At the relevant time D-wing of Mountjoy Prison comprised a basement, ground floor known as D1, first floor known as D2 and second floor known as D3. On D2 and D3 landings, there were and are perimeter walkways with a central atrium at roof level which is glazed and fitted with controllable air vents.

26. D1 landing was the main service area for prisoners of D wing. Food was served to the prisoners from a servery which at the time of these proceedings was opposite cells 12 and 16. At the time there was access to three yards from the ground floor of D wing, the D yard, the C yard and the yard of the medical unit. On each landing of D wing there were two toilet and washing areas located facing each other at the end of the landing away from the circle. Each toilet area contained two WC pans, two urinals, a slopping out sluice and two sinks.

27. In addition, a shower area was constructed in and around 2011 in the basement with access from D1. This contained eleven showers in two rows, one of seven on the other of four. The stair to the shower area entrance and some of the shower cubicles are set out at photographs 51, 52, 53 and 54 of the Plaintiff's engineers photographs.

28. The individual cells in D1 landing were 3.96m in length and 2.13m in width, making a total area of 8.43sq m. Some controversy arose over areas allocated for the furniture in the cell and on the courts request Mr. Romeril, the Defendants engineer, by letter of 25th October, 2016, set out the area taken up by individual pieces of cell furniture,

- bunk which was 1.98 in length and 0.95m in width, area 1.88sq m,
- a chair 0.45 in length, 0.45 in width, an area of 0.20sq m,
- a table 0.45 in length and 0.45 in width making up an area of 0.20sq m,
- a locker of 0.35 in length and 0.35 in width making up an area of 0.12sq m. The available space deducting the furniture was 6.03sq m.

29. The cell was heated by a heating pipe running along the back wall which is exhibited in cell 12, photograph 2 in the Plaintiffs engineers photographs.

30. A standard window in the cells is shown in photograph 3 of cell 12. The glass had been removed from the historic tilting steel window which was covered by a sheet enclosure of sliding panels. The opening was 470mm by 400mm. There was a set of iron bars, followed by an external mesh screen. The wall is 700mm thick.

31. The cell was illuminated by a ceiling mounted florescent strip light with an option for a blue night light. The cell lights were controlled from switches on the landing. There was a call button in the cell which illuminated a light over the cell door. When pressed this illuminated a light in a control panel in the circle.

32. During the refurbishment programme, protection prisoners were housed on D1 which is the ground floor wing of D wing and prisoners who were not on protection were housed on wings D2 and D3 which were directly above D1 wing.

Over the relevant period, the Plaintiff was housed in different cells within D1. He was in cell 19 for 90 days; cell 23 for 47 days; cell 41 for 21 days; cell 10 for 17 days; cell 30 for two days; and cell 32 for one day.

33. On two separate occasions he was transferred to a separate section of the prison the Separation Unit which contains in-cell sanitation.

34. The prison information management system had cell movement records in respect of the Plaintiff for the period of February to September 2013 and these are set out in Tab 5 of agreed discovery documents folder 1 and are as follows:-

Gary Simpson – Prisoner No. 30640

13th February, 2013 – 8th April, 2013 Cell 23, D1

8th April, 2013 – 12th April, 2013 Separation Unit – E2, Cell 3

12th April, 2013 – 12th July, 2013 Cell 19, D1 landing

12th July, 2013 – 31st July, 2013 Separation Unit – E5, RH

31st July, 2013 – 24th August, 2013 Cell 19, D1

24th August, 2013 – 9th September, 2013 Cell 10, D1

9th September, 2013 – 30th September, 2013 Cell 41, D1

The Plaintiff was transferred to the medical unit, full time, on 30th September, 2013.

35. There was no in-cell sanitation provided in the cells of D1 landing nor was there a sink or running water. Prisoners were normally provided with a slopping out chamber pot, 200mm by 125mm in height, with a cover and a handle. In addition, prisoners were provided with a plastic bucket for water for washing their hands etc. These are illustrated in photograph 28 of the Plaintiffs engineers photographs. There was controversy which I will return to on the absence of chamber pots and lids. Drinking water was provided from a double water fountain facility near the servery on the landing to D1. These are shown at photographs 30 and 31 of the Plaintiffs engineers photographs. The slop out pot would have to be washed out at the toilets at the end of the landing.

36. Historically on the campus of Mountjoy there existed as a separate institution, St. Patricks Institution for the Detention of Juvenile Offenders. This institution has been closed as a juvenile detention centre and Mountjoy adult male prison has taken over its operation and two wings have been re-designated as Mountjoy West C and D. These have now been designated as the protection wings of the prison for protection prisoners. They were not in operation during the relevant imprisonment of the Plaintiff, the subject

matter of these proceedings.

37. Mountjoy West C and D all have in-cell sanitation, upgraded electrical wiring and this work was ongoing in 2013 and was completed towards the end of December 2013. At the date of the inspection by the engineers, 19th December, 2013, D wing had been almost closed down for refurbishment and protection prisoners were in the process of being transferred to Mountjoy West C and D.

38. During the relevant period of imprisonment, the Plaintiff was housed in the separation unit on two separate occasions. As stated, the separation unit is a stand alone three storey building within the Mountjoy Prison complex and consisted of five landings. E1 on the ground floor had six cells all with in-cell sanitation, modesty screen and a wash hand basin and one shower on the landing. E2 on the first floor had six cells, all with in-cell sanitation, and a modesty screen wash hand basin and two showers on the landing. E3 on the first floor had six cells, all with in-cell sanitation and modesty screen, wash hand basin and two showers on the landing. E4 on the second floor had eight cells, all with in-cell sanitation, modesty screen and wash hand basin and three showers on the landing. E5 on the second floor had six cells all with in-cell sanitation, modesty screen and wash hand basin and two showers on the landing.

39. In his first period of imprisonment in the separation unit from 7th to 12th April, the Plaintiff was housed in cell No. 3 on the first floor landing, E2. On the second period of imprisonment in the separation unit from 12th July to 31st July, 2013, the Plaintiff was housed in cell RH on E5 landing, that is on the second floor of the separation unit. The separation unit was the subject of a separate report by the Inspector of Prisons of 23rd July, 2014 and this unit was closed in August 2014.

40. A summary of the complaints of the Plaintiff as tendered in evidence as distinct from the Statement of Claim about his conditions are as follows:-

(i) Failure to be let out of the cell to go to the toilet, and no set time when this would happen or advance notice.

(ii) General conditions of the toilets, showers and slop hopper including blockages.

(iii) Having to urinate and defecate in the presence of another prisoner.

(iv) The odour due to prisoners having to urinate and defecate in the cell.

(v) Staff ignoring requests and complaints.

(vi) Hygiene, lack of cleaning material, sheets, towels not being changed at regular intervals.

(vii) Lack of monitoring of prisoners in landing D2 and D3 landing to ensure they did not throw urine into cells. Lack of response to these issues. Allegation that prison officers and management conspired to facilitate abuse of protection prisoners by non protection prisoners.

(viii) Infreqeuency of showers and deliberate withholding of showers for twelve days.

(ix) Harassment by one officer, PO Murphy, assisted by other officers.

(x) Assault by PO Murphy.

(xi) Lack of running water in the cell to wash and clean.

(xii) Inadequacy of the chamber pot provided. Had to defecate on a newspaper on the floor, urinate into a milk carton, and regularly throw faeces wrapped in plastic bags out the window.

(xiii) Suffered stomach cramps over a prolonged period of time.

(xiv) On some occasions confined to a cell for 30 hours.

(xv) On some occasions only let out of his cell for a period of ten minutes in a 24 hour period.

(xvi) Forced to run to the slop out area as prison officers were anxious to speed up the process.

(xvii) No adequate ventilation in cell, too hot in summer and too cold in winter.

(xviii) Had to source water supply from taps located directly over the slop hopper.

(xix) The floor of the cell was always filthy.

(xx) The red light alert button was ignored and rarely answered by prison staff.

(xxi) Had to eat meals in the cell and food delivered without gloves and food was invariably cold.

(xxii) Complaints were minimised and staff were generally unsympathetic, unhelpful and contemptuous.

(xxiii) He did not go on visits as he did not want his family to see him.

(xxiv) The overall condition of the separation unit was poor.

(xxv) Prison cleaners were on drugs and unable to do their jobs.

Prison capacity and over-crowding.

41. The evidence of Brian Purcell the Director General of the Irish Prison Service from July 2004 to December 2011 (transcript 23 11th October 2016), Jimmy Martin Assistant Secretary of the Department of Justice Equality and Law Reform with responsibility for Prison

and Probation Policy from 2004 to 2009 (transcript 21 27th July 2016 and transcript 22 28th July 2016) and the evidence of Michael Donnellan the current Director General of the Prison Service since 2011 (transcript 24 12th October 2016) dealt with this issue.

42. The Prison Estate as of 1985 when the first report on the penal System was published (The Whitaker Report) comprised of Mountjoy male and female, St Patricks Institution, Arbour Hill, Portlaoise, Limerick male and female, Cork, together with open prison institutions at Shelton Abbey, Loughan House, and Shanganagh Castle.

43. The first new prison to be constructed was Wheatfield Prison which was opened in 1989 with a capacity for 400 prisoners which was subsequently extended in 2010 to a capacity of 550. Prior to that Loughan House in Co. Cavan an existing building had been converted to prison use with a capacity of 85. Loughan House was extended in 2007 to a capacity of 140.

44. Since the construction of Wheatfield Prison there has been a sustained building programme both to extend prison capacity and to modernise existing prisons. A new remand prison at Cloverhill was completed in 1999 with a capacity ranging from 400 to 460. Castlerea prison was completed in 1996 with a capacity of 193 and was subsequently extended in 2008 with an increased capacity of 340. The Women's Prison Dochas was completed in 1999 with a capacity of 80, women had previously been in imprisoned in the women's section of Mountjoy prison. The Midlands prison on the campus of Portlaoise Prison was completed in 2000 with a capacity of 515 and subsequently extended in 2012 bringing the capacity to 870. Arbour Hill Prison was refurbished with a capacity of 138 and accommodates prisoners serving longer term sentences of imprisonment for sexual offences. Cork Prison was modernised in 1972 with a capacity of 200 and a new Cork Prison was opened in 2016 with a capacity of 296 prison cells and the old prison closed.

45. The original capacity for Mountjoy was 547 prisoners. Very little modernisation of the wing block of the prison was carried out but there were new construction works on the campus.

46. The average numbers of prisoners in custody increased from 2,108 in 1990 to a high point in 2010 of 4,440 with a decrease thereafter. On 18th November 2015 the average total number in custody was 3,741 prisoners. In Mountjoy Prison the total number on average in custody in 1990 was 581. Custody in Mountjoy reached a high point in 1999 of 826. In the relevant year of these proceedings 2013 the average total number in custody in Mountjoy Prison was 537 prisoners.

47. Mr. Martin in his evidence referred to two documents of relevance at schedule 5 of his book of documentation. He set out the numbers in custody between 1990 and 2015 and at schedule 6 indicated the change in prison capacity of the various prisons.

48. Overcrowding had been an increasing problem in Irish prisons since the 1980s forcing the abandonment of the one prisoner to a cell principle. This was highlighted as early as the report of the Committee of Inquiry into the Penal System known as the Whitaker Report which was published in July 1985.

49. Mr Martin in his evidence stated that from 1990 until roughly 1996 the prison population was always relatively stable but that from 1995/1996 onwards there was quite a significant increase with prison numbers peaking in 2010 to 2011. One of the mechanisms used for trying to control the numbers was temporary release which increased from about one hundred and twenty to approximately eight hundred in 2008/2009. Mr. Martin described this increase in numbers as a crisis in the management of the prison and that the immediate short-term response was temporary release and the longer term response were measures to increase prison capacity and to encourage greater use of community service.

50. He explained that to carry out renovations on existing prisons, it was necessary both to have the capital resources but also to have space to move prisoners when refurbishment work was being undertaken as major renovations required the emptying of wings of prisons.

51. On in-cell sanitation Mr. Martin stated that going back to 1993 nearly every male adult prisoner was in a cell with no in-cell sanitation but that now there are only a small amount of prisoners who might be slopping out, at maximum fifty prisoners. In some Portlaoise prison cells where there is no in cell sanitation, all are single occupancy cells with substantial time out of the cells afforded to prisoners. There is work underway to remedy the situation in Limerick, and approval in principal to replace the relevant block in Portlaoise. Therefore, at this point in time slopping out as a feature of the Irish prison system has more or else ended.

52. The overcrowding in Mountjoy prison was a particular focus of a number of reports of the Inspector of Prisons Judge Michael Reilly.

53. The first Inspector of Prisons was Judge Dermot Kinlen who operated on a non-statutory basis.

54. The office was formalised by statute by Part V of the Prisons Act 2007 when the Minister for Justice and Equality could appoint a person to perform the functions conferred on him by the Act. The functions of the inspector are set out in s. 31 of the Act which states:-

> "31(1) The Inspector of Prisons shall carry out regular inspections of prisons and for that purpose may—
>
> (a) at any time enter any prison or any part of a prison,
>
> (b) request and obtain from the governor a copy of any books, records, other documents (including documents stored in non-legible form) or extracts therefrom kept there, and
>
> (c) in the course of an inspection or arising out of an inspection bring any issues of concern to him or her to the notice of the governor of the prison concerned, the Director-General of the Irish Prison Service, or the Minister or of each one of them, as the Inspector considers appropriate.
>
> (2) The Inspector may, and shall if so requested by the Minister, investigate any matter arising out of the management or operation of a prison and shall submit to the Minister a report on any such investigation.
>
> (3) As soon as practicable after receiving the report, the Minister shall, subject to subsection (4), cause a copy of it to be laid before each House of the Oireachtas and to be published."

55. Pursuant to s. 32 of the Act the Inspector of the prisons was obliged to furnish to the Minister an annual report on the performance of the Inspector's functions during the previous years or any other related matters.

56. Judge Reilly first annual report was that of 2008 and in Chapter 7 he addressed the issue of overcrowding in prisons as follows:-

"7.1 Overcrowding in prisons is an international problem. In Ireland the problem is acute.

7.2 The Irish Prison Service has no control over the numbers of prisoners entering our prisons. The system must take all persons who are remanded into custody while awaiting trial or sentence in addition to all sentenced prisoners.

7.3 If the prison population equated with the stated bed capacity of our prisons one might assume that overcrowding was not an issue. This is far from the truth as this chapter will show.

7.4 I accept that in certain cases because of the numbers in Irish Prisons and because of the limited accommodation in such prisons that doubling up of prisoners in cells is inevitable. I accept that, in this context, a distinction must be drawn between some of the accommodation cells in Mountjoy, Cork and Limerick prisons and those in newer prisons such as Wheatfield and The Midlands. The former were constructed in the 19th century, are small with little light and ventilation and no in cell sanitation. Whereas the latter are larger, have adequate light and ventilation and are equipped with in cell sanitation. Doubling up of prisoners in cells should only be accepted as a temporary measure (which should be kept under constant review) and should, except in exceptional circumstances, never happen with the following classes of prisoners:-

a. Prisoners on 23 hour lock up

b. Prisoners who are kept in their cells longer than normal

57. In respect of Mountjoy prison in his first report he stated:-

7.8 Mountjoy Prison when opened in 1850 had 500 cells constructed for individual occupation. Since then many parts of the prison have been altered or demolished.

7.9 The majority of cells designed as single cells measure 3.91m x 2.06m with a minority measuring 3.43m x 2.06m.

58. He pointed out that the designed capacity of the cells on the 16th of February, 2009 was for 489 prisoners when the actual bed capacity of the cells was 573 and that since the 1st of January, 2008 the prison had consistently operated far beyond it's designed bed capacity and also beyond its stated bed capacity. On the 24th of February, 2009 the population of the prison was 660. He stated that the overflow numbers were accommodated on mattresses on floors or in cells not meant for occupation or mattresses in the reception area where fifteen prisoners were kept for a night. He noted that none of the 376 cells on A, B, C and D wings of the prison had in-cell sanitation.

59. The Inspector prepared a specific report on Mountjoy prison which was presented in August 2009 and in his introduction to the report of Chapter I – he stated at:

1.4 I am aware that the intention had been that Mountjoy prison would be replaced by a purpose built prison at Thornton Hall. This is still the intention but because of budgetary considerations, the timeframe for a construction of a new prison is uncertain. It is understandable that as the intention had been to build another prison which had been expected to open in 2011 little was done to maintain Mountjoy prison in the interim. If it is to continue to be used as a prison immediate work must be carried out and recommended changes must occur.

1.5 I acknowledge that enormous strides have been made by the Irish Prison Service, local management and service providers which enhance the standard of care for prisoners in the prison. Important examples of these relate to the provision of health care, the high standards in the workshops and the desire by prison staff, despite the working conditions to encourage prisoners to participate in worthwhile activities.

1.6 In order to be helpful I set out in general terms the work that must be carried out, the procedures that must be put in place and the regime changes that must occur. In this connection I wish to acknowledge the cooperation that I received from the Irish Prison Service and local management when I made suggestions regarding regime changes. These of course must still be implemented.

1.7 Some work will require time for completion, some work is in the nature of housekeeping and other work procedures and regime changes requires the active support of the Irish Prison Service but all must be commenced without delay.

1.9 I am conscious that Mountjoy prison is a very old institution and that this brings its own problems. I am conscious that the services that should be provided as a minimum, can only be provided to a finite number of prisoners and I am also conscious of the constraints on the public finances. In this regard, I must point out that none of these can be taken as an excuse for denying prisoners their basic human rights. Neither can the prospect of building a new prison be an excuse for not attending to all matters of concern as set out in this Report.

1.10 From my observations and from my conversations with a wide cross section of people, prisoners, staff and service providers I am satisfied that despite the efforts of management and staff Mountjoy prison cannot at present provide safe and secure custody for its prisoners. It is questionable as to whether the prison provides a safe environment for staff to work in.

1.11 This report while highlighting many negatives in Mountjoy prison should not be taken as a total condemnation of the prison. There are many positives in the prison and if my recommendations as outlined in Chapter 8 are acted on Mountjoy prison can continue, in the short-term to play an important role in the Irish Prison System where safe and secure custody can be provided in an environment which respects human rights and human dignity, that is safe for staff to work in and where prisoners live in a structured environment.

60. The Inspector prepared a further special Report on Mountjoy prison presented to the Minister on 25th of March, 2011 and in his introduction at 1.9 he stated:-

"I am pleased to report that there has been a sea change for the better in many aspects of the prison. I accept that

proposed changes cannot in all cases be implemented overnight. I am satisfied that if the present planned projects for Mountjoy Prison are brought to fruition and if the advice that I have given in various reports (referred to in Chapter 6 of this Report) is followed the prison subject to paras. 1.10 and 1.11 should be in a position to provide safe and secure custody in an environment which respects human rights and human dignity, that is safe for staff to work in and where prisoners can live in a structured environment.

> 1.10 I have referred to the practice of "slopping out" in Mountjoy prison and other prisons as inhuman and degrading. For as long as 'slopping out' is a feature of imprisonment in Mountjoy Prison the endorsement contained in para. 1.9 is qualified.
>
> 1.11 I have referred to the overcrowding in Mountjoy Prison and other prisons. For as long as overcrowding is a feature of imprisonment in Mountjoy Prison the endorsement contained in para. 1.9 is also qualified."

61. In Chapter 2 headed Response to Recommendations in 2009 Report he stated the following:

> 2.8 On the 13th of August, 2008 (the date of the submission of my last report on Mountjoy Prison) the numbers in prison where 620 with a stated bed capacity of 590. In my recommendation dealing with the elimination of overcrowding I stated that this could be achieved by the end of 2009 with the opening of 400 additional prison spaces in other prisons. I stated that the Irish Prison Service should ensure that obstacles were not created to frustrate the ordinary reduction in the Mountjoy Prison population. This recommendation has been ignored.
>
> 2.9 The prison population of Mountjoy prison should be capped at a maximum of 600 prisoners.
>
> 2.10 I and any reasonable person would accept that in certain circumstances a degree of overcrowding maybe acceptable. The circumstances where such overcrowding could be deemed acceptable is where prisoners are doubled up when cells are taken out of commission in the short-term to enable refurbishment work to proceed. If this is occur the situation should be explained to both prisoners and staff and a timeframe for a completion of such works should be given. This timeframe should in all cases be adhered to.

62. Mr. Brian Purcell the Director of the Irish prison service from July 2004 to December 2011 dealt with the issue of overcrowding in his evidence when he referred to the numbers peaking in custody at 4,600 in 2011 which did not include prisoners who would have been on temporary release upwards of 1,000 prisoners at that time. He was concerned that the level of temporary release was too high and that a huge element of it was unstructured and that the service was having to release prisoners because the system was overcrowded and there was not enough space within the system to facilitate the number of prisoners. He noted that the service had to accept all prisoners that were committed by the courts and that they had to be accommodated within existing prisoner accommodation. He noted that there had been no real investment in prison infrastructure since the foundation of the State and that when Wheatfield was built in the late 1980s that was the first purpose built prison in the State since Mountjoy was built in 1850 and that perhaps was an indication of the level of underinvestment or lack of investment in prison infrastructure from the period since then and certainly from the time of the foundation of the State and that the prison system was effectively trying to play catch-up in terms of years of underinvestment and from that time from the late 1980s until the late 1990s we started seeing the first elements of a modernisation program.

The decision to close Mountjoy and construct a new prison.

63. The first reference in the course of these proceedings to the proposed refurbishment of Mountjoy was a reference to a multidisciplinary group chaired by the former Governor of Mountjoy Prison, Mr. John Lonergan, which was published in 2000 as the Mountjoy Redevelopment Group Report. This Court did not have access to that report but it was referred to in the evidence of Mr. Purcell and in the subsequent report of a sub-committee of the Interim Board of the Irish Prison Service chaired by Mr. Brian McCarthy. Mr. Purcell, whose evidence (Transcript 23, p. 155 and 156) referred to the report as being at the end of 2001 but it seems to have been 2000, and he stated that the group was convened and chaired by Governor John Lonergan to look at re-development of the Mountjoy site. They came up with a recommendation for a re-development project that would not have been a bad solution but the big problem at the time was that in order to re-develop the site approximately seven hundred prisoners would have had to be moved from the site and it was quite costly as well, an estimated cost of €350m.

64. A feasibility study was prepared for the possible refurbishment and upgrading of Mountjoy Prison by DBFL Consulting Civil and Structural Engineers. The report was presented in February 2003 and is contained in agreed discovery documents folder 1, Tab 9. The feasibility study related to A wing and D wing and involved a complete examination of A wing as to its existing condition and requirements to upgrade and refurbish it and the expression of an opinion that the same situation would arise for D wing. Rather than minimum refurbishment, the report recommended either the complete refurbishment of the wing or the demolition of the wing, and construction of a new wing. The estimate for a complete refurbishment was €14m and a demolition and new build was €19,800,000 for each wing. In addition, it was estimated that to construct an extension to the end of A wing to provide further facilities would have been an extra €5,200,000. The feasibility study indicated that D wing was approximately 10% longer and contained one additional storey, and that costs would be the same except for the extra space.

65. This feasibility study was examined by the sub-committee set up by the Irish Prison Service Interim Board to review what it described as the current appalling conditions in Mountjoy Prison. That sub-committee prepared a report of 7th May, 2003, which is included in the Jimmy Martin documentation. The evidence of Mr Martin and Colm McCarthy, Economist, are relevant to these matters.

66. A sub-committee of the Interim Board of the Irish Prison Service considered the options available for the redevelopment of Mountjoy Prison and issued a written report on 7th May, 2003, the committee members were Anne Counihan, Jerry Kiersey, Michael Whelan and Mr. Brian McCarthy, the chairperson of the Interim Board. Having looked at a number of options in relation to possible redevelopment, the committee rejected the proposal to redevelop Mountjoy due to the estimated cost at over €350m in 2000 and also on the grounds of the length of time to complete the project estimated at ten to twelve years. Option 5 in the proposal was to build a replacement prison for Mountjoy on a green field site in the Dublin area and dispose of Mountjoy and Shanganagh Castle when the new prison was commissioned.

67. The recommendation of the sub-committee was that option 5 be progressed immediately. Option 5 stated

"Build a replacement prison for Mountjoy on a green field site in the Dublin area and dispose of Mountjoy and Shanganagh Castle to part fund the development when the new prison is commissioned. This would result in the development of a new six hundred place prison in the Dublin area (the Dublin area is recommended for access to public transport, national road network, adjacent hospital, closeness to Four Courts and Dublin Criminal Courts). It will take four years to design, build and commission at which stage the

Mountjoy Male Prison and Training Unit Complex would be sold to part-fund the development cost. A new modern prison would result in significant operating cost reductions through the introduction of new technologies and the reduction of maintenance costs which in themselves justify the development of a new prison. Any developments on the current Mountjoy and Training Unit site would have to take place within the restrictions imposed by the configuration of the present site. This option was reviewed in detail by the Capital Sub- Committee and is detailed in this report.

68. Jimmy Martin dealt with the implementation of this proposal in his evidence. He stated that the Government gave approval in principle to build a prison on a green field site in February 2004. He was asked to chair the group to find the site. Thirty sites were examined. Building land was expensive to acquire. The rough estimate for a new prison at that time was €150m. Because it was such a large amount of expenditure it was decided to finance the project by way of a public private partnership. The Government granted approval in January 2005 for the acquisition of an 150 acre site known as the Thornton site. In north Co. Dublin, approximate to the M50 and N2 to Ashbourne.

69. When the project moved into the design phase the proposal developed from constructing one prison into building eight separate institution as a campus on the site. The campus would encompass:-

(i) a high security institution

(ii) a medium security institution

(iii) a low security institution

(iv) step down facilities

(v) a facility for women

(vi) a facility for young offenders

(vii) other training facilities

70. In addition it was proposed that one part of the site would be set aside for a potential site for the Central Mental Hospital relocation from Dundrum. The revised proposal envisaged that the campus would have 1,400 cells and allow for double occupation in certain cells which would allow for a capacity of roughly two thousand persons in custody. The tender process was complicated. It was envisaged that there would be separate buildings but all within one large secure site. It was also envisaged that there would be a very large visiting wing. The project required the engagement of design, engineers, accountants and law firms. It was ready for tender in November 2006 and permission was granted by the Government to invite tenders for the public private project. The tenders were assessed in March/April 2007 and a preferred bidder was chosen. It was envisaged at that time that the construction element would cost around €500m and the annual unit charged would be in the region of €50-55m over a period of 25 years. Over the period from the first recommendation to the tender process, there was substantial inflation in the building industry. The project tender was delayed by legal action which was finalised in July 2007.

71. To enable planning for the prison to go ahead, a new Act had to be passed the Prisons Act 2007.

72. This was finalised in July 2008. At this time, the financial crisis was upon the Irish State and the financial supporters of the project withdrew financial support from the successful bidder who increased the tender by 30%/40%. The estimated unitary charge proposed increased to €70m/€80m a year and the Government then decided this was too expensive. The decision not to go ahead on grounds of costs was made in May 2009, and the project was placed on hold. Certain development of the site was carried out. A service road was provided to the site and some extra land had to be purchased to provide access and water and sewerage services to the site.

73. Attention was again turned to the redevelopment of Mountjoy in 2010. Unusually and fortunately around that period pressure on the system was reducing because of a reduction in the number of committals. The new Midlands Prison extension had come on stream. It was decided to proceed with the refurbishment of Mountjoy wing by wing. Tenders were invited for the refurbishment of C wing in December 2010 which was commenced in March 2011.

74. Mr. Martin accepted that a decision had been made subsequent to the decision to purchase the green field site not to invest a large amount of capital on Mountjoy on the basis that it was only going to be used in the short term. He stated that investments were made in other prisons to reduce the amount of overcrowding in Mountjoy. He stated that major capital investment was not made in Mountjoy but more minor attempts were made to improve the prison. He accepted that there was no capital investment made to ameliorate the slopping out in the prison but there was a concentration on reducing overcrowding by building other prison spaces in other locations.

75. Mr. Colm McCarthy an economist stated that it was sensible in the circumstances not to have a big capital programme in those facilities that were not going to be kept on as prisons and when the Thornton Hall project was cancelled it was then necessary to relook at full refurbishment of Mountjoy. He examined the capital spending on Mountjoy over the period 2005 to 2014 which was set out in a table to his witness statement. The capital spending on Mountjoy was

2005 5 million

2006 3.7 million

2007 7 million

2008 200,000

2009 1.9 million

2010 2.3 million

2011 11.3 million

2012 6.5 million

2013 5 million

2014 3.7 million.

76. The conclusion of the Comptroller and Auditor General's report into the purchase of the Thornton site drew conclusions which Mr. Martin in his evidence disagreed with those were,

9.41 The purchase of the Thornton site was undertaken to deal with problems of the Mountjoy complex especially the overcrowding, the elimination of the 'slopping out' and the security issues. The Government was advised that €150m would be the construction cost for a new prison complex on a green field site to replace Mountjoy which housed around 950 prisoners. Since 2010, many of the problems at Mountjoy have been dealt with at a much lower cost than that proposed originally to build a new prison on the Thornton site.

> 9.42 Subsequently the proposed scale of development at Thornton was expanded to provide 1,400 cells (47% more that Mountjoy) with flexibility to accommodate up to 2,200 prisoners. The estimated cost of the larger development was €525m, around 3.5 times the cost indicated when the original purchaser of the Thornton site was approved. That decision was underpinned by inadequate analysis of the likely costs of developing a new prison, which appeared to have been significantly understated and the cost of addressing the problems at the Mountjoy complex which appeared to have been overstated.
>
> 9.43 The appropriation account presents inconsistent valuations of prison land and buildings with the property at Thornton being treated differently to similar property held by the Prison Service elsewhere. Relative to other property, the property at Thornton is overvalued in the account.

The Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
77. Various Reports of the European Committee for the prevention of torture and inhuman or degrading treatment and punishment, and the Response of the Irish Government was opened to the Court.

78. There is no need to repeat all the extracts in this judgment. The lawyers for the Plaintiff helpfully prepared a summary of extracts and page references for the court.

79. It is useful to refer to the first report and the Governments response, as essentially the same message was conveyed to the Irish Government in every subsequent report.

80. The first report was sent after its visit and inspections between 5th and 26th October 1993, to the Prisons Division of the Department of Justice on 23rd June 1994.

81. The Irish Governments response was published on the 13th December 1995.

82. Commenting on its inspection of Irish prisons, and in particular Mountjoy, it stated:

> 99. With the exceptions of the cells for women at Mountjoy Prison and those in St Patricks Institution, none of the cells seen was equipped with integral sanitation. As a result, prisoners were forced to rely upon buckets or pots in their cell to meet the needs of nature. The buckets and pots were later "slopped out" by prisoners at fixed times – a process which was observed by the delegation in Mountjoy Prison.
>
> 100. The CPT considers that the act of discharging human waste, and more particularly of defecating in a bucket or pot in the presence of one or more other persons, in a confined space used as a living area is degrading. It is degrading not only for the person using the bucket or pot but also for the person with whom he or she shares a cell.
>
> The other consequences of the absence of integral sanitation- the hours spent in the presence of buckets or pots containing one's own excreta and that of others and the subsequent slopping out procedure- are scarcely less objectionable. The whole process is extremely humiliating for prisoners. Moreover, slopping out is also debasing for the prison officers who have to supervise it.
>
> 101. In the view of the CPT, either a toilet facility should be located in cellular accommodation (preferably in a sanitary annex) or means should exist enabling prisoners who need to use a toilet facility to be released from their cells without undue delay at all times (including at night)
>
> The delegation was told that the above mentioned "Five Year Plan" would include attention to the installation of integral sanitation in Prisons"
>
> The CPT recommends that this be treated as a matter of the highest priority preferably the Plan should include a target date for the eradication of the practice of slopping out in Irish prisons.
>
> 102. The provision of adequate washing and bathing facilities is of particular importance in establishments which are overcrowded and/or lack integral sanitation. In the CPT's view access to such facilities at least once a week is an absolute minimum requirement in any prison(cf, also Rule 18 of the European Prison Rules) further in establishments where prisoners do not have ready access to either toilet facilities or running water weekly access to bathing facilities cannot be considered to be sufficient.

83. The Irish Governments response stated,

> P64 Para 4. As indicated in the Five Year Plan the strategy must be to establish priorities and to tackle the requirements in a structured way on a phased basis. Given a reasonable financial allocation over the period of the Plan, it is envisaged that the main works to be undertaken will include the provision of

In cell sanitation as part of refurbishment projects, in Mountjoy, Portlaoise and Limerick….

THE ISSUE OF PROTECTION OF PRISONERS IN THE IRISH PRISON SYSTEM AND IN PARTICULAR MOUNTJOY

84. The Plaintiff in his evidence stated that he had requested protection on the following morning after arriving in Mountjoy. He stated he was after having a little bit of a brush with a couple of people and had requested protection and that he had concern in relation to the people from the general prison population in Cloverhill previously. He stated he just basically felt vulnerable and under threat. He accepted that he had been on protection a good few times before this (transcript 2 p. 66). In cross examination he accepted that he had specifically requested his transfer from Wheatfield Prison to Mountjoy Prison and that he ended up in protection because he had heard there was one or two individuals in Mountjoy that he had been arguing with (transcript 3 p. 60).

85. Mr. Simpson in his evidence accepted that he had never identified any specific prisoner who he had a difficulty with.

86. This matter is dealt with in the Prison Rules 2007 at Rule 63 headed Protection of Vulnerable Prisoners. It states 6

> "63.(1) A prisoner may, either at his or her own request or when the Governor considers it necessary, in so far as is practicable and subject to the maintenance of good order and safe and secure custody, be kept separate from other prisoners who are reasonably likely to cause significant harm to him or her.
>
> (2) A prisoner to whom paragraph (1) applies may participate with other prisoners of the same category in authorised structured activity if the Governor considers that such participation in authorised structured activity is reasonably likely to be beneficial to the welfare of the prisoner concerned, and such activity shall be supervised in such manner as the Governor directs.
>
> (3) The Governor shall make and keep in the manner prescribed by the Director General, a record of any direction given under this Rule and in particular
>
> (a) the names of each prisoner to whom this rule applies,
>
> (b) the date and time of commencement of his or her separation,
>
> (c) the grounds upon which each prisoner is deemed vulnerable,
>
> (d) the views, if any, of the prisoner,
>
> (e) the date and time when the separation ceases."

87. The problem of keeping prisoners in protection and the growth of the number of prisoners in protection was a developing problem in the Irish Prison Service particularly in Mountjoy Prison. At the relevant period all those prisoners housed in D1 landing in Mountjoy were on a protection regime at their own request.

88. The separation unit in the prison was also being used to house protection prisoners.

89. The prisoners were locked in their cells on average for 23 hours out of 24 hours. When there were lower numbers of protection groups they could have more time out of their cells. Their access to recreation, education and leisure activities was severely restricted.

90. The overwhelming evidence put before the court was that there was a very challenging problem being faced by the administrators of the prison in that not alone had the protection prisoners to be segregated from the main part of the prison population but each group of protection prisoners had to be separated and kept away from each other and there was also then a group of prisoners who had to be protected from the main category of prisoners and also all the other groups and they were defined as PAOs (protection against all others).

91. The number of groups fluctuated from time to time depending on circumstances within the prison.

92. Governor Gregg Garland gave evidence on this issue on the 21st June, 2006 (transcript 12 p. 154 – 156).

93. He stated that at the relevant time of the Plaintiff's detention protection inmates were growing that the separation unit was full and that they had to find an overflow in relation to protection inmates and D1 was selected because of ease of access to visits and to the yards and when protection prisoners were placed in D1 there was only about half a dozen at the beginning but as time went on the numbers grew and eventually took over the full landing. Explaining how protection arose he stated it could happen probably in two ways. One is that on committal when an interview takes place with every committal prisoner the prisoner would be asked if they have any issue in relation to any other inmate in the prison and there would be some who would require protection due to issues that would follow him into prison whether they owed a drug debt or through fear or gang related and since they would not say who they were fighting with they would just say that they required protection. Therefore the Prison Authorities had to evaluate and make sure they were safe and there might be issues developing on a daily basis within the prison.

94. Separately one inmate might require protection after some issue that had arisen within the prison. His estimate at the time the Plaintiff was in prison was that there were approximately twelve to fifteen factions in different groups and that they could not mix with each other. He stated you could also have smaller splinter groups within the protection community and they could range from two or three in a group to ten in a group.

95. He stated that normally whoever used to be the longest in D1 was sent across to the separation unit when vacancies became available when either some prisoners were released or came off protection.

96. The Plaintiff has made serious allegations about the lack of protection of the protection prisoners from other prisoners but he has at all times accepted that the various protection groups on the D1 landing were kept separate from each other.

97. The protection of protection prisoners was further complicated because the landings on D2 and D3 were directly above the ground

floor landing on D1. The non protection prisoners were operating the normal regime in the prison.

98. The Defendants provided a summary of the daily routine for prisoners on D2 and D3 landings in the relevant period which was as follows:

> 8 am Day staff come on duty
>
> 8.15 am Prisoners unlocked for breakfast which is available from the D1 landing servery. Prisoners may also slop out and use toilet and washing facilities.
>
> 8.40 am All prisoners locked back in their cells and checked in cells by staff via the cell door viewing hatch.
>
> 9.25 am Prisoners unlocked from their cells. Prisoners may slop out and use toilet and washing facilities. Prisoners may speak with the Governor or Governor's representative in the Governor's office on the D1 compound. Officers ensure that all prisoners apart from landing cleaners and painters vacate their cells and landing. Prisoners can attend workshops, school, gym or exercise yard. Prisoners can attend gym, exercise yard, video room and snooker room Saturday and Sunday and prisoners can attend religious services on Sunday.
>
> 12 midday Prisoners cease their activities and begin to return to their landings and cells. Prisoners go to the D1 landing servery to collect their lunch.
>
> 12.30 pm Prisoners return to cells with their lunch.
>
> 12.30 pm to 2.10 pm Prisoners locked in cell and checked in cells by staff via the cell door viewing hatch.
>
> 2.10 pm Prisoners unlocked from cell. Prisoners may slop out and use washing facilities. Officers ensure that all prisoners apart from landing cleaners and painters vacate their cells and landings. Prisoners can attend workshops, schools, gym or exercise yard Monday to Friday and prisoners can attend gym, exercise yard, video room and snooker room Saturday and Sunday.
>
> 4 pm Prisoners cease their activities and begin to return to their landings and cells. Prisoner go to the D1 landing servery to collect their evening tea.
>
> 4.30 pm to 5.20 pm Prisoners locked in cell and checked in cells by staff via the cell door viewing hatch.
>
> 5.20 pm Prisoners unlocked from cell.
>
> Prisoners may slop out and use washing facilities. Officers ensure that all prisoners vacate their cells and landings.
>
> 5.20 pm to 7 pm Prisoners recreate in gym and exercise yard, video room and snooker room.
>
> 7 pm to 7.30 pm Prisoners collect supper from D1 and return to cells.
>
> 7.40 pm All prisoners should be in cells and cells should be locked secure. Day staff off duty.
>
> 8 pm to 10 pm Toilet patrol staff on duty to unlock prisoners to use toilet.
>
> 7.40 pm to 8.10am Prisoners are checked in cells on a regular basis by staff via the cell door viewing hatch.

Prisoners can avail of showers on D2 and D3 landings during periods of unlock and gym attendees may shower in the D1 shower block. Prisoners can attend the doctor every day and have access to nursing staff at all times. Prisoners also have ready access to make phone calls. Prisoners can visit the library at allocated times.

99. Therefore in addition to making sure that the individual groups of protection prisoners in their varying numbers were kept away from each other the challenge on the D landing was also to make sure that the protection prisoners were separated from the general body of non protection prisoners who were housed in D2 and D3 landing. Effectively the D1 protection prisoners had to be locked in their cells when D2 and D3 prisoners were circulating on the D1 landing. One aspect of this is the factual controversy between the Plaintiff and the evidence given on behalf of the Defendants which I will return to later.

Factual controversies about the conditions of the Plaintiff's imprisonment

100. This is an action where there is an imbalance in the ability of the Plaintiff and Defendants to tender evidence. In any action in which an individual alleges institutional abuse the court has to be careful to ensure that the evidence provided on behalf of the institution is scrutinised carefully to the extent that the court is satisfied that the institutional witnesses have not closed ranks about the allegations made. The approach taken by the court has been to review all of the evidence and seek assistance from that evidence which the court considers to be independent and corroborative,

101. The evidence in conflict between the parties is substantial and the court will deal with it in subheadings.

102. The court has not subdivided the evidence of two witnesses who were prisoners on D1 landing. It has summarised the relevant evidence of both witnesses Mr Abdullah and Mr Walsh separately in the judgment. They have also issued proceedings against the Defendants seeking similar reliefs. The Plaintiffs action is not a test case, as each action is being treated separately. For that reason I am reluctant to comment in detail on the evidence of Mr Abdullah and Mr Walsh. I have given their evidence careful consideration in the context of the Plaintiffs action. Mr Abdullah was only on the D1 landing for 11 days. Mr Walsh was a cellmate of the Plaintiffs for a substantial period of time up to his transfer to Limerick Prison on 22nd August 2013, and is a more relevant witness.

In cell sanitation and practices of prisoners and the Plaintiff when in cell

103. In a cell of two occupants, and on exceptional occasions three, there was no toilet or running water. The general practice was that each prisoner was provided with a chamber pot which had a lid for the purposes of defecation and urinating when in the cell. The prisoner himself was required to take this chamber pot to the toilet area and slop out by pouring the contents of the chamber pot into a slop hopper of which there were two on the landing. The prisoner was also supplied with a bucket and a basin. Water was available for toileting purposes from the toilet areas and drinking water was available from water fountains close to the servery on the landing.

There were two drinking water fountains which are exhibited in photos 30 and 31 of the Plaintiff's engineer's photographs. These would have been suitable for filling from a smaller receptacle rather than a bucket. There was no privacy screen in the cell nor was there any commode type construction which would enable a prisoner to be seated comfortably while defecating.

104. It should be stated from the outset that this practice was uncivilised and a poor reflection on the Defendants that this practice still existed 28 years after the publication of the original Whitaker report into the penal system which was published in July 1985, and 19 years after receipt of the first report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) in June 1994 following a visit to Ireland from the 26th September to the 5th October, 1993 and also after the Inspector of Prisons report of 2008 which stated that doubling up of prisoners in cells should never happen to prisoners who are on 23 hour lock up except in exceptional circumstances.

105. The Plaintiff in his evidence stated that he did not use the chamber pot to defecate in his cell. If he needed to go to the toilet he would put a newspaper on the ground flat out, put a plastic bag underneath it, defecate into the newspaper, wrap the newspaper and then tie it in a plastic bag and then put it into another plastic bag to stop it smelling.

106. He said that most of the time he would wrap up the faeces and wait until the next day and put it into a bin beside the toilets on the landing, but that twice or three times a week, he would have thrown it out the window and was aware that other prisoners were doing this. It was put to him that from the Prison Authorities perspective, there was very little in terms of picking up bags of faeces in the yard on the gym side where he had spent most of his time, and that there were perhaps two or three bags of faeces recovered from the area on the side of D wing where the Plaintiff spent most of his time. That is on the side of the wings where cells 19, 23 and 41 were located. Mr. Simpson stated he was disagreeing but said it was up for debate. He accepted that if his evidence was correct that he was throwing bags of faeces out the window two or three times a week and the other prisoners were doing the same there would be more bags recovered. When asked what was the normal thing, he stated that he would normally mash it down and put it out the window (transcript 2, pp. 102 and 103).

107. Both Mr Tennyson and Mr Romeril gave evidence about the ability to throw excrement in plastic bags out the window. Mr Tennyson stated that he had inspected a service yard behind the kitchen. He stated that he was appalled at what he had found. When he entered the passageway he could smell excrement, and he saw bags hanging from the window grills. Mr Tennyson did not give evidence about the feasibility of throwing these bags through the wire mesh grill fitted to the outside of the prison windows. Mr Romeril in his evidence stated that he accompanied Mr Tennyson to this yard, which he had thought was for the purpose of checking out odours from the kitchen. He stated that Mr Tennyson had not brought to his attention any bag of faeces. He described the window and noted that there was a fine wire mesh guard bolted to the outside of the prison cell windows which can be seen in photograph 57 of the photographs supplied. He stated that it was physically impossible to get one of those bags through a 20 millimetre square. He stated that this may have been the practise years ago when there were no grills. I did not consider Mr. Tennyson's evidence on this matter reliable. He was carrying out an inspection for another action that of Mr. Sheridan. For that inspection he had no advance instructions from the Plaintiff in this case. This is an enclosed yard at the back of the kitchen the photographs at 58, 59, 60, 61 and 62 are taken in this yard. Photo 58 shows the remnant of one bag which was not inspected. The evidence before this court was that the Plaintiff has spent seventeen days in cell 10 which was the only cell that he spent time on which overlooked this yard. The vast majority of his time on D 1 landing was spent in cells on the north side of the wing.

108. Subject to my criticism of the practice of having to defecate in ones cell in the first place the court is satisfied that the chamber pot provided was satisfactory. The lids provided fitted snugly to the pot itself. The evidence of the Defendants particularly the evidence of assistant governor Carey and chief officer Burke was that there were vigilant to inspect cells for the lack of chamber pots. There was no difficulty in each prisoner having a chamber pot in his cell or getting a replacement. There would be an unpleasant smell initially when a prisoner defecated in a cell which was unsatisfactory from the point of the prisoner and his cell inmate. If the lid was replaced promptly onto a pot he smell would diffuse after a reasonably short period of time. The chamber pot was of sufficient size to accommodate the average urine output of an adult male over a 24 hour period and given the opportunity which the Plaintiff had to slop out I am satisfied that it was of sufficient size to both urinate and defecate.

109. I find it unacceptable that the prisoner had to try and defecate in a crouched position and also to urinate while standing up when the chamber pot was placed on the floor. This would have led to splashing and spillages. Modesty screens could have been provided without difficulty.

110. Governor Whelan stated that they tried to introduce portable toilets which were trialled

111. on a number of wings in the prison in or around 2011 or late 2010 but that the prisoners were not keen on them. He stated that the offenders would tell you that they would rather have their chamber pots and did not want to use them.

They would be left outside the door when the cells were opened. Mr. Tennyson in his evidence correctly referred to the option of using some form of portable toilets in the cell for the benefit of the prisoners. The example that he evidenced to the court was a chemical toilet which the court would not consider suitable in the prison setting because of the dangers of the chemical in the toilet being used as a weapon in some dispute between the prisoners or because of risk to prison staff.

112. The reasons why the portable toilets were unsatisfactory is not clear to the court. A photo of the type of toilets trialled was produced to the court, which had the trade name "Kampa". No effort was made to consult the protection prisoners about introducing these toilets. No evidence was adduced by the Defendants that any thought had been put into facilitating the toilet requirements in cells of protection prisoners who had to be locked in their cells for substantial periods of time in a 24 hour period on average 23 out of the 24.

113. One of the responses of the Irish government to a CPT report, that of the response of the Government of Ireland to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from the 25th January to the 5th February, 2010 furnished to the Committee by the Government on the 10th February, 2011 dealt with this issue. It stated at p. 35 "a new camping style toilet is being piloted in Mountjoy Prison and is to be rolled out across the prison by the end of the year. Modesty screens have been installed in each cell and initial feedback from the prisoners is positive". At p. 36 the report stated "as indicated earlier a new camping style toilet is presently being tested on a trial basis, in Mountjoy, Limerick and Cork prisons. The initial feedback from the prisoners is positive and the Irish Prison Service intends to roll out this initiative to all areas where prisoners currently slop out". This information is in stark contrast to the evidence heard before this court. The least that could have been done was to provide a commode type structure into which the chamber pot could have been placed with the ability to remove it for slop out purposes and a modesty screen. This would have been more comfortable and dignified for the individual prisoners and would have minimised the risk of splashing and spillage.

114. I would not have regarded as good practice or appropriate that the chamber pot was not used to defecate, but the court accepts the evidence of the Plaintiff that it was his practice, not to use it to defecate. I do not accept his evidence that he threw plastic bags of faeces out the window.

SLOPPING OUT BETWEEN 7 AM AND 8 AM

114. The Plaintiff stated that he was never given the opportunity to be released from his cell between 7am and 8 am to slop out at the toilet area. He also disputed that the governor's parade for protection prisoners occurred between 7 am and 8 am.

115. The evidence adduced by the Defendants was that because it was not feasible to have a governor's parade for protection prisoners at a time when the general prison was unlocked that a special arrangement was made which involved staff of the prison service volunteering to work between the hours of 7 am and 8 am. The normal day shift within Mountjoy Prison was from 8 am to 8 pm for the general staff with working hours usually of 8 am to 5 pm or 6 pm for management staff.

116. The procedure whereby prisoners can raise matters of concern with the governor or his nominees within the prison is called "the governors parade". For the general prison population a prisoner can request to see the governor and this can be facilitated by the prisoner attending at an office within the prison for the purposes of raising his concerns.

117. The procedure for the governor's parade for non protection prisoners was that the campus governor or his nominee a senior member of management would attend at an office on a particular wing and prisoners who wanted to see the governor would queue up outside this office. This was not a suitable system for protection prisoners as it could be a hostile environment if they had to queue up with non protection prisoners who they might have difficulty with.

118. Once the need arose to house protection prisoners on the D1 landing which necessitated a degree of intermixing with non protection prisoners it was decided to set up a system where the governor's appointed nominee would attend at each cell of the protection prisoners and enquire from them if they had any specific requests or complaints. That the system was put in place is evidenced by a separate documentary record kept by the prison authorities and headed "prisoners wishing to see the governor". This journal from the 13th February 2013 to the 11th September 2013 was produced to the court.

119. The evidence in respect of the governor's parade was tendered to the court by campus governor retired governor Whelan, governor Gregg Garland, assistant governor Jean Carey, assistant governor Mal O'Sullivan and chief officer Paul Burke and was corroborated by prison officers Declan McBrearty, Kevin Fagan, Pauline Doyle and Tom Murphy. Assistant governor Jean Carey explained that it was carried out usually by herself and assistant governor Mal O'Sullivan and a chief officer, usually chief officer Paul Burke except when he was not on duty. The procedure was that one of the assistant governors either assistant governor Carey, assistant governor O'Sullivan or when they were not available governor Gregg Garland would attend on the D1 landing at 7 am and would be in possession of a key and would methodically open each cell door, go inside the cell, wake the prisoner, switch on the light, carry out a brief inspection and ask the prisoners in the cell if they had any requests or complaints. All these witnesses stated that during this period of time between 7 am and 8 am if the prisoner so wished he could slop out by taking his chamber pot down to the toilet area. The general evidence was that this was not widely availed of by the inmates because a lot of them were not early morning people. There were some prisoners who were up early and went down to slop out but there was not a great take up of it. Chief Officer Burke explained this in some detail. The governor's parade occurred between Monday and Friday each weekday but did not take place on Saturday or Sunday.

120. I am satisfied that this governor's parade took place between 7 am and 8 am and had to be finished before general unlock at 8.10 am. During that period of time a prisoner if he so wished could go down and slop out in the toilet area but this was not widely taken up by prisoners. I am not sure if it was as widely available on a Saturday and Sunday morning as the governors parade did not take place. Breakfast was being distributed in D1 wing between 7 am and 8 am and it may well be that the opportunity to slop out during those days was not as widely available as it was from Monday to Friday.

Ventilation in the cells occupied by the Plaintiff

121. The Plaintiff complained that the cells that he occupied were too hot in May, June, July and August and too cold in the months of February, March and April. He stated there was not good ventilation in the cell. He complained there was a stink off the urine buckets in the heat after defecation. He stated they were able to deal with this by way of purchase of lavender in the tuck shop and that made the smell ok and reasonable enough. He stated that there were times when he was supplied with spray bottles by prison authorities, but for the majority of time when there was different shifts these were withheld.

122. There was a conflict of evidence between Barry Tennyson, consulting engineer, and Paul Romeril, consulting engineer, as to the standard of ventilation in the cells and the common area of the landing.

123. Mr. Tennyson in his evidence accepted that his visit to the prison on the 19th December 2013 was for the purposes of compiling a report for an action taken by Mr. Raymond Sheridan and the cells that he visited on that occasion, four in number, related to Mr. Sheridan's time in the prison. He accepted that he had not spoken to the Plaintiff, nor knew the cells numbers he was in, but did have his statement of claim. He accepted that his report for the Plaintiff's case was the same as the report that he prepared for the Sheridan case.

124. Mr Tennyson stated the window opening, which was providing natural ventilation, was not of a sufficient size to do so and there was a requirement for mechanical extract ventilation, which was not supplied to the cell, thus the air would remain stagnant because there was not a proper cross flow of air. He noted on his inspection that some ventilation openings were plugged and painted over. He was of the opinion that the air gaps around the perimeter of the door were not sufficiently wide enough to create proper air flow and that this was not a proper means of ventilating the cell. He expressed the opinion that in summer the cell would be very hot because of a lack of ventilation and in winter would be very cold. He described the hot pipe system of heating as inefficient. He did not refer to the ventilation of the landing in his direct evidence but on cross examination also considered it inadequate. Mr. Romeril had prepared an initial report for the Sheridan case on the 9th January 2014, but prepared a revised report on the 25th July 2016 for the Simpson case and having considered a transcript of Mr. Tennyson,'s evidence. Both engineers agreed that the building regulations did not apply to Mountjoy Prison. Mr. Romeril described the ventilation system in Mountjoy as a stack effect or chimney effect where the air was drawn out from the cells through the external windows of the cells under the door and rose up the central atrium out through the roof. The roof had vents which could be opened or closed to increase or decrease the effect. He stated there were no sources of water vapour in the cell and no sign of mould growing in the cells which would be an indication of lack of ventilation. He did not consider that an extract fan would be useful.

125. Mr. Patrick Dunne, a deputy governor of the prison, responsible for the building services division gave evidence about the heating system on D1 at the time. He stated there was a stream boiler system which was connected to a heat exchanger and that steam

came from the plant room below the floor and was then broken down into lower temperature hot water through a series of controls and that the water then circulated through pipes to heat the whole wing and on return the temperature was monitored. He accepted it was a centralised system and there was no individual temperature control in each cell but that the system would reference to the outside air temperature. He regarded the system as adequate to heat the various cells because it was serviced regularly and also subject to statutory inspection every fourteen months which was carried out by an independent external engineering service. He stated that the temperature for each wing could be monitored to a standard equivalent to an ordinary heating system which operated between anything from 60° to 73°. The heating was provided by a pipe at a low level across the base of the cell which can be seen on the photographs. Mr. Tennyson's opinion was that this pipe was inefficient but Mr. Dunne took the view that a radiator for a prison cell was not very robust and had individual controls and that the pipe or coil system had been found to be one of the most robust systems in the organisation and that in fact it had been maintained after the refurbishment of the prison because physically it would have been very difficult to re-pipe the building. He said that the same system was in operation in the Midlands prison and Cloverhill. He described it as secure and practical.

126. Both engineers described the window in each cell. The original Victorian window is approximately 750mm x 500mm in height and is an arch. The original window was cast iron, hinged at the bottom and would tilt out to a certain degree. It had fixed glass panes. It could be opened to allow for what Mr. Romeril called general ventilation or purged ventilation. It opened about four inches. The glass was removed from the windows for security reasons. Behind the window looking outwards, there were iron bars and then beyond that again a wire mesh screen was attached to the outside of the window on the open prison side. The glass was replaced by a perspex screen which could be opened and closed. Mr. Dunne described this perspex as being of a polycarbonate material and stated that the windows were continuously being broken so there was a series of measures taken to blank out the opening and provide this piece of polycarbonate which could be opened and closed to allow ventilation to the cell.

127. While the heating system had some deficiency in not allowing for individual cell control temperature, it was capable of been controlled on every wing and was monitored. The prison authorities were able to monitor the outside temperature and control the temperatures in the wing to ensure there was proper heat in winter and that is was not too hot in summer. I prefer Mr. Romeril's evidence on the ventilation system. There was appropriate ventilation in the cell. The difficulty was not due to ventilation but to double occupancy and protection prisoners being left in their cells for long period of time without release to the common areas of the prison. There was an unpleasant odour if a prisoner was defecating in the cell which would fade and could be controlled by air freshener as evidenced by the Plaintiff or the use of the secure lid on the chamber pot. If there were long periods of time between slopping out there could be a residual smell in the cell. There was no danger to the health of the prisoners from the air quality and its circulation. There was an historic system of ventilation in the prison which Mr. Romerill describes. The unusual chimney stacks which are visible when one looks at the outside of Mountjoy operated an historic ventilation system which is no longer in place. The vents which Mr. Tennyson witnessed which are closed up by prisoners using some form of material to do it are no longer in use but a legacy from the historic system in place and in some cells this caused a draft which on occasions would have been unpleasant for the prisoners.

Adequacy of space in cell and certification of cell

128. Rule 18 of the Prison Rules 2007 set out at Part 3 under the heading of Treatment of Prisoners deals with the certification of cells or rooms and states:-

> 18 (1) The Minister shall, in relation to a prison or part of a prison, certify that all such cells or rooms therein as are intended for use in the accommodation of prisoners are, in respect of their size, and the lighting, heating, ventilation and fittings available in the cells or rooms in that prison or that part, suitable for the purposes of such accommodation.
>
> (2) (a) The Minister may specify the maximum number of persons who may, in normal circumstances, be accommodated in cells or rooms belonging to such class as may be so specified.
>
> (b) The Minister shall when specifying a maximum number under subparagraph (a) have regard to the size of, and the availability of lighting, heating, ventilation and fittings in cells or rooms belonging to the class concerned.
>
> (3) The Minister shall, in relation to a prison or part of a prison, designate particular cells or rooms, to be used only for the purposes of the special observation of prisoners in accordance with the provisions of Rule 64 (Use of special observation cell), and such cells or rooms must comply with the design requirements approved by the Minister for such special observation cells.
>
> (4) Each cell or room used to accommodate prisoners shall be fitted with a mechanism by which a prisoner locked inside may attract the attention of a prison officer and each such mechanism shall be capable of being operated by such a prisoner at all times.

129. Rule 18(4) was complied with by the Defendants but it was acknowledged by Retired Governor Whelan that there was no certification system of the individual cells in Mountjoy Prison so the Defendants had failed to observe r. 18 of the Prison Rules 2007.

130. Mr. Tennyson and Mr. Romerill gave evidence about the size of the cells and the minimum allocation of space. This is an issue which has been dealt with in a number of European Convention cases, commented on later in the judgment. The Defendants could not have been in any doubt as to the standards expected from them about occupancy. In his first annual report to the Minister for Justice, Equality and Law Reform in 2008 presented on the 6th May 2009 in Chapter 7 of the Report the Inspector of Prisons was emphatic. The Inspector of Prisons, the late Judge Michael Reilly, was robust and independent in the discharge of his functions and if necessary was critical of the regime and indicated any shortcomings which required to be remedied and was also quite prepared to acknowledge the progress and important strides made in the improvement of the Irish Prison system.

131. In Chapter 7 of the Report. At 7.4 he stated:-

> "7.4. I accept that in certain cases because of the numbers in Irish Prisons and because of the limited accommodation in such prisons that doubling up of prisoners in cells is inevitable. I accept that, in this context, a distinction must be drawn between some of the accommodation cells in Mountjoy, Cork and Limerick prisons and those in newer prisons such as Wheatfield and The Midlands. The former were constructed in the 19th century, are small with little light and ventilation and no in cell sanitation. Whereas the latter are larger, have adequate light and ventilation and are equipped with in cell sanitation. Doubling up of prisoners in cells should only be accepted as a temporary measure (which should be kept under constant review) and should, except in exceptional circumstances, never happen with the following classes of prisoners:-
>
> (a) Prisoners on 23 hour lock up

(b) Prisoners who are kept in their cells longer than normal

(d) Prisoners serving long sentences

132. The Defendants had to be aware that the accommodation for protection prisoners on D1 landing breached this direction. I accept the evidence of retired Prison Governor Whelan that it was communicated to the prisoners that this was a temporary arrangement pending the refurbishment of the prison., I would interpret the Inspector's direction as, doubling up should be only a temporary measure for prisoner's who were on the normal regime, but except in exceptional circumstances it should never happen for prisoners on twenty three hour lock up.

133. The Court has heard evidence that the Plaintiff had to occupy his cell with two others for a number of days and nights. I am satisfied apart from the missing records from 6th June to 27th June to accept the accuracy of the records on allocation of cells. He occupied a cell with Jason Walsh and Patrick Padget from 27th April to 2nd of May and with Jason Walsh and Michael Kinsella from 1st of June to at least 5th of June and perhaps somewhat longer. The Plaintiff denies he consented to this. The Defendants allege there was consent. To the court consent is irrelevant it should not have happened.

134. I did not consider the space available to the Plaintiff and his fellow inmates on the basis of two to a cell where the prisoners were on twenty three hour lock up as sufficient space to live for such lengthy periods of time without been out of their cell for reasonable period of times as well. It would have been satisfactory if the prisoners had been on the non protection regime. This finding relates to the time in the cell rather than the calculation of the physical space available to the prisoner.

Service of food in cell and quality and condition of the food
135. I am satisfied from the evidence adduced before the Court by the Defendants and certification referred to by the Defendants that the standard of hygiene and food preparation in Mountjoy prison was of a high degree. The servery for D1 landing was on the ground floor and close to the cells where the Plaintiff was housed. Food was served off a trolley and delivered individually to each cell. I am satisfied that it was delivered in a hygienic state and that for the most part prison officers wore gloves. Food was served hot and if the meal was cold there would have been no difficulty having the meal reheated or providing a replacement hot meal. It was uncivilised that the Plaintiff had to eat food, where there may have been on occasion defecation and urine materials in receptacles in the cell. This was not a public health hazard but was a breach of the prisoners' dignity to have to eat in the cell in those particular circumstances. The Plaintiff was exaggerating his complaints about food and food hygiene.

The general cleaning regime in Mountjoy, access to cleaning materials, sheets, towels, cleaning sprays and mops.
136. The general tenor of the Plaintiff's evidence was that the cleaning regime in Mountjoy prison during the period from February 2013 to September 2013 was a disgrace. He alleged that the cells, the landings, the toilets, the slop out hopper, the shower block, were all filthy and not kept clean and that the prison cleaners were heavy drug users and did not and were not capable of doing their jobs. His criticism was trenchant. The evidence placed before the court by the Defendants was starkly different. It was not stated directly in the evidence of the relevant prison officers, prison governors, assistant governors and chief officers that there had been an historical problem about lack of cleaning in Mountjoy but it was implied because all of the evidence from the Defendants' witnesses who worked in the prison was that from the arrival of retired campus governor Whelan in Mountjoy in 2010 the cleaning regime in Mountjoy was improved considerably and particular attention was paid to cleaning and general refurbishment of the prison. All of the Defendants' witnesses who worked in the prison stated that the retired campus governor had high standards for cleanliness in the prison. Mr. Brian Purcell, the director general of the Irish Prison Service at the time of the Plaintiff's imprisonment regarded retired campus governor Whelan as one of the best governors at the disposal of the Irish Prison Service and praised him highly. At the outset of this chapter of the judgment the Court stated it would try to rely on some form of independent evidence to corroborate it's findings. That is available to the Court in the form of both reports of the Inspector of Prisons, the late Judge Michael Reilly, of his inspection of Mountjoy Prison.

137. The first report was dated the 13th August 2009 and covered a period of eight months from the Inspector's initial unannounced visits on the 25th and 26th November 2008 to his last visit on the 2nd July 2009. He said that during that time he visited the prison on eleven occasions and the visits were both announced and unannounced and took place during the night and day.

138. The Inspector was critical of the standard of cleanliness in the prison. He stressed that not all landings were dirty or untidy and that his comments were intended to give a general view of the prison which may be particular to certain areas and not to others.

139. He stated in this report as follows:-

> "4.13. Because of the overcrowding of the prison, the inadequate number of slop hoppers and because prisoners often have to use their 'slop out' buckets as rubbish receptacles (which cannot be emptied into the slop hoppers) human waste is often poured into these bins. I have witnessed this happen on occasions. This amounts to inhuman and degrading treatment.
>
> 4.18 The areas that caused me most concern were where the sanitary/washing facilities are situated and around the rubbish bin areas on the landings.
>
> 4.19 Numbers of areas were dirty – at times filthy. Toilets were dirty and sometimes blocked, urinals were overflowing, wash hand basins were dirty, floors were covered with water or other liquid and hand driers were not working. The areas around the rubbish bins had pieces of food on the floor, were generally dirty and untidy and at times liquid could be seen seeping from them.
>
> 4.20 Some landings and stairs were dirty.
>
> 4.21 Certain recreation areas were dirty.
>
> 4.22 Yards were dirty.
>
> 4.23 The majority of the cells in the main block and in the B Base were dirty and unkempt. Many need repainting and some need total refurbishment.
>
> 4.24 Numbers of cells did not have adequate furniture such as chairs, tables or storage facilities.
>
> 4.25 Numbers of cells did not have adequate rubbish bins and in some cases as detailed at paragraphs 4.10 and 4.13

none.

4.26 Where prisoners had to 'slop out' sufficient 'slop out' buckets were not provided in some cells. In most cases 'slop out' buckets were uncovered. This amounts to inhuman and degrading treatment.

4.27 In some cells I observed torn and soiled mattresses. It is the policy of the prison that worn mattresses are changed. It is difficult to maintain mattresses when, in some cases, prisoners have to sleep on them on the floor.

4.28 Cockroaches and mice are a problem in certain cells. I witnessed cockroaches at night and evidence of mice.

4.29 Not all cells had working 'alarm bells'.

4.30 The smell of sewage was evident on landings at certain times and this permeated into cells.

4.31 In certain cells windows were broken or not working.

4.32 Locks on certain cell doors were not working properly.

4.33 Broken and leaking equipment is a problem throughout the prison. The main reason is the age of the prison but a secondary reason is that the prison now has a population which imposes a workload on a system not designed to carry such a workload.

4.34 Broken and/or leaking water pipes, broken and/or leaking sanitary facilities and broken 'in cell' alarm bells were the most common features observed under this sub-heading.

4.35 On many visits I found that the already inadequate number of toilets, wash basins, urinals, slop hoppers, showers and hand driers was reduced because of breakages, blockages or leaks.

4.36 In some areas the water pressure was not adequate. This was most obvious in the Reception Area where the water pressure, on the occasion of most of my visits, was so low that there was either very little or no water in the wash basins and only sufficient water for one shower at any time.

4.37 In certain toilet and wash areas windows were broken and in one area, I was informed, the windows had been broken for a number of years."

140. In his general comments he stated at 4.43:

"4.43 I am aware that prisoners contribute to the dirty and untidy environment.

4.44 I am aware that prisoners are responsible for certain damage caused in the prison.

I have witnessed this on occasions.

4.45 I am aware that prisoners, at times, block toilets and slop hoppers with clothing and other articles".

141. The Inspector of Prisons then compiled a revised report or a further report prepared on the 24th March 2011. He stated that he had visited the prison on numerous occasions over a six month period up to the 11th March 2011 both during the day and at night. The majority of these visits had been unannounced. He noted a new management structure had been put in place in mid-2010.

142. Dealing with his previous criticisms he noted in the report of the 24th March 2011 as follows:

"2.32 In my 2009 Report I was critical of the fact that rubbish bins were not emptied on a regular basis. The bins provided at that time were not adequate. They were used not only as rubbish bins but frequently as receptacles for the contents of 'slop-out' buckets. This meant that the bins and surrounding areas were filthy on numbers of landings.

2.33 I am happy to report that all rubbish bins are being emptied on a regular basis, I have inspected the prison on many occasions unannounced both during the day and at night and have found all bins empty, clean and fit for purposes.

2.35 I am happy to report that all of the areas that caused me concern have been cleaned. In all cases they have been power hosed and steam cleaned.

2.36 The sanitary/washing facilities and the areas around the rubbish bins on the landings are clean and have been clean on all of my recent visits. Toilets do get blocked from time to time but are immediately freed, urinals are not seen to be overflowing, all landings and stairs are clean as are recreational areas and the yards.

2.37 A painting programme for all of the prison has been undertaken and as of the date of this Report all landings and other 'public' areas of the prison have been painted. All landings are now maintained and polished to a high standard. The painting and cleaning work is done by prisoners under supervision.

2.38 There has been a major financial investment in new cleaning equipment. Prisoners have been and are being trained in the use of such equipment. This means that all parts of the prison both indoors and outside are and should in the future be clean. This investment will lead to considerable savings in the future as outside agencies will no longer be required to do the majority of this work.

2.39 An Industrial Cleaning Supervisor has been appointed with responsibility for the cleaning of the entire prison. An officer of similar grade with similar responsibilities should be appointed in all prisons.

2.43 A major scheme of refurbishment of all cells is taking place. This entails repainting cells, mending broken windows, replacing damaged beds and installing appropriate furniture. The new windows and furniture are being made in the workshops in the prison by prisoners under instruction and supervision. New Irish Prison Service style windows are to be installed in the B Base. I am informed that this work will be completed by the end of May 2011. These windows, because

of there specifications, cannot be made in the workshops.

2.44 The refurbishment of the cells is being carried out in a structured way and I have been informed that all cells should be completed to an appropriate standard by the end of 2011.

2.45 An adequate number of 'slop out' buckets are now provided.

2.46 Cockroaches and mice are still a problem in certain areas but the management of the prison are taking appropriate steps to try to eradicate this problem.

2.47 In my recent visits to the prison I found all alarm bells working in the cells and the locks on cell doors working.

2.48 The smell of sewage is far less evident on the landings due to the repairs carried out to broken and leaking equipment.

2.49 A concerted effort has been made by management to repair all broken and/or leaking water pipes, broken and/or leaking sanitary facilities, broken 'in-cell' alarm bells and broken hand driers.

2.50 Toilets, wash basins, urinals, slop hoppers and showers have been replaced where necessary.

2.51 The water pressure in the areas which experienced restricted water pressure has now been improved.

2.52 The windows in the toilet and wash areas have been replaced.

2.53 It is prison policy that when equipment is broken it is immediately repaired or replaced."

143. Retired Governor Whelan gave evidence on the introduction of an improved cleaning regime in his evidence to the Court on the 20th July 2006, (T17, p111)

144. I considered him and honest and truthful witness. On his appointment substantial efforts were made as borne out by the Inspector of Prisons Reports to introduce a cleaning regime in the prison that operated to a high standard. Governor Whelan was pro active in his management of the prison and was a regular visitor to every part of the prison and would not have approved of un-cleanliness in the prison and common areas.

145. The Plaintiff alleged there was insufficient access to cleaning products and that he rarely received a clean mop and had to use towels to clean spillages and only got a new bottle of disinfectant spray every two months and had to buy cleaning spray in the tuck shop. In his direct evidence he did not allege a shortage of cleaning products. His complaint related to lack of access to mops and brushes and stated on one occasion he and a cell mate had to mop out the floor of their cell with a towel because they could not get a mop.

146. Officer Declan McBrearty helped with the provision of cleaning material and in his evidence on the 22nd June 2016, (T 13 at p. 161) stated there were two or three different types of cleaning spray provided together with green scrubber pads, scotch pads and j cloths and there was no restriction at that time on the amount of cleaning products available to prisoners but since then prisoners get a pack every six weeks. He stated that a mop and a mop bucket were available but that as a rule it would not be issued to a prisoner because of the danger of fashioning a weapon with a mop but if a prisoner wanted a mop it would be loaned to him. There was no difficulty supplying mop heads and most prisoners would have kept some mop heads in their cell.

147. Assistant Governor Carey dealt with the provision of towels and bed linen and the regime in relation to prisoners' clothes. In her evidence of the 23rd June 2016, (T 14, p 108/109), she stated there was no distinction between the entitlement of a protection prisoner and an ordinary prisoner to items such as towels or bed linen. There was a reception day each week when there was a change of clothing and bed clothes available. Prisoners had their own clothes but also would have clothes in reception and could leave out their clothes to be washed by their family to be returned and would have a supply of t shirts and socks in their cells.

148. There may have been occasions when a mop was not available to the Plaintiff. I am satisfied that adequate cleaning materials, sheets and towels were available to the Plaintiff. The provision of clothing was a matter for himself to arrange with his family.

State of floors in cells, and lighting.
149. Both engineers stated there were different types of material on the floors in cells. One had a wooden type flooring, one had marmoleum, another had some other types of lino tiles. Mr Tennyson did not examine the floors in the cells the Plaintiff occupied. The court was informed that the flooring in cell 19 where the Plaintiff spent 90 days was marmoleum a type of hard wearing lino. The flooring in these cells needed renewal as evidenced from the engineers' photographs. The wing was in the process of been closed down for complete refurbishment. It was the responsibility of each prisoner in the cell to keep the floor of his cell clean and while the standard of the floors was deteriorating they were still adequate if maintained in a clean state by the prisoners. The lighting in each cell as far as I could establish was adequate. There was some light from the window and good quality strip lighting and a blue light at night so as not to annoy the prisoners. It was not ideal but not sub standard.

Rodent and insect infestation.
150. The Plaintiff alleged in his Statement of Claim that he frequently saw cockroaches in the floor of the cell and mice on the landing. He did not elaborate or go into detail in respect of this in his direct evidence. This had historically been a problem in the prison and was referred to in the Inspector of Prisons Report on Mountjoy of 2009 which I have already referred to. Assistant Governor Carey stated the matter was not a problem in the prison during the Plaintiff's imprisonment. Retired Governor Whelan stated, historically it had been a problem but there was a contract with a pest control firm who regularly inspected the prison and dealt with any infestations. I am satisfied the prison authorities had an appropriate system in place to deal with this issue.

Release from cell during the day for exercise and to use the toilets.
151. The Plaintiff claimed he was not released from his cell during the day on request to go to the toilet, and there was no set time when this would happen or any advance notice. He stated there was no fixed time for exercise, and on occasions he would be locked in his cell in excess of 24 hours, and on occasions when released to the landings or exercise yard it was for periods of much less than an hour. In the Defendants Notice for Particulars of 6th January 2015, this was queried at questions 5 and 6. In his Reply to Particulars of 27th March 2015 the Plaintiff alleged he was confined to his cell for 30 hours without release to the yard on 10 to 14 occasions, and released for no more than 10 minutes on approximately 10 to 15 occasions. In his evidence he alleged the frequency

of these occurrences was much greater. The number of different groups who had to be kept away from each other among the protection prisoner population varied regularly and the number of groups would dictate the ability of prison officers to accede to protection prisoners requests to be released from their cells to go to the toilet.

152. There was a genuine attempt to operate a roll over system for exercise as protection prisoners did not generally like to avail of early morning exercise and in fairness to them this had to be alternated. Given the regime in place where protection prisoners were housed on a wing where there were other non protection prisoners on the landings above them the Defendants were dealing with a difficult logistical problem. There were occasions where the Plaintiff was in his cell in excess of twenty four hours and sometimes the hour exercise was shortened when there were larger numbers of groups. This was counter balanced at times when there were lower numbers of groups and prisoners could be let out of their cells for longer periods of time, or more often than once a day for exercise. It is difficult for the Court to put an exact number on the occasions where the Plaintiff was in excess of twenty four hours in his cell as he was also been accommodated for showers between the hours of 8 p.m. and 10 p.m., the frequency of which is in controversy. In addition the Court has already decided he was free to leave his cell during the governor's parade between 7 a.m. and 8 a.m. The records of the prison on offers of exercise and showers is incomplete. The record of phone calls is accurate and this demonstrates that the Plaintiff was out of his cell even when the manual records show differently.

The Defendants frequently if at all could not release the Plaintiff to go to the toilet on the landing, because of the presence of D1 and D2 non protection prisoners in close proximity.

Response to emergency red light.
153. A prisoner in a cell can alert prison staff by pressing a buzzer on the inside of the cell which illuminates a red light on the outside of the cell and this also shows up in the circle on a panel there. It is the responsibility of the prison staff to respond immediately or as soon as possible to this red light in case it is an emergency. The Plaintiff has complained that the red light was ignored and not responded to and the alarm switched off, without looking into his cell. I am satisfied from the evidence that prison officers were diligent in responding to the red light to ascertain if there was an emergency or not. However if it was a routine request or a request to go to the toilet on many occasions this could not be complied with due to time constraints security implications and staffing arrangements. This problem arose because these prisoners were locked in their cells 23 hours out of 24 and because there were non protection prisoners in D2 and D3 in close proximity. It was logistically difficult for prison staff to comply with a lot of the requests from inmates on D1. To that extent the Plaintiff is correct, but his allegation that red lights were deliberately ignored is incorrect.

Chaotic nature of slopping out
154. The Plaintiff stated that slopping out was dirty, unhygienic and humiliating, that he had to empty his urine bucket into a slop hopper and when he was doing so, it could splash over him. He alleged a number of staff would rush him, make him run down the landing and curse at him, try to intimidate him and treated him like a piece of dirt at the end of his shoe. It was his opinion that protection prisoners were stigmatised because they were on protection. He stated that at times when he went to use the toilets, they would be blocked and he was not able to use them. (T 2 – p. 99 and 100).

155. He insisted there would be a large queue forming to slop out, and there would be four or five ahead at the slop hopper, which was a small area and everyone was emptying their urine buckets into one slop hopper that contained faeces, tops of razor blades, all sorts of stuff. He accepted he was slopping out as part of his group and that the group varied at most from six or eight down to two or three. He still insisted that in a group of three or four slopping out, there would still be a queue. He accepted that on occasions, he would talk to other prisoners as he walked down the landing to slop out.

156. He stated that the slopping out area was filthy every time he used it, that there were 80 prisoners at any particular time emptying their urine buckets on a daily basis, but then qualified his evidence to state that eighty would not do it at one time but throughout the day. He complained there were tops of razor blades and lumps of faeces on the floor and insects. He stated there was a rotten pipe and the sinks were all dirty and sometimes the tap did not work, and you could not even wash out your urine bucket.

157. He complained of a big hole in the wall, and the dirt of the slop hoppers as there used to be faeces all over them. He stated he did not empty faeces into the slop hopper but used the black industrial bin at the end of the landing, or would squash it up and throw it out the window of his cell.

158. The Plaintiff stated that slopping out was chaotic because they were being rushed and verbally insulted by the use of bad language. His evidence was somewhat confusing. He stated that all the prisoners were rushed every single time they got out but were not abused or cursed at every single time. It was only when Mr. Murphy and two colleagues, Mr. Doyle and Mr. Sheridan were on duty that we were abused and cursed at. He clarified his evidence to state that he was always rushed when Mr. Murphy and his two colleagues were on duty. He accepted he was not always rushed but stated that every time Mr. Murphy was on duty, he was always rushed and treated like an animal. He then further clarified his evidence to state that they were rushed to a certain extent but not verbally abused. He stated that this caused urine to be thrown all over the place and spillages all the time. He stated that chaotic was putting it mildly, and that they were rushed all the time when one shift was on but bad when the other staff were on duty.

159. The Plaintiff on cross-examination on 2nd June 2016 (T 3 p 102) accepted that there were different faction groups within the protection prisoners and these were coded with different colours to assist the prison officers in their tasks. The number of groups fluctuated and he accepted that a particular given group would be released to slop out at the same time and that the other groups would not be released at this time. He accepted that for substantive period of his imprisonment he was in the blue group which was numbered between six and eight. He thought there was probably between seven and eight groups, and he could not remember precisely how many there were. The green group could have gone up to as high twelve in March 2013 and the Plaintiff accepted that towards the end of the stay he was in a smaller group, the red group with about five or six, and that in August and September he was either part of this red group or part of protection all others which meant that he was in a group on his own with another inmate.

160. With the acknowledged numbers going down to slop out at any one time in groups, I cannot see how slopping out could be chaotic. I do not accept the Plaintiff's evidence that he was forced to run while carrying a chamber pot or a bucket. There were time pressures when the number of different groups had to be let out to try and facilitate recreation and prisoners were not allowed to dally. Due to the nature of the operation of slopping out the slop hoppers and toilets could be blocked on occasion. I accept that it was an unpleasant and unacceptable operation and there could be spillages in the toilet areas. I also accept that prisoners may have improperly emptied the contents of slop out buckets in the sinks. It is unlikely it happened in the shower in each block. I emphasise again that I accept the Defendants evidence that these toilets and sinks were cleaned regularly.

161. Mr. Tennyson and Mr. Romeril were in conflict on the standard of the toilets and slop out area. I accept the evidence of the Defendants that the toilets were cleaned regularly on a daily basis and if there were blockages the prison maintenance staff were

summoned to repair these. The toilets and slop hoppers were of an appropriate standard. There was some disrepair, a hole in the wall over the sluice hopper and some breakages in the tiling. On the date of the inspection of the engineers on the 19th December, 2013 the whole wing was in the process of being closed down and was closed down shortly after for major refurbishment. It was realistic and understandable that the prison authorities did not to carry out these repairs due to the imminent closure of the wing.

162. The Plaintiff has exaggerated the chaotic nature of the slopping out process and the condition of the toilets and sluice area. The whole process was unacceptable to the dignity of any prisoner and should have been terminated as a procedure in the prison much earlier.

Frequency of showers and condition of showers.
163. The Plaintiff has stated in his evidence that the frequency of showers was never more than two a week.

164. Rule 25 of the Prison Rules 2007 governing personal cleanliness states

> 25.1 (1) A prisoner shall keep his or her person clean.
>
> (2) A prisoner shall be permitted to take a hot shower or bath as often as is reasonably practicable and shall be entitled to, and may be required to, take a hot shower or bath at least once a week.
>
> Rule 24 states,
>
> 24. (1) In so far as is practicable, sanitary and washing facilities shall be provided in the prisoner's cell or room.
>
> (2) Where adequate sanitary and washing facilities are not provided in the prisoner's cell or room, the prisoner shall have reasonable access to sanitary and washing facilities.

165. Chief Officer Paul Burke gave evidence about this matter and referred to a directive prepared for the inmates of D1. He stated in evidence on 19th July, 2016 (T 16 p54) because of the closure of A division for refurbishment more officers became available to work a shift on D1 from 8pm to 10pm. There were also prison officers who volunteered to work this period of time, therefore it was possible to provide staff to facilitate inmates going to the toilet and having showers. Showers were offered between 8pm and 10pm.

165. The Directive stated as follows:

> "11 x 2 x 13 SOP showers D1 protection.
>
> Following the closure of A division, showers for protection prisoners housed in D1 will take place between 8pm and 10pm daily. Staffing for this task will come from the group between 10am to 10pm. A minimum of two staff will be detailed to carry out this task. In addition to the staff detailed showers D1 an additional two staff will be detailed for toilet patrol D1. Staffing of showers will only take place once all cover for night guards and hospital escorts etc. has been filled. Priority for staffing is a) toilet patrol D1 b) showers D1 c) toilet patrol D2 and D3. A written list of all prisoners offered a shower should be maintained by the officers in charge of showers. This list should also indicate if a prisoner availed of a shower or not.
>
> Showering of prisoners will take place on a roll over basis with all prisoners getting an equal opportunity to shower. This roll over list will be maintained by the class officer in charge of D1 who will generate the roll over from the records submitted by the officers in charge of showers taking into account the different factions on the landing. All factions should be clearly identifiable by the use of different coloured cell cards i.e. only prisoners with the same coloured cell card can be unlocked to shower at the same time. No more than four prisoners at a time should be unlocked for a shower at the same time. Once in the shower area the gate to the shower should be locked and the officers on toilet patrol can unlock prisoners for the toilet. Prisoners unlocked for toilets must be locked back secure in cells before prisoners returning from showers are allowed out of the shower area and back to their cells. The D1 gate and the gate leading from D1 to D2 must be kept locked at all times when prisoners from D1 are unlocked for either the showers are toilets. Access to reception for change of clothes etc. will remain Saturday and Sunday.
>
> Signed by
>
> Paul Burke
>
> Chief Officer".

166. There was a record kept on the offer of showers. Chief Officer Burke accepted these records were incomplete but disagreed they were false. The Plaintiff has challenged the accuracy of these records.

167. The Plaintiff was also concerned that he was not able to have a shower prior to visiting his partner and children which he found distressful. Showers were only provided between 8pm and 10pm at night and would not have been available to the Plaintiff during the day. The Plaintiff instructed his solicitors Fahy Bambury McGeever to write to the governor of the prison on the 15th March, 2013 complaining that he had not been permitted to access shower facilities since Wednesday the 6th March, 2013. I will deal with the circumstances surrounding this letter of complaint and the subsequent letter of complaint under a separate heading. The records corroborate the claim of the Plaintiff that between the 6th and 14th of March a period of seven days he was not offered a shower.

168. There was one shower in each of the toilet blocks and a separate shower block with 11 shower stands downstairs in the basement of D1 with access by stairs. Mr. Tennyson's complaint about this block was to do with its untidiness on the date of his inspection. Mr. Remoril stated the standard of the shower block was good and was satisfied that the showers were in order. The shower block in the basement of D1 was fine. The block was constructed in 2011, and was in good condition. On occasion the prisoners in D1 were able to use the new showers which had been refurbished in C block. The individual showers in the toilet and slop hopper blocks would have been unattractive to use.

169. The Plaintiff has made a separate allegation that he was deliberately denied showers for twelve days in succession because he had made a complaint against a prisoner officer and I will deal with that separately.

170. The Defendants made a genuine effort to accommodate the prisoners on D1 to have showers given the overall structure of the

confinement of the protection prisoners. It is clear from the directive issued by Chief Officer Burke they were conscious to try and provide regular showers for D1 protection prisoners.

171. I would not consider two showers a week for a prisoner locked in a cell for an average 23 hours out of 24 hour days as being compliance with rule 24 and 25 of the prison rules as reasonable access to shower and washing facilities. I accept that rule 25.2 states that he should be entitled to a hot shower or a bath at least once a week. My interpretation of the rules on reasonable access to sanitary and washing facilities for prisoners on 23 hour lock was that showers should have been more often. The records produced by the Defendants would indicate that the Plaintiff on average was offered more than two showers a week. I accept these records were incomplete and may be inaccurate. The court also has difficulty with the credibility of the Plaintiffs evidence in many respects on this issue. I cannot be definitive but am of the opinion that the Plaintiff was offered more than two showers a week but did not get a daily shower or one before a visit except the night before a visit on occasion. It reinforces the unsuitability of D1 landing for these protection prisoners.

The allegation that cleaners who were prisoners were always on drugs and did not carry out their cleaning functions.
172. The Plaintiff in his Statement of Claim alleged that the cleaning service was not reliable as the cleaners were usually heavy drug users.

173. In his evidence on the 1st June, 2016 (T2 p125) he stated that the cleaners were heavy drug users and he did not think they did any work and that sometimes you would see them doing the work but sometimes you would not. He alleged the landing was pretty dirty, and there was no industrial type cleaning. In cross-examination on 3rd June, 2016 (T4 page 40) the Plaintiff insisted that the prisoner cleaners were heavy drug users insisting that the photographs speak volumes in that the landing was never clean, it was filthy dirty and the cleaners were allowed to do what they wanted to do and that he saw one out of their head every time he got out and they looked to be heavily intoxicated whilst cleaning and this was totally obvious.

174. It was put to the Plaintiff in cross-examination that when he had been transferred to the medical unit, he had a meeting with his addiction counsellor when he told her that he had got a cleaning job on the landing and was focussed on his drug free status.

175. The Plaintiff accepted he was appointed as a cleaner in Mountjoy West wing for the first time ever since he was in prison. He accepted that at that time he was drug free, providing regular urine samples, and being closely monitored, and not in trouble with disciplinary issues. He still maintained when it was put to him that cleaners were not people who were drug free behaving themselves and trusted. Various witnesses for the Defendants gave evidence that cleaners were trusted prisoners with drug free status, and if they misbehaved they would be relieved of their duties.

176. The court has independent evidence from the Inspector of Prisons who inspected Mountjoy Prison over a period of time who presented a report on his inspection to the Minister for Justice, Equality and Law Reform on 24th March, 2011. and I have already referred to it in detail. It corroborates the evidence adduced by the Defendants that a particular cleaning regime had been put in place by the purchase of industrial cleaning machinery for use on the landings and that cleaning officers within the prison staff had been appointed to supervise and carry out this industrial cleaning and also prisoners trained to do so. From the Plaintiff's own evidence it is clear that you would not be appointed a cleaner unless you had a drug free status, a good prison disciplinary record, behaving well and regarded as a trusted prisoner in order to be appointed a cleaner.

177. This is a nasty allegation and I am satisfied it is not an exaggeration but untruthful evidence by the Plaintiff.

Solicitor's letters of complaint.
178. The Plaintiff's solicitors at the time he was in prison Fahy Bambury and McGeever on 15th March, 2013, wrote a letter to Governor Carey on behalf of the Plaintiff.

179. The letter stated

> "We are solicitors acting on behalf of Mr. Gary Simpson who is currently imprisoned in Mountjoy Prison. Mr. Simpson instructs us that he was transferred from Wheatfield Prison on 8th February, 2013. Mr. Simpson further instructs us that he has been subjected to a regime of 23 – 24 hour lock-up daily since that date. In addition he instructs us that he is not been permitted to access shower facilities since Wednesday 6th March, 2013.
>
> Mr. Simpson has instructed us, in all of the circumstances, to write to your good self to request that he is considered for transfer from Mountjoy Prison. He instructs us that the difficulties that abide in Mountjoy Prison which resulted him being placed on protection, would not be in existence in other prisons. In particular, his requests that he be considered for a transfer to either Wheatfield Prison, Midlands Prison, Portlaoise Prison, the Training Unit or Shelton Abbey.
>
> We ask that this request is dealt with as a matter of urgency. We look forward to hearing from you.

The letter is noted to have been received in the Mountjoy Governor's Office on 20th March, 2013.

It was replied to on 25th March, 2013 by Assistant Governor O'Sullivan and the letter of reply stated:

> I refer to your correspondence received at this office regarding the above.
>
> 1. Your client is currently housed in D1 landing as he requires protection from other inmates in the prison. This landing has a restricted regime were services are curtailed slightly. He has received the same amount of exercise as all other prisoners on this landing and this amounts to at least two sessions and a shower per day.
>
> 2. Your client has availed of shower facilities at least twice a week and where possible showers are provided daily.
>
> 3. Your client has been approved a transfer to the Midlands Prisons on 19th March, 2013 by Irish Prison Services HQ and will be transferred there in due course.

Fahy Bambury and McGeever wrote a further letter on 22nd May, 2013 addressed directly to Governor Whelan and it is stamped having been received in the Governor' office on 24th May, 2013. The letter states:

> Dear Governor

> We are instructed that our client is on protection on D1 landing in cell 19. He complains of conditions some of which have general applicability to prisoners in D1 and the complaints are as follows:
>
> 1. He is only permitted to slop out once daily.
>
> 2. He has no time to wash and shave.
>
> 3. His meals are cold when they reach him.
>
> 4. Food is handed to him by hand.
>
> 5. He is on screen visits which is causing difficulty as he has a young child visiting him.
>
> 6. He has made complaint to Governor Carey and O'Sullivan as have other prisoners. The basic ordinary requirements of hygiene and food safety are not being met. It will require no cost and minimum effort to meet these basic requirements.
>
> We would be obliged if you can confirm to us that these issues are and will be addressed. We would be obliged for reply within seven days.

There is no record of this letter having been replied to. the Plaintiff has not furnished any letter from Fahy Bambury McGeever nor have the Defendants furnished any copy letter of reply.

The court presumes that the letter was not replied to.

However there was a note prepared by JK Keliher Assistant Chief Officer in order to have the letter replied to and that note is dated 7th June, 2013 to the Governor and it states: "I refer to correspondence received from Fahy Bambury and McGeever Solicitors on behalf of prisoner 30640 Gary Simpson.

Within the correspondence they list several complaints and I have responded in order of receipt.

> 1. All prisoners on D1 class have at least two opportunities to slop out each day.
>
> 2. Prisoners accommodated on D1 class are offered a shower every evening it is the prisoner's choice to avail of the shower. This would afford him the opportunity to wash and shave.
>
> 3. All meals are served from hot bain marie's as is required of us.
>
> 4. Prisoners are handed their food on a plate there is no other method of food service available.
>
> 5. All prisoners accommodated on D1 class are subject to screen visits for operational reasons.

Within the correspondence he also states:

> "The basic ordinary requirements of hygiene and food safety are not being met".
>
> The Prison Kitchen meets the highest industry of standards as is required of them. Please find attached the Food Safety Policy of 2013 for your ease of reference.

This matter was dealt with in the evidence of Assistant Governor Mal O'Sullivan on 23rd June, 2016 (T14 p148-151 and on 24th June, 2016 (T15 pag 4-50), Chief Officer Paul Burke on 19th July, 2016 (T16, p 66-67 and 20th July, 2016 (T 17 p12-29, Retired Governor Whelan in evidence on the 21st July 2016 (T18 p. 11).

180. Governor Whelan told the court he had no knowledge of the letter of 22nd May 2013 addressed to him and his practice would have been to have the matter delegated to one of the other governors who had a responsibility to check it out and correspond with the solicitor in question.

181. From the evidence established in this action the reply of the 25th March 2013 was inaccurate and careless.

182. Assistant Governor O'Sullivan has already accepted the use of the word 'slightly' in relation to the restricted regime was an unfortunate use of the word.

183. It is inaccurate to state that the prisoners had at least two sessions of exercise out of the cell per day. This occurred on occasions.

184. If the records had been checked properly, it would have been established that the Plaintiff, according to the records, did not have a shower for a continuous period of seven days from the 7th to 13th March inclusive. The suggestion that because the letter was received on the 20th March and replied on the 25th March there was some excuse by way of examination of the records from the 14th March to 25th March is not credible. The solicitor's letter states that the date from which the Plaintiff was complaining was Wednesday 6th March 2013.

185. There was no communication either to the Plaintiff or his solicitors about the outcome of the approval to transfer him to Midlands Prison which had been approved on the 19th March 2013.

186. If the Midlands Prison, had refused to accept the Plaintiff that should have been communicated to him or his solicitors.

187. It seems that an important letter of the 22nd May 2013 was not replied to and that the information provided to the Governor to reply to it by Assistant Chief Officer Kelleher was inaccurate. Paragraph 2 of that suggested reply is incorrect. The prisoners on D1 on protection could not be offered a shower every evening and this was confirmed by Chief Officer Paul Burke in his evidence. Chief

Officer Burke was a careful and truthful witness.

188. The response of the 25th March 2013 and the failure to reply to the letter of the 22nd May 2013 reflects poorly on the Defendants. This was not a minor issue. The Defendants should have been conscious that the circumstances and conditions of the imprisonment of the protection prisoners on D1 was a matter of acute sensitivity.

Allegation of assault by Prison Officer Thomas Murphy on the Plaintiff on the 5th July 2013.
189. It was unusual but the court had to spend some time hearing evidence about an alleged assault on the Plaintiff by Prison Officer Thomas Murphy on the 5th July 2013 at a visiting area in the prison.

190. The court was concerned that it was a collateral issue but it has arisen in respect of the allegation set out at para 24 of the Statement of Claim of the Plaintiff which states:-

"The Plaintiff found that the majority of prison staff were very unsympathetic in respect of his concerns about conditions on D1 wing. They were usually unhelpful when the Plaintiff tried to address his living conditions with them and often replied to him in a contemptuous way. One officer on D1 was particularly difficult to deal with, Officer Murphy. This officer assaulted the Plaintiff on one occasion after a verbal altercation on the landing. The officer grabbed the Plaintiff by the throat and said "I am sick of you". The Paintiff lodged a complaint after this incident and sought CCTV but none was available. On a visit after he had made the complaint, the Plaintiff was ordered back to his cell after fifteen minutes by Officer Murphy. The visit was meant to last thirty minutes. This officer would regularly seek to undermine and upset inmates including the Plaintiff. It was he who denied the Plaintiff and his cellmate, Jason Walsh, a shower for a period of twelve days. The Plaintiff also believed that Officer Murphy would go through his belongings while the Plaintiff was out in the yard. He found that objects had been moved around when he returned."

191. This was further dealt with by the Plaintiff in Replies to Particulars on the 27th March 2015 which states at para 21:

> (i) He stated Officer Murphy assaulted the Plaintiff on or about the 5th July 2013;
>
> (ii) The Plaintiff was scheduled to receive a visit from his girlfriend and children. This visit was scheduled to last for thirty minutes. Officer Murphy was supervising the visit and after fifteen minutes had elapsed, ordered that the visit come to an end. The Plaintiff refused to leave this visit area. Officer Murphy eventually escorted the Plaintiff from the visiting area. After leaving the visiting area, and whilst leading the Plaintiff back to D1 wing Officer Murphy grabbed the Plaintiff by the neck and thus assaulted him in the manner set out at para 24 of the Statement of Claim. After the assault the Plaintiff lodged a complaint in the manner detailed below.
>
> (iii) The Plaintiff complained to the prison authorities regarding this assault on or about the 5th July 2013.
>
> (iv) The Plaintiff asked to speak to Governor Whelan and the Chief Officer on duty and duly completed a category A complaint form in relation to the incident.
>
> (v) The Plaintiff withdrew his complaint two months after making it. He felt in the aftermath of lodging the complaint, that he was been victimised by Officer Murphy and by other prison officers who were all aware that the Plaintiff had lodged a category A complaint against Officer Murphy. This victimisation took a multitude of forms, such as failing to let the Plaintiff out of his cell at certain times, denying him showers, and acting in a generally aggressive manner towards the Plaintiff. In the face of this response, the Plaintiff withdrew his complaint in the hopes that the attitude of prison officers towards him would improve. The Plaintiff was also under pressure from a cell mate at the time to withdraw the complaint, as many of the actions been taken against the Plaintiff impacted on his cellmate too. The complaint was processed not withstanding the fact that it was withdrawn. The Plaintiff eventually received a letter from Governor Whelan stating that the complaint was not been upheld as there was no CCTV to verify the Plaintiff's version of events, and interviews with other prison officers did not support the Plaintiff's version of events.

192. The allegation of assault is dealt with by Mr. Simpson's on 2nd.3rd,and 7th of June 2016.(T3 p 25 -33, T 4 at p. 112 and pp. 114 -144 T5 pp. 14 to 51.) Assistant Chief Officer Susan Foley gave evidence on the 21st July and 22nd July 2016 (T18 pp. 131 -142,T19 pp 6 – 51) Officer Tom Murphy gave evidence on the 22nd July 2016 (T19 pp 87 -144).

193. The court had the benefit of CCTV coverage of the visit by the Plaintiff to his partner and two children on the 5th July 2013 and a book of photographs of the area in which the alleged assault took place. There was no CCTV footage available to the court of the location of the assault.

194. In his evidence the Plaintiff alleged that his visit was cut short and that he requested the presence of an assistant chief officer. He confirmed that his written complaint of 8th of July 2013 was correct. He alleged Mr. Murphy grabbed him by the throat in clear view of Assistant Chief Officer Foley and Officer O'Connor.

195. The CCTV footage was shown to the Plaintiff and he was cross examined on the matter. The evidence from the CCTV footage showed the Plaintiff arriving in the visiting area for his visit at 10.58.44. The first child arrived to visit him at 11.00.18. His partner then arrived at 11.00.30 and the visit proceeded without any difficulty. At 11.07 the Plaintiff got up to make sure that a red package which included sweets was delivered to the other side of the screen by the prison officers. This was carried out. At 11.14.32 Prison Officer Murphy is seen calmly furnishing a docket to the Plaintiff's partner.

196. At 11.16.06 the Plaintiff is still talking to his partner and children and at that time gestures and speaks to the prison officers and on his own admission sought the assistance of an assistant chief officer because he had alleged that his visit was cut short.

197. It has been established that this was a special visit of 15 minutes and the Plaintiff has accepted that he was not entitled to a thirty minute visit on that occasion. He had mistakenly formed the opinion that he was entitled to a thirty minute visit and that it had been shortened substantially. Even though this information would have been readily accessible to him either through prison records or by speaking to his partner he maintained in his statement of complaint and in the Statement of Claim that it was a thirty minute visit.

198. He also maintained in direct examination that his visit even though it was fifteen minutes was cut short. That is not correct. The Plaintiff had difficulty in accepting that it was normal procedure for a docket to be presented to a visitor shortly before a visit ended so that the visitor could exit the prison. He accepted that in some prisons the practice was to give this prior to the visit ended to allow the visit to be wrapped up at the convenience of the prisoner and the visitor but said this was not the position in Mountjoy. The Plaintiff is incorrect as it was normal procedure for Prison Officer Murphy to present the docket. It was presented a very short period

of time before the visit was to end.

199. The Plaintiff was angry about the situation he found himself in even though he had no grounds for anger as his visit had not been curtailed. The special visit had been facilitated to his partner and children on request by him.

200. The evidence of Assistant Chief Officer Foley and Prison Officer Murphy was that the Paintiff was volatile and aggressive and the CCTV evidence, though without sound, would indicate that. The Plaintiff was exercised by what he thought was an injustice to him.

201. In the visiting area Prisoner Officer Murphy did not have any engagement with the Plaintiff. The CCTV coverage shows ACO Foley arriving and having a conversation with him and he is then put in handcuffs and is conducted out of the visiting area. There is no evidence on the CCTV footage that the Plaintiff's partner or children were upset.

202. There is no CCTV footage in the area outside the visiting area. The Plaintiff has implied that there was a conspiracy because this was absent. I do not know why it was absent or if there was CCTV coverage. The evidence from ACO Foley was that the CCTV coverage, if there was any of this area, was not under control of the prison authorities.

203. It is now accepted by the Plaintiff although it was alleged in the statement of complaint and in the Statement of Claim that he was handcuffed by Prison Officer Murphy at the direction of the Assistant Chief Officer Foley that it was Prison Officer O'Connor, who handcuffed him.

204. He was escorted from the visiting area by Prison Officers O'Connor and Murphy together with Assistant Chief Officer Foley. The disputed evidence about the assault relates to an area at the bottom of the ramp which is visible in the photographs supplied of the scene. It is a narrow space in the open air separated by a tall, solid aluminium fence which separates the egress of the visitors and the prisoner from each other. The court was somewhat confused by the evidence of the Plaintiff as at p. 112 of T4 when he stated that he had been assaulted in front of his two children and partner.

205. The court inspected this screen on the 18th July 2017 at Mountjoy prison and was informed that the makeup of same had not changed since the date of this incident. The photographs from the visitor's side shows that there is solid aluminium sheeting attached to a wire mesh fence to above head height. There are no holes other than a very thin vertical strip. When one goes close to this vertical strip one can see through it but with a very narrow range of vision. the Plaintiff's partner and children could not have witnessed any assault on the Plaintiff but could have heard what was going on.

206. The Plaintiff stated that Officer Murphy should not have been accompanying him on the date in question and has implied that it was part of a wider campaign by Officer Murphy to harass him. I am satisfied from the evidence that he was discharging his duties and was not engaged in harassment of the Plaintiff.

207. The court is of the opinion the Plaintiff was verbally abusive when leaving the visiting area. The court for a moment will move to the Plaintiff's behaviour after the alleged assault when he was returned to his cell. He was particularly volatile and aggressive. On return to his cell he thrashed it by throwing the television and other implements out of the cell and had to be removed to the reception area to calm down.

208. Wherever there is corroborative evidence i.e. the length of the visit , the CCTV footage, the ability to see through the screen, the Plaintiff has given inaccurate evidence which he maintained in his statement of complaint, in Statement of Claim and evidence.

209. There was some confusion in Officer Murphy's evidence about the nature of the contact. He alleged that the Plaintiff made a lunge at him with his handcuffs and that he just put his hand up to push him away as he did not want to get hit by him. He accepted that he made contact with him in the chest and pushed him back with his hand towards the middle of his chest but did not knock him to the ground. At T19p. 105 he stated:

> "It was not different than kids in a playground. He pushed me and I pushed him, that sort of way."

210. There is no suggestion that the Plaintiff pushed Officer Murphy. The evidence of all three prison officers' Assistants Chief Officer Foley, Prison Officer O'Connor and Prison Officer Murphy, was that the Plaintiff lunged at them. Assistant Chief Officer Foley accepted that in her initial report to the Governor on the 5th September 2013 she stated that an altercation took place between Mr. Simpson and Officer T Murphy and that prison Simpson was highly agitated and verbally aggressive towards Officer Murphy and that there was no mention of an actual physical encounter. Assistant Chief Officer Foley stated that she amplified this matter to Mr. Andrew Crow, who was carrying out an investigation on behalf of the Irish Prison Service, when she stated in that particular statement:

> "P.O. Murphy and P.O. O'Connor were leaving the visiting area and down the ramp Mr. Simpson began verbal abuse of P.O. Murphy and then started lunging at him with his handcuffs. At this point P.O. Murphy put his hand up as a block to the chest to keep him back. I then got in between them and kept telling Mr. Simpson to calm down."

211. The Plaintiff alleges that without provocation he was grabbed by the throat by P.O. Murphy with two prison officers present. Assistant Chief Officer Foley and P.O. O'Connor, state there was a lunge by the Plaintiff with his handcuffs and that P.O. Murphy reacted by pushing the Plaintiff away by pushing him on the chest and did not come in contact with his throat area.

212. The court rejects the evidence of the Plaintiff that this was an unprovoked assault by P.O. Murphy on him when he grabbed him by the throat. I cannot definitively say whether there was some over reaction on the part of P.O. Murphy but I am satisfied from the evidence that there was some gesture by the Plaintiff that provoked P.O. Murphy into a reaction.

213. The plaintiff made this complaint through the Prison Governor on the 8th July 2013 and P.O. Murphy did not file a disciplinary allegation sheet, known as a P19, until the 9th July 2013. that strikes me as a reactive decision as I would have expected if he was proceeding with an allegation, which he was entitled to do, it would have been carried out immediately on the 5th July 2013.

214. In summary, the Plaintiff's behaviour in the visiting area in the presence of his partner and children was wrong and distasteful. He persisted with inaccurate allegations about the length of the visit, it having been cut short and that P.O. Murphy had behaved badly in the visiting area, long after he knew this was inaccurate.

215. The Plaintiff may well perceive, that P.O. Murphy's reaction to him in the corridor was unjustified but the state of the evidence puts the Plaintiff's, credibility very much in issue.

Allegation of denial of showers for 12 days in succession.
216. In his Statement of Claim at para.24 already quoted the Plaintiff stated that it was he (Officer Murphy) who denied the Plaintiff and his cellmate Jason Walsh showers for a period of twelve days.

217. The Replies to Particulars of 27th March 2015, at Para 8 stated

> "The Plaintiff was simply not let out of his cell to take a shower for twelve days, despite other prisoners being allowed out for that purpose. No formal explanation was provided to the Plaintiff. However, Officer Murphy was in control of releasing prisoners from their cells to go to the toilet, and the Plaintiff believed that Officer Murphy was not releasing him for showers as retaliation for a formal assault complaint made against him by the Plaintiff on the 5th July 2013 and in part because Officer Murphy took a dislike towards the Plaintiff."

218. The replies to particulars went on to state at 22:

> (iv) Officer Murphy denied the Plaintiff access to a shower for a twelve day period in or about July 2013.
>
> (v) No reasons or explanations were given by Officer Murphy for denying the Plaintiff access to a shower for 12 days. The Plaintiff was simply not let out of his cell by Officer Murphy at shower time when other inmates were been allowed out.

219. The Plaintiff stated in his direct evidence (transcript 2, p. 134 and 138).

> "At one time I did not get a shower for nearly 12 days. Governor Carey sanctioned that I was to be let out for a shower after 12 days of not getting a shower because Mr. Murphy would not let me out and that is the truth".
>
> He further stated:-
>
> "As I said there was a time when I went 12 days without being allowed a shower, because Mr. Murphy did bully and intimidate the prisoners on the landing."

220. The matter was dealt with on cross-examination by the Plaintiff on the 3rd June, 2016 (T4 between p. 45 -144 and on 7th June, 2016 T5, p. 52 -59).

It was established that the Plaintiff was not referring to the period from the 7th March to 13th March inclusive when the Plaintiff did not get a shower for a period of 7 days which was the subject of a solicitor's letter of complaint of the 15th March, 2013. There was further correspondence from his solicitors of the 22nd May, 29th July and 15th August, 2013 which did not refer to this issue.

221. The Plaintiff stated that the complaint he made against Officer Murphy was filed on the 8th July, 2013 subsequent to the alleged assault on the 5th July, 2013 and that this was the point at which Officer Murphy started to victimise him. He accepted that Officer Murphy was not on duty for all of this period of 12 days but alleged that Officer Murphy's colleagues colluded with him in denying the Plaintiff showers for that period of time.

222. The records retained in the class office of D1 landing record that the Plaintiff was offered showers on the 5th, 7th, 9th and 10th July. The Plaintiff was in the separation unit and not on the D1 landing between the 13th July and 31st July. While the court has concerns about the completeness and accuracy of the records of showers being offered it has no doubt that the Plaintiff was in the separation unit from 13th to 31st July and is of the opinion from the 5th July to the 12th July that he was offered showers. The Plaintiff's evidence is not truthful in alleging that Officer Murphy colluded with colleagues to victimise the Plaintiff after he made a complaint on the 8th July, 2013 by deliberating withholding showers for a consecutive period of 12 days subsequent to the complaint being made.

Allegation of pressure to withdraw complaint of 8th of July 2013.
223. The Plaintiff alleges that he and his cellmate Jason Walsh were pressurised about the complaint the Plaintiff made on the 8th of July 2103 alleging assault against Officer Murphy on 5th July 2013. Andrew Crow a Serious Complaints Investigator was appointed on the 3rd September 2013 by the Irish Prisons Service to investigate the complaint. The complaint was takes seriously. The Investigation file of the complaint was produced to the Court and it is Tab 3 of Agreed Discovery documents Folder 1.

224. A thorough investigation was carried out by Mr Crowe notwithstanding the written withdrawal of the complaint by the Plaintiff on 17th September 2013. The Plaintiff made no complaint of intimidation to Mr Crowe when he withdrew the complaint. It is the practice of the Irish Prison Service to proceed to investigate a Category A complaint alleging assault on a prisoner. The complaint was also referred to the Garda Siochana for investigation and the Plaintiff declined to meet the investigating Guard.

225. The court cannot rule out that some Prison Officers mentioned this complaint to the Plaintiff and Mr Walsh. Officer Murphy denies any such approach. In my opinion the withdrawal of the complaint had minimal impact on the investigation, which was painstaking and thorough and came to the same conclusion the court has arrived at after lengthy evidence. It is a very good practice on behalf of the IPS to insist that these investigations are concluded because it prevents intimidation of a prisoner.

Allegation of Conspiracy against Prison Officers and Collusion by Senior Management to Facilitate Protection Prisoners Being Bullied and Intimidated by Non-Protection Prisoners
226. One of the most serious of allegations made by the Plaintiff is that protection prisoners where stigmatised because they were on protection. He alleges among certain staff there was a lot of intimidation and he identified the shift of Mr. Murphy, Mr. Sheridan and Ms. Doyle. He alleged that Officer Murphy made his life a misery by intimidating prisoners, belittling prisoners and verbally abusing them. He alleges that Officer Murphy would respond to a red light over his cell by just knocking it off and would not even look into the cell to see if he was alright. He alleged that he was assured on numerous occasions that he would be getting out in the evening for a shower and then when the evening arrived he would be told to "go fuck off" by Officer Murphy. The Plaintiff alleged that this was a head game played by Officer Murphy in that he would promise to let the Plaintiff out for a shower and then when it came to night-time he would not let him out.

227. He also alleged that Officer Murphy when handing dinner to the Plaintiff on numerous occasions did it with a smile on his face and he the Plaintiff interpreted this as the officer messing with his food.

228. He alleged that when seeking to get out to the toilet he was verbally abused by prison officers and told to defecate into a newspaper. He also alleged that when being given time to slop out he was being rushed and intimidated and being verbally abused by

prison officers. He stated that because of the ill treatment that he was being subject to he sought a transfer from D1 landing and asked his solicitor to write for that transfer. He alleged that non-protection prisoners in D2 and D3 landings caused mayhem on D1 landing because they were abusing the protection prisoners through the door pouring urine buckets underneath their door and buckets of faeces and that they would be doing laps up and down the landing during recreation and were terrorising all the prisoners on D1.

229. He referred to two specific incidents, one when going on a visit he witnessed a chamber pot full of urine being thrown over a prisoner from D1 Mr. Anthony Connors and an incident in his cell when he was there with Paul Hurley, when there was a chamber pot of faeces emptied underneath the door and they were left for 2 and half hours pleading with the staff to allow them to clean it up. He alleged that it happened two or three times when he shared a cell with Paul Hurley.

230. On cross-examination he made two further serious allegations which were not in his pleadings or referred to in direct evidence. He alleged on the Governor's parade on D1 landing as followings "the Governor's parade used to go on when D2 and D3 were getting their breakfast. D2 and D3 were also getting their meals when D1 prisoners were fed. So D2 and D3 prisoners on numerous occasions stormed by and stormed into cells with people there because the doors were left open and there was prisoners being set up and intimidated". When asked was he suggesting that prison staff colluded in protection prisoners being set up for attack the Plaintiff stated "it happened numerous times on D1, it happened numerous times, doors being left open. (2nd June 2016 T3 pp 89, 90).

231. The Plaintiff made a further allegation against Officer Murphy on cross examination not previously made in the pleadings or direct evidence.

232. He stated

> "He used to come around to the cell whilst there was prisoners from D2 and D3 on the landing recreating taking shop orders hoping that people would run by the cell. That's exactly what he was doing. He was doing it. He was setting prisoners up on D1 also for attack setting people up, Anthony Connors to be precise, to be drowned with a urine bucket, letting him out of his cell. Do you know what I mean like? Like, as I said to you I don't know whether it was a thing that Mr. Murphy had or a little presumption that he had. I found that he stigmatised people that were on protection. He thought we were weak, he thought we were vulnerable, he thought we were basically a piece of dirt of the end of his shoe". 7th June 2006 (T5 p59)

233. The Plaintiff seemed to qualify an allegation against prison management in relation to doors being left open on the governor's parade and prisoners storming in.

> He was asked
>
> "So just to be clear on this, when the doors opened for Governors parade, ... Your feeling was that you were being set up for assault by other prisoners when the doors opened". He replied
>
> "no not when the governor's parade was going on. I didn't say that. I said when they were coming around with the dinners and the teas and that for the hot water at 7 o'clock. (T3 pp 91,92).
>
> He alleged that the prison officers who were setting up prisoners were Mr. Murphy and Mr. Sheridan he alleged that Officer Murphy was in charge of the landing and knew what was going on.

234. Officer Pauline Doyle gave evidence that she was on a roster with Officer Murphy and Officer Sheridan. On the opposite side of the roster were officers McBrearty Fagan and O'Connor. She stated that she recalled the Plaintiff. She stated that she never witnessed any prison officer using abusive language and never witnessed treatment that a prisoner was rushed or treated like an animal. She stated that they tried to accommodate as many groups as possible to ensure that they got exercise and never witnessed any of her colleagues nor did she herself ignore any prisoner. They had a white board in the class office of details of showers for the previous night. She wanted to facilitate groups who had not been out for showers previously. She stated that she did the breakfast patrol for D1 on approximately 15 – 20 occasions and did the toilet patrol from 8pm to 10pm approximately 15 – 20 times. She denied that either herself or Officer Murphy or Sheridan intimidated prisoners. She stated that she never witnessed prison officers turning a blind eye to urine or faeces being poured under D1 prisoner cell doors and that they would try to get D2 or D3 prisoners away from the doors.(T18 pp 92-106)

235. In cross-examination she stated that they all had days when they didn't get on with prisoners and there were days when they would have a bad relationship with prisoners and there would be clashes of personality and Officer Murphy worked on the D1 landing for a long time and that might have had an influence on it. She stated that on a landing where you have that many prisoners there is going to be clashes of personalities and not everybody is going to get along. She stated that she would have been aware on occasion of intimidation from prisoners on D2 and D3 coming down to D1 it was usually shouting through the door. She stated that it didn't happen very often and wouldn't describe it as shouting but sometimes it could be whispering through the door or talking through the crack in the door but that when they would see it we would ask them to move on. Sometimes they would have to raise their voices and ask them two or three times to move on (T18 pages 106 – 129).

236. Officer Murphy stated that he had been a prison officer since 2007 and that he worked on a shift with Officers Doyle and Sheridan of which he was the senior prison officer. He denied on slop out that he ever shouted abuse at a prisoner. He stated that on D1 landing he would open up the prison doors one at a time and that they had plenty of time to their business. He stated that in relation to showers he would check a white board in the class office and allow the groups out on rosters and wanted to be fair to everyone. Officer Murphy disagreed completely with the Plaintiff's evidence stating that he would not target him in any way shape or form he would not be roaring at him that it was not in his nature to roar. He stated that the Plaintiff did not stick out in his mind. He did not make his life hell or intimidate him and that all times he tried to work as best as he could with the situation the prisoners were in. He denied playing head games or being vindictive as to when the Plaintiff got out of his cell.

> He stated
>
> "No we always found that it was easier, it worked out better for ourselves and for the prisoners as well at least if they were informed that they would be getting out at say dinner time or at 4 o'clock or at least let them know that there was some sort of structure in place rather than them constantly banging on the door and wanting to know. Once they knew they knew themselves then".

237. He disagreed that he had ignored red lights and that he would have told prisoners to defecate into a newspaper. In respect of

the allegation that he attempted to set up other prisoners on the D1 landing to be attacked by prisoners from the general population of D2 and D3, he stated

> "What I'd say about that is that it just I couldn't do that because if I did, setting up, with the cameras around the place and the whole lot, if I did like I couldn't just let a prisoner out and let ordinary prisoners on the landing I would be in trouble myself do you know".

238. To the allegation of throwing a blind eye to prisoners in D2 and D3 coming down and throwing urine and faeces under the cells, he stated that was not possible because in D2 you would have staff standing on the bridge and on D3 you would have staff standing on the bridge there as well. It would just be on top of the landing where the stairs go up and if a prisoner wanted to come down with a bucket of urine or whatever he wouldn't be allowed down because he would know what the intention would be. It could be to throw at staff as well so he would not be allowed down".

239. He denied that he had put any pressure on anyone to force the Plaintiff to drop his complaint against him alleging assault and he said it would be impossible to deny the Plaintiff showers for a period twelve days for the purpose of pressurising him and his cell mate to drop the complaint. He said it was impossible because he did not hold that much power that he was only a class officer and there were two sides of the roster and there would be other prison officers on from 8 – 10pm so he could not do it.

240. "It would not be possible for me to pronounce he's not to get anything or whatever".(T19 22/07/2016 pp 70-96).

241. In cross-examination he asserted that he had conducted himself professionaly at all times and that he would not get in people's faces as that you would only end up getting a slap and that he did not invade their personal space and that his style with prisoners was not competitive or tenacious. He stated that he would not have time for playing any head games.

242. He accepted that the work on D1 while not chaotic was very busy and that they had to do their work with dispatch but denied that it involved shouting and roaring. He stated that we were very busy and wanted to give everyone a chance to get out to the yard, that they were short staffed with low numbers and accepted that there was a time deadline.

243. He stated that they were busy and under a lot of pressure and that there were days that he would be there in the morning from 7am and not knock off until 11pm at night. He asserted that he did not hold grudges. He denied that he was regularly causing any difficulties for prisoners on the landing. He denied that he had made life more difficult for the Plaintiff when he did not withdraw his complaint. He denied interfering with prisoner's food, he accepted that when delivering dinners that he had not time to have small talk. (T19 pp96-152)

244. Chief Officer Paul Burke gave evidence. He was the senior operational chief in charge of the prison in other words the senior uniformed officer with daily responsibility and overall responsibility for security.

245. He accepted that on days of inclement weather D2 and D3 prisoners who did not want to be out in the exercise yard had the option of coming in and that they were allowed to recreate on the D1 compound and prisoners were walking up and down the landing. He stated there were several staff positioned on the landing and if they came across prisoners talking or shouting into cells they would be moved on.

246. In relation to D2 and D3 prisoners walking by cells where the cell door was opened during the Governor's parade he stated that it would not be the case as D2 and D3 prisoners would still be locked up, that general unlock would not take place until after the staff parade after 8:00am and that the odd morning you might have one or two prisoners being brought down who were due in court and they would be walked past but that there would be staff there. This would not happen often, usually they would be brought down through a spiral staircase coming down to the centre of the prison but the odd morning a prisoner might be brought down through D1, certainly not a general unlock of prisoners of D2 and D3.

247. He described Officer Murphy as a good officer who was thorough in his job and gave a particular example of him responding to a red light after he had finished his shift to give assistance to a prisoner who was hanging in his cell and that he was up for a merit award.

248. He stated the shower, exercise and slop out records were not false just incomplete and that 12 days without a shower would involve both sides of the shift on a couple of occasions and he found it hard to believe that anybody would go for 12 days without a shower. It would need officers on both sides of the shift to be doing the same thing. (T16 19/07/2016 pp 4-69)

249. In cross-examination he stated that if at times prisoners were talking in through doors they would move them on as best they could. Chief Officer Burke accepted that the records in relation to showers were incomplete and that they were not great but did not accept that it was possible that a prisoner would be without a shower for 12 days or that it could be engineered by a prison officer.

250. He stated that he knew Mr. Murphy was not popular with the Plaintiff but that he was there every day of the week so unfortunately personalities clash at times and that he was not popular because he did his job correctly and that it happens in big organisations you cannot expect everybody to get on with everybody and he knew he was unpopular with some prisoners because he would hear prisoners shout at him, calling him names and that some prisoners had a general complaint that he was in their face the whole time, but he was one of the class officers who was attached to the D1 landing so was there all the time and from time to time personalities do clash.

251. He stated there were some general complaints but no specific complaints. He would have possibly heard from an Assistant Chief Officer or 2 bar Chief Officer that prisoners were saying that they did not like Officer Murphy but it was down to a matter of personalities. He stated that maybe he used the wrong expression by saying into prisoner's faces. He stated that he moved prisoners along, he gave prisoners what they were entitled to. If they were not entitled to it, he probably did not give it to them. He denied that Officer Murphy made life difficult for prisoners.T16 19/07/2016 pp71-78 T17 20/07/2016 pp 6-89)

252. Assistant Chief Officer David Treacy gave evidence on the 27th July, 2016. He stated that he was in charge of D division, that is D1, D2 and D3, the workshops, the exercise yard and the gymnasium and that he would liaise with class officers on the smooth running of D1. He stated that he was on duty from 8am to 8pm and sometimes he would come in half hour, fifteen minutes early just to make sure that everything was ready. He stated that he would not allow prisoners to run on the landing. He stated that D2 and D3 prisoners would not be allowed to come onto D1 with slop buckets and that he was the supervising officer in the area and that there were staff detailed on each landing D2 and D3 to stand at the top of the stairs commonly known as the bridge and if a prisoner was to walk down with a chamber pot or a bucket he would be stopped by staff and sent back, that there was no need for a prisoner to

come down onto D1 from other landings with any buckets or chamber pots. He stated that he was always available for prisoners on the landing. (T20 27/07/2016 pp5-18)

253. In cross-examination he stated that D2 and D3 prisoners would come on to D1 compound but that they would go to the exercise yard, the gym or the workshops. They would be passing through D1 alright going on route to the workshops and that as soon as that was clear then they were moved off the landing, they would deal with red lights. He stated that a prisoner on D1 on protection would not be unlocked unless it was safe to do so or otherwise in the case of an emergency. He said that he had heard of the incident involving Paul Hurley having liquid thrown at him, he was not aware of the other incident, all he heard was that a prisoner had liquid thrown at him. He accepted that some of the prisoners in D1 would have been kept separate from D2 and D3 prisoners. He accepted that as prisoners from D2 and D3 were coming down onto D1 they would go to the odd door and would be talking in but that we would move them on their way, some of the conversations would be raised voices.(T20pp18-53)

254. Assistant Governor Carey gave evidence on the 23rd June, 2016 She stated in her direct evidence that prisoner's safety was never in jeopardy during the Governor's parade from 7am to 8pm and it was done in a manner that was not rushed. She stated that she knew the Plaintiff a good long time because he had been in the training unit when she was there and also on the medical unit when she was in charge of it and she always got on very well with the Plaintiff.

255. In terms of the attitude of staff to prisoners of aggression and abuse her view was that staff always got on, that they worked 11 hour days and that officers to a degree worked very closely with prisoners and that there was a great interaction and that there was great comradery to a degree and she could say that for Mountjoy and the training unit that officers got on very well with prisoners. She stated that she would not tolerate any form of prisoner abuse or inappropriate aggression or inappropriate treatment of prisoners. She stated that the Plaintiff's complaints in relation to these matters did not have any validity and were never raised with her during the Governor's Parade and she never noticed the Plaintiff's reluctance to make requests about anything that concerned him. (T14 23/06/2016 pp90-127)

256. Michael Donnellan the present Director General of the Irish Prison Service gave evidence on the 12th and 13th of October 2016. He had previously been director of the Probation Service between 2005 and 2011.

257. Referring to the issue of protection prisoners he stated that it took up an awful lot of space. People who come into prison who cannot go into the normal population have to be separated into their own areas and their own wings and their own faction and that soaked up accommodation which in a perfect world should be open to ordinary prisoners. He described the challenge in dealing with protection within the prison and that it was continuous work and that there were still multiples of people who want to be away from the prison population because of all sorts of gangland related issues. He stated that the priority in relation to the prison service was safe and secure custody, that was the number one priority, that is the prisoners are safe and that the staff are safe and that society is safe. He stated that the Service ensured that prisoners were not getting beating up or murdered and maintained this culture of safety and security as a number one priority.

258. Referring to the 3 Year Strategic Plan 2012-2015 he stated that they had tried to challenge the whole idea of 20% of prison inmates being in protection. He stated that it was unmanageable and those numbers had to be reduced.

259. In relation to the issue of the treatment of prisoners Mr. Donnellan in cross examination stated:-

> "I would disagree with you, I mean I have been in prisons the world over from America to Australia, to Eastern Europe, to everywhere and I am in awe of how the Irish Prison Service treats its prisoners in the most humane way that is possible and I think we excel in the prison system in Ireland in the relationship we have with our prisoners. We absolutely excel unlike other systems I have been in and yes the conditions in Mountjoy and Cork are poor and very poor but in terms of inhumanity there is no shortage of humanity and we have a very proud record. You know prisoners know me by my first name. They can write to me. They can come up to me. They can talk to me. They can approach a governor. They can talk to anybody. Relatives can ring my mobile number and talk to me. We have a very humane prison system and always have, something I think we should be very proud of, unlike prison systems I have been to, you know with shackles and handcuffs and five in a bunk on that side and huge issues. Now I am not excusing our conditions but I would stand over that we have a very proud tradition. It has gone on for more than 100 years because the Prison Service was the only uniformed service that never stood down at the foundation of the State. It transferred in and our system I think is very humane. Now we are dysfunctional but I believe we are very humane."(T25 13/10/2016. pp64.65)

260. It is obvious from the evidence and the documentation and records of the prison that the issue of safety and security of prisoners who are put on protection at their own request was taken seriously. The number of protection prisoners in Mountjoy was a huge challenge to the Prison Service. This is clear from the evidence of Michael Donnellan, the Director General of the Irish Prison Service and in reference to a direct question from the court he referred to the establishment of a specific group to try and eliminate solitary confinement within the Irish Prison Service.

261. There was evidence of careful attempts to ensure that separate factions in Mountjoy prison where kept separate from each other, and that within protection prisoners different group were kept apart, and individual prisoners were kept apart from other protection prisoners. It was accepted by the Plaintiff there was colour coding of disparate groups which changed so that groups were kept separate from each other.

262. The allegation that Prison Officer Murphy conspired with others to deny him showers for 12 days after he made a complaint on the 8th July, 2013 was untrue.

263. In cross-examination he made two separate allegations not raised in pleadings that prison management had colluded at the Governor's parade to put prisoners at risk and that Prison Officer Murphy had facilitated the assault of protection prisoners when taking tuck shop orders.

264. The plaintiff's credibility in the eyes of the court on this matter has been seriously challenged.

265. The court is conscious that the placing of protection prisoners on D1 landing when there were non-protection prisoners on the landings immediately above them at D2 and D3 caused problems. It was unavoidable that these non-protection prisoners came onto D1 landing for the purpose of having their food served, going to education, workshops and the gymnasium and for recreating in inclement weather. This provided a challenge to the Prison Authorities. It was possible that prisoners who had an axe to grind with protection prisoners could go to cell doors or try and engage in mischief. This was an unsatisfactory situation and part of the court's criticism of the use of D1 landing for protection prisoners, but to expand it as the Plaintiff has done into a deliberate conspiracy by

the prison authorities to facilitate the abuse of protection prisoners is untrue and wrong.

266. I have already stated that I regarded Chief Officer Paul Burke as a truthful and honest witness and his view of the relationship between Prison Officer Murphy and the Plaintiff is an accurate description. The Plaintiff was a volatile prisoner, who had a number of disciplinary offences. He was involved in two separate serious incidents with Prison Officer Murphy on the 5th July, 2013 and the 15th August, 2013. The Plaintiff has amplified a difficult personal relationship between himself and a prison officer into an invented conspiracy.

267. I do not accept his evidence that the overall approach of prison staff within Mountjoy was one of contempt or unhelpfulness. Assistant Governor Carey and Assistant Chief Officer Treacy did not have a difficult relationship with the Plaintiff and many efforts were made to assist him. I emphasis in particular the assistance the Plaintiff received by way of addiction counselling, being transferred to the medical unit, and ultimate transfer and temporary release to Coolmine Residential Unit. Part of the prison management had never given up on the Plaintiff nor written him off. I do not accept his evidence that the general tenor of the prison officers and management during this period was one of contempt or lack of respect for him. I have at all times accepted that the circumstances of his imprisonment on 23 hour lock up in a doubled up cell with no in cell sanitation was unacceptable and distressful for him but his evidence on this aspect of his claim is marked by gross exaggeration and untruthfulness.

Allegation of Suffering from Stomach Cramps
268. In para. 10 of his Statement of Claim, the Plaintiff stated that he would experience stomach cramps while waiting to get out of his cell to go to the toilet when he would not know how much longer he would have to wait before he could go to the toilet. Paragraph 4 of the Replies to Particulars states:-

> 4(i) The Plaintiff suffered from stomach cramps as described at para. 10 of the Statement of Claim for a period of approximately seven months.
>
> (ii) The Plaintiff attended with Dr. Crowley, a prison doctor attached to the medical unit of Mountjoy Prison.
>
> (iii) The Plaintiff attended with Dr. Crowley on various dates in mid-September 2013 and early October 2013. As the Plaintiff was attending a prison doctor attached to the medical unit current details as sought should be within the knowledge of the defendants.

The Plaintiff is currently seeking his medical records and these may be available at trial. A medical report was to be furnished in due course.

269. The Plaintiff did not deal with this issue at any length in his direct evidence, but there was substantial cross-examination on the matter. He did state that he had lost a stone and a half in weight when he was on D1 landing and that his partner was very concerned about him and that he did not feel healthy or clean. Further in direct evidence, he stated that his partner could see he was losing an awful lot of weight, that he was not eating and he stated the reason for this was because the dinners were cold arriving to the door and that he did not feel particularly reassured that the dinners were what they said they were. He stated that he did not want to defecate in front of his cellmate, he would make efforts to hold it in until he get out of the cell just to avoid doing it in front of his cellmate.

270. In his Statement of Claim at para. 8, he also stated that he withstood the resulting stomach cramps for as long as possible causing pain and discomfort to him for an extended period. The matter was dealt with at some length in cross-examination at Transcript 3, (pp. 122-138) and Transcript 4 (pages 4-39). The Plaintiff stated that he did not complain about stomach cramps until he was in the medical unit when he was transferred there on the 30th September, 2013.

271. He maintained that he suffered from stomach cramps over the period of time that he was on the D1 landing from February to September, but accepted that he made no complaint to any medical practitioner or nurse during that period of time. He also accepted that when he was in the separation unit for two periods of time, although having in-cell sanitation, the issue of stomach cramps did not arise.

272. The Plaintiff's initial evidence was that stomach cramps began to affect him in the medical unit because he was then able to go to the toilet regularly. He stated that he attended Dr. Crowley when in the medical unit and raised this issue on a number of occasions. He stated that he did not raise it until then because it only came on severely when he went to the medical unit, because he was not defecating into a newspaper at that stage. He still maintained that he suffered from stomach cramps whilst on D1 and these occurred every few days. He accepted that there were two medical doctors, Dr. Cox and Dr. Crowley, and that Dr. Crowley mostly dealt with addiction issues and the prescription of Methadone. He accepted that he had attended the doctor while in D1 complaining of headaches and also a nurse officer on the 3rd April, 2013, and on the 1st May, 2013 attended Dr. McCarthy and also on the 2nd May, 2013. He accepted he never complained of stomach cramps to the medical personnel between February and September 2013. He accepted that on the two occasions he was in the separation unit, he did not have the problem that he suffered from when he went to the medical unit; that is the stomach cramps becoming more severe. There was no reference in the medical records to making a complaint about stomach cramps in the medical unit to the medical personnel there.

273. I do not find the Plaintiff's evidence complaining about stomach cramps credible. He made no complaint to any of the medical personnel in Mountjoy during the period of time that he was on D1 nor in the medical unit that he had suffered from stomach cramps, either mild or severe, because of the lack of in-cell sanitation. It would not be logical that the stomach cramps would be more severe at a time when he is able to go the toilet regularly with no restriction as in the medical unit and the separation unit. A further inconsistency is that they did not become more severe when he went into the separation unit, which has in-cell sanitation. I do not accept the Plaintiff's evidence that he suffered from continuous stomach cramps while he was in a cell in D1 landing without in-cell sanitation for the period of seven months.

Allegations that the conditions were dangerously unhygienic with the risk of bacterial contamination and infection.
276. The Plaintiff made various allegations that the conditions of his imprisonment were unhygienic, and complaints about the condition of the cell, the quality of the food being served to him, the condition of the toilets, showers and slop hopper.

277. The court heard expert evidence from Mr. Barry Tennyson, engineer, and Professor Martin Cormican on behalf of the Plaintiff and Professor Ronald Russell on behalf of the Defendants. I do not consider the evidence of Mr. Tennyson sufficiently expert on the issue to rely on it and I have relied on the evidence of Professor Cormican and Professor Russell. The court was presented with written reports from both of them. Professor Cormican gave evidence on 14th June, 2016 (T 8 pp. 35 – 122) and Professor Russell's evidence on 27th July, 2016 (T 21 pp 8 – 67).

278. There was no difference in the elucidation of the scientific principles on the transfer of microorganisms from one person to another and the type of material transferred. There was a different opinion expressed in respect of the overall assessment of the risk to health of the Plaintiff.

279. Professor Cormican, in his report and reinforced in his evidence was of the view that:-

> "The condition of Mr. Simpson's detention as I understand them, were such that he was exposed to a substantial ongoing risk of infection during the period of his detention. It is my opinion that a substantial element of this risk was avoidable if there was better maintenance of the fabric of the building and he had access to adequate basic sanitation."

280. Professor Russell in his report stated:-

> "Despite the doubtless realities of malodours and discomfort, repugnance regarding the situation and anxiety over hygiene, it is fairly clear that the risk to health of the Plaintiff was quite low, although it is impossible to quantify it due to lack of data regarding infection incident. There is no mention of the Plaintiff being immuno-compromised, therefore one must take it that his immune system was normal and susceptibility would therefore also be low."

281. One issue was clarified during the evidence of Professor Cormican. He stated he was relying on the report of Mr. Tennyson as to the actual conditions on D1 landing and also when he prepared his report he was of the opinion that the prisoners in the shared cell used the same chamber pot, bucket and washing bowl and he had only become aware that each prisoner had separate receptacles just before he was about to give evidence. He accepted that if prisoners were using separate pots there would be a lower risk than using the same pot.

282. The shared opinion of the experts was that microorganisms are transmitted regularly between persons. There can be contact transmission, either direct or indirect or airborne or aerosol transmission. There is no risk whatsoever to an individual from his or her own faeces or urine. There is no risk from the microorganisms of other persons, provided that person is not suffering from or carrying an infection.

283. It was accepted by both experts that transmission can occur in any setting where there is close contact with people. Direct contact can be shaking hands with someone when microorganisms are inevitably exchanged by that contact, the other is indirect contact where one's hand goes on a bench, or faeces goes on a bench or worktop and somebody subsequently touches that bench or worktop. That would transmit the microorganisms. The other mechanism is through the air and there are two means, droplets and aerosols. If one coughs or sneeze, that will generate relatively large drops with a reach within about 1m. It is also possible to generate aerosols which are much finer and which disperse throughout a whole enclosed space.

284. Professor Russell noted that the risk was from enteric infection, that is coming from the intestines. He described the most common enteric infections as salmonella, shigella, winter vomiting disease, norovirus, cryptosporidium. He stated that if two individuals are healthy and they are using their individual receptacles and their individual towels and their individual washbasins and buckets, they are not cross-contaminating between each other and there would be normal healthy microbes basically transmitting, which would be no different from schoolboys in a dormitory sharing a communal toilet or in a hostel or hotels, just standard cross-contamination between individuals, which is happening all the time.

285. The risk therefore is of transmission of microorganisms which are infectious, which can be aggravated by the receiver of the microorganisms being in anyway immuno-compromised. Both experts accept that microorganisms will be transmitted in areas where individuals come into close contact with each other.

286. Professor Cormican regarded it as a higher risk when prisoners were sharing a cell and were in close contact with each other as contact was the important thing. In the slopping out arrangement of the prison, it would be less so, but could arise if a prisoner comes into contact with microorganisms transmitted by other prisoners, again subject to infection.

287. I have come to the conclusion based on the evidence of both experts that there was a low risk of injury to the Plaintiff's health by the lack of in-cell sanitation and sharing with another prisoner, or with two other prisoners. There was a screening program in the prison for certain infectious diseases. There was regular access to medical services and there was the facility if an infection arose in a prisoner in a cell, of transfer to the medical unit. The greatest risk would arise where some form of infection was incubating and had not manifested itself creating a risk of transmission to the other prisoner in the cell. There is no evidence in the medical records of the Plaintiff being immuno-compromised or of suffering from diseases or infections which were transmitted in the way described by the experts.

Allegation of psychological injury in the Statement of Claim

291. The Plaintiff claimed at 30(a) of the Statement of Claim that he has suffered psychological injury as a result of the conditions of his detention. He felt depressed frustrated upset agitated and overwhelmed. He particularised the loss or damage as the degradation inflicted on him and the neglect of his well being causing him extreme stress and anguish and left him with feelings of hopelessness and worthlessness and has thus been subjected to psychological injury. He stated that it hampered him significantly by removing his motivation his sense of self-worth and his hope for the future.

292. Apart from the Plaintiff's own evidence he relied on evidence from two experts Professor David Canter Environmental Psychologist Professor at the University of Liverpool in the United Kingdom and Dr. Patrick Randall Clinical Psychologist. The Defendants called Professor David J. Cooke Professor of Psychology to give evidence. A substantial portion of the evidence by Professor Canter and Professor Cooke concentrated on the expertise of Professor Canter to give evidence and on the discipline of environmental psychology.

293. I have no difficulty relying on the expert evidence of Professor Canter. The court's duty is to assess the consequences of a psychological nature of his imprisonment if any. Professor Canter did not carry out the necessary evaluations that could be relied on to form definitive conclusions on the impact of the conditions of imprisonment on the Plaintiff between February and September 2013. The court therefore prefers to rely on the evidence of Dr. Patrick Randall who did carry out specific psychological testing and who assessed the Plaintiff in his capacity as a clinical psychologist.

294. Dr. Randall in evidence stated that he met with the Plaintiff on three occasions 14th and 23rd September 2015 and 16th October 2015. He also administered three tests or measures to get an objective indication of his mental state. He stated that the Plaintiff presented as an amicable man who attended punctually and there were no adverse signs of psychopathology. There was no evidence of clinical depression or anxiety.

295. His conclusions were that the Plaintiff was a psychologically vulnerable man whose traumatic earlier experience pro-predisposed him to psychological vulnerability, alcohol addiction and acting out behaviour. He nonetheless had been able to maintain a relationship with his partner and children. There was no doubt that due to the experience of his conditions in prison he felt deeply humiliated alienated from support and denigrated. This was further exacerbated by a perceived lack of response to his complaints and the conditions could not but place Mr. Simpson physical and mental health at risk. He stated that the Plaintiff did not meet the criteria for a diagnosis in relation to any stress related illness which is post-traumatic stress disorder but there were indications of stress.

296. He went on to state that the Plaintiff had done well. He was a vulnerable man from a traumatic background and in spite of the conditions of his imprisonment there is no diagnosable psychopathology. He was not overly depressed, was not suffering from any anxiety disorder and was free from a diagnosable psychopathology and was still committed to sobriety. He presented properly and was articulate and Dr. Randall was of the view that he had recovered reasonably well from the experiences that he had been subjected to.

297. Dr. Randall was of the opinion that the necessity to defecate in front of another person causes certain self-conscious embarrassment, making a person aware of the impact on his cell mate of the smell and also having to deal with the disposal as a group results in self-consciousness and self-denigration.

298. In cross-examination he accepted that it was very difficult to carry out retrospective psychological assessment and confirmed that the Plaintiff did not suffer any clinical depression or diagnosable pathology. He acknowledged that the Plaintiff had substantial difficulties himself which pre-dated his imprisonment. Dr. Randall also accepted that imprisonment itself is stressful and the fact that he was a protection prisoner was additionally stressful. Dr. Randall accepted that he was presenting no diagnosis to the court.

299. The court considered Dr. Randall as a measured and reliable witness and has no difficulty in concluding that the Plaintiff found his time on the D1 landing between February and September 2013 extremely stressful.

300. The court has already made a finding that there was no risk to the physical health of the Plaintiff and no evidence that he suffered any physical ill health as a result of the conditions of his imprisonment.

The evidence of Hamza Abdullah
303. Hamza Abdullah who was a prisoner in Mountjoy gave evidence on 17th June 2016 (T 11, pp 4-118). He was placed on D1 landing in either cell 37 or 39. He was on D1 landing from 19th November, 2013 to 1st December, 2013 eleven days. He stated that on transfer onto D1 he was told to find his own cell.

304. He stated that when he went to D1 it was not supervised all the time and the prisoners from D2 landing gave the prisoners on D1 landing a hard time. He alleged he did not get a replacement chamber pot for a period of five days after transfer to D1. He stated that you were not released to slop out between 7am and 8am. He complained about nearly everything but the prison officers followed a hierarchy. The system did not look after everybody it took care of the non protection prisoners and afterwards protection prisoners. He described some of the prison officers as cheeky. He stated that the toilets were always dirty and that slop out was a rush because everything was packed into one, the yard, slopping out and phones. He alleged there were blades everywhere on the floor, and he had only two showers when he was on the landing.

305. He stated that the mops supplied were always dirty. When he asked for air freshener, cleaning items or towels he was always told they were out of stock, He realised the cleaners were on drugs and their priority was not D1 because of pressure from D2 prisoners. He used the toilets on left side of the landing because the right side was dirty and the slop hoppers got blocked.

306. He stated that the red lights were always on because nobody came to answer them. He alleged that a few times there was urine thrown under his cell and he told prison officers about this. He stated that in the separation unit the cells were cleaner and bigger. Prisoners were never searched on the way from D2 to D1 and could bring anything down.

307. On cross-examination he accepted when on D2 he was found with an iron bar in his cell and on two other occasions he had illegal alcohol in his cell. He stated that when you are in prison you have lie for other prisoners if you are holding something for somebody you have take the blame. He stated he could see other prisoners going down from D2 to D1 with their chamber pots to throw at somebody. His recollection on recreation out of the cell was that it was not only for 10 or 15 minutes but was longer. He stated that you were able to get clean water from the sinks beside the kitchen on D1. He accepted that there was not a big queue for slopping out on D1. He said he did not see evidence of the cleaners on drugs but they could have been on drugs. He said the urine was thrown towards the end of his time there and it happened a couple of times. He accepted that the prisoners were not enthusiastic about exercise in the morning.

308. It was put to him from the records that he was offered exercise on every date that he was on D1 and that he availed of it on eight occasions and declined it on three occasions. He accepted on the three occasions it was declined it was in the morning. It was put to him that the records showed for eleven days he was present on D1 he availed of showers on six occasions and declined twice and there was no record for three times. He stated he only declined a shower once. It was again put to him he was offered slop out on ten occasions and declined once. He denied having declined slop out.

The evidence of Jason Walsh
310. Jason Walsh a fellow prisoner with the Plaintiff gave evidence on the 21st June, 2006 (T12, pp. 19-134). Mr. Walsh was a cell mate of the Plaintiff for a number of months. He was in a cell with the Plaintiff in the separation unit from the 7th April to 13h April when they were both transferred back to the landing on D1 after a fire was set off in their cell. Mr. Walsh thereafter was in Cell 19 with the Plaintiff up to the 22nd August, 2013 with a gap when the Plaintiff was in the separation unit from the 12th to the 31st July. For six nights from the 27th April to 2nd May Mr. Walsh, the Plaintiff and Patrick Padget shared a cell. Also for at least four nights from 1st June to 5th June Mr. Walsh and the Plaintiff shared a cell with Michael Kinsella and may have shared it for longer as records are not available from the 6th June to 26th June.

311. Mr. Walsh accepted that he had a difficult disciplinary record in prison and had been in prison on a number of occasions as he had 60 to 70 previous convictions. He said he knew the Plaintiff but that they were not friends. He denied that he was offered a slop out three times a day and did not get to slop out on the Governor's Parade from 7am to 8am. He stated he was able to have a shower two to three days a week max. He stated sometimes he would get an hour's recreation if he got out, but there were days when they were left in their cell for twenty-four hours and did not get out and it could go for three or four days a week before they got out.

312. He explained about defecating in the cell. There was not an opportunity to be released from the cell other than the times he was released for exercise, slop out or showers. He criticised the lack of cleaning equipment. He stated there was a rush to slop out. There

was sometimes a lack of chamber pots and he had to share a pot on some occasions. He also stated there were no mops provided to clean the floor in the cell. The toilet and shower area was dirty and always crammed. Sometimes he would not get a renewal of bedsheets for three to four weeks. He also stated that there was no drinking water and that the only water that came to the cell was with the dinner in a burco and it was hot water. If he had to get drinking water he would go to the slopping out area, the same place where they were cleaning the pots. There was no other water on the landing. He said that there was a fountain but he was never able to use it. He never declined exercise or a shower.

313. He stated that there was intimidation of protection prisoners on D1 by non-protection prisoners on D2 and D3. He could hear their cell getting wrecked, things being thrown at their doors, roaring and shouting at them, calling them names. He said that he had direct experience of this as he was fighting with young fellas upstairs and they would come down roaring at his cell door and would not be moved off the landing. There was a problem with prisoners on the landing, throwing the contents of chamber pots down or hot kettles of water.

314. He did not feel that complaints got him anywhere. He stated that he was approached to ask the Plaintiff to drop a complaint. There were two other officers on the landing that came to his door and asked him. He did make a complaint to a solicitor and there was one letter sent on his behalf on the 30th April, 2013 alleging that he was a victim of an assault on the landing. He alleged that there were holes all over the lino in his cell.

315. In cross-examination Mr. Walsh accepted that he had initiated a civil action himself and that he was aware that there was a questionnaire circulating amongst prisoners in respect of these actions and he knew that these questionnaires asked about slopping out. He said he was placed on protection by staff because they feared he would be at risk on the normal landings due to a drug debt and he wanted to sign off protection but he was told that he would still be in danger on the landing. He insisted that he would not get out of his cell three to four days a week – some weeks three days, other weeks four days. He accepted that that this would apply to his cell mate as well. The only exception was placing a bag in a bin.

316. He accepted there was no other way to dispose of his faeces other than by getting out of his cell and going to the slop out area or the bin area. He stated that there were cages on all the windows. He disagreed with the Plaintiff's evidence that you could squeeze faeces out through this window but said if he did it on occasions it was when he was not in his cell. He stated that the squares were very small. He then stated that it would be possible to squeeze it out but he never tried it himself. He disagreed the chamber pots where always there.

317. He repeated in cross-examination that he never had any cold water and it was impossible to get near the drinking water. He stated that he got an hour's recreation if he was lucky, some days it was ten minutes, some days it was fifteen. If he got out to the yard it could be for half an hour. The prisoners were watched constantly on the landing by officers. Sometimes he did get out to the compound. This happened a lot of times about ten or fifteen times when he was on D1 landing.

318. About the fire in his cell in the separation unit, he said there were three people in the cell and they were fighting so he asked to be moved back from the separation unit and that a fire happened in his cell. He accepted he started it. Both the Plaintiff and himself no longer wanted to be in the separation unit. It was a great improvement but that he was in danger of his life.

319. He stated that D2 and D3 prisoners where on D1 landing at recreation time from 2pm to 4pm and 5pm to 7pm. He accepted there was no reason for D2 and D3 prisoners to be slopping out on D1 because they had toilets on their own landing. He never saw prisoners from D2 or D3 coming down with full chamber pots, but saw the contents of pots being thrown from D2 on top of prisoners on D1. He stated he had never urine or faeces thrown into his cell under the door, but it was possible because the gate at the bottom of the stairs on D2 and D3 landing was left opened.

320. He stated he was assaulted but not with urine but was standing beside persons who got urine thrown at them. He asked his solicitor to write about the assault. Sometimes there were two pots in the cell with three prisoners. He stated he never suffered stomach cramps as a result of the slopping out regime. He recalled the Plaintiff moaning on the bed saying that he needed to go to the toilet and kicking doors. He would be moaning about going to the toilet. The Plaintiff never said his stomach was in bits or anything like that. He stated that there were no cleaners on D1. He was not aware of any issues about drugs or cleaners on D1.

321. There were three, four or five days sometimes longer when he did not get a shower. It was Officer Murphy & two other officers who asked him why did the Plaintiff put in a complaint and they were asking him to get the Plaintiff to drop it. He likely said this to the Plaintiff . He could not tell him what to do, he had his own mind but he did ask him. He felt that the conditions would continue and that the complaints did not really matter.

322. He could remember a period of twelve days in a row when he and the Plaintiff where deprived of showers. He stated he could remember being treated very badly, and asked the Plaintiff to drop his complaint. It must have been the twelve days. He agreed that the reason he asked him to drop the complaint was because he had been deprived of showers for twelve days and had a recollection of being deprived of a shower for twelve days, maybe not twelve days but it was a long period of time.

323. He accepted that he left D1 on the 22nd August, 2013 as he was transferred to Limerick. He said he did not know when the Plaintiff dropped his complaint but accepted that it was a month later on the 17th September. He accepted that the loss of showers for twelve days would have happened between the time he came back from the separation unit at the end of the July and the 22nd August.

324. It was put to him that the telephone records show that he made a call virtually every day. Mr. Walsh said that must be definitely wrong. He accepted that he had to be out of his cell to make a telephone call. He disagreed that he was allowed out of his cell every day. It was put to him that he was offered exercise every single day except three and the three days not offered were the 16th May, 2013 when he was in court, the 12th July, 2013 the day he was moved to the separation unit and the 30th July, 2013 the day he was moved back from the separation unit. He disagreed with the records. He accepted that he got showers in the evening times. The staff wanted to get you off the landing as quickly as possible. He said that it was chaotic as there were twelve factions on the landing. He stated that he never ran himself but would be rushed.

Phone calls

326. The Court heard evidence from Noel Reilly of the Irish Prison Service about the system of phone calls in Mountjoy. (T19 pp 51-69). When a prisoner enters the prison his details are entered on the Prisoner Information Management System (PIMS). A unique ID is created for him, which is assigned to him. He can give the numbers he wants to call and they are inputted into the system. There are phones in the yards and landings, and the prisoner can call the designated number by entering his pin code and with a single button access his priority numbers. The system can generally trace what location the call is made from. Records of the calls made by the

Plaintiff were furnished to the court. I am satisfied these record are accurate. The following is a summary of his calls,

12th February to 28th February. Everday except 12th 13th,14th,16th20th and 27th.

March, everyday except 11th.

April, everyday except 12th.

May everyday except 22nd

June everyday except 19th.

July everyday except 9th29th, and 31st.

August. The Plaintiff did not make any calls on 2nd,
3rd,5th,7th,8th,9th,10th,12th,13th14th15th,16th,17th,20th,22nd,23rd,24th,25th,28th,29th,31st.

September. The Plaintiff did not make any calls on 2nd,4th,6th,7th,9th,10th.11th,12th,14th,17th,18th,19th,20th,21st,23rd.

The Plaintiff would be out of his cell any time he made a call.

Visits
327. The Plaintiff was entitled to one 30 minute visit a week and special visits on request of 15 minutes. All visits were screen visits except one visit. The Plaintiff received regular visits from his partner. The evidence which was not disputed was that protection prisoners were facilitated whenever possible with special visits.

Access to Medical and Addiction services
328. There was no difficulty having access to medical consultation and treatment. The Plaintiffs medical records were produced to the court. He had access to nurses and doctors during his imprisonment. He also accessed the addiction counselling services. He was transferred to the Medical Unit on the 30th September 2013 and there participated in a drug treatment programme for alcohol abuse and eventually was transferred on temporary release to Coolmine Therapautic Treatment Centre.

The Separation Unit
329. The Plaintiff in his evidence accepted that facilities in the Separation Unit were better than D1 landing. All the cells had in cell sanitation. A report has been produced to the court from the Inspector of Prisons of 23rd July 2014 on the Separation Unit. The unit has since been closed. I cannot see the relevance of the report to my deliberations as the essence of the Plaintiffs case is a breach of his constitutional rights because he had no access to in cell sanitation of a private nature.

Should the refurbished wings of the prison have been used to house the Protection Prisoners
330. The use of D1 as a protection wing had advantages and disadvantages. It was positive because of access to the exercise yards and to facilitate visits. It was negative because of lack of in cell sanitation, and the use of D2 and D3 by non-protection prisoners who moved through D1 to be served food, to go to workshops, gymnasiums and the exercise yard and had some periods of recreation there particularly in bad weather. There were opportunities for D2 and D3 prisoners to intimidate prisoners by approaching their door and shouting or speaking to them.

331. At the time of the Plaintiff's imprisonment B and C wing had already been refurbished. The court cannot second guess the decision of the campus governor to use D1 and not to put prisoners on protection into refurbished wings. While it would have been ideal and much better to have housed the protection prisoners in the refurbished cells with in-cell sanitation, the court accepts that the safety and security of prisoners and staff has to be the overall consideration. I consider Mr. Whelan to have been a highly responsible governor and a truthful witness. He was held in high regard throughout the Prison Service as reflected in the evidence of various witnesses. He was a hands on governor and not remote.

332. The court accepts his judgement that after a wide consultation he felt that he had no choice but to use D1 for protection prisoners but I note at that time the number of protection prisoners in D1 was very small. He estimated about seven.

333. The court was surprised the issue did not receive serious consideration at Executive level within the Service. It was left to the campus governor of the prison to deal with. The matter was not revisited when the numbers increased to the extent that the whole of D1 landing housed protection prisoners. The IPS could not have been in doubt as to it's unsuitability due to the CPT Report of

334. 1993 and the directive of the Inspector of Prisons on doubling up of cells with no in-cell sanitation when prisoners were on twenty-three hour lock up.

335. There were no minutes of any meetings produced to the court either at IPS level or at Governor level to demonstrate that this issue was given careful consideration. In my opinion, it was self-evident that the maintenance of prisoners in a doubled up cell for twenty-three hours a day without in-cell sanitation was a breach of their privacy however limited by imprisonment. There was no attempt at amelioration by the provison of portable toilets, commodes or modesty screens.

336. It is to the credit of the management and staff in the prison that they went to substantial lengths to mitigate the hardship on prisoners in other ways. The Governor's parade between 7am and 8am Monday to Friday when every protection prisoner was visited and asked about their requests was humane and commendable. It was carried out on a voluntary basis by prison staff. I am satisfied that contrary to the evidence of the Plaintiff prison management and staff were conscious of the undesirability of the regime they had to enforce.

Preliminary issues and alleged infirmity in the Plaintiff's proceedings.
337. The Defendants in their defence filed on 6th January, 2015 raised two preliminary objections:

> 1. By way of preliminary objection, the Defendants plead that the Plaintiffs' claim for damages pursuant to s. 3 of the European Convention on Human Rights Act 2003 (hereinafter "the 2003 Act") arising from alleged breaches of the European Convention on Human Rights (the ECHR) which claims are denied are statute barred by reason of the delay of the Plaintiff and the institution of these proceedings and in this connection the State Defendants will rely on s. 3(5) of the 2003 Act.

2. Pursuant to s. 12 of the Personal Injuries Assessment Board Act 2003, no proceedings may be brought by the Plaintiff in respect of damages for personal injuries (which are denied) without first having obtained a PIAB authorisation in this regard. As such the proceedings are misconceived.

338. The Defendants made further submissions on the infirmity of the Plaintiff's action as follows:-

•The Plaintiff should have brought judicial review proceedings and as the proceedings were not brought in that form, the action is statute barred.

• Even if brought in Plenary form, the Plaintiff was bound by Judicial Review time limits.

• He was not entitled to seek declaratory relief, when the issues complained of were remedied, with no loss, damage or injury to him.

• It was not appropriate to initiate an action per se claiming declaratory relief that his constitutional rights had been breached by being subjected to inhuman or degrading treatment or punishment.

• That breach of the Prison rules made pursuant to the Prisons Act 2007 was not an actionable claim for damages.

• That the actions of public officers acting bona fide without negligence, were immune from damages even if declaratory relief granted.

• The action was an interference with the constitutional norm of separation of powers, as the reliefs sought would compel the court to decide that public spending on prisons was incorrectly allocated.

• He should have initiated a claim for misfeasance in public office.

339. The Defendants did not seek to have any preliminary issue dealt with at the outset of the action. There was also confusion about the nature of the Plaintiffs claim. The Statement of Claim sought compensation for personal injuries, claiming his mental health had been adversely affected by the conditions of his imprisonment which caused him extreme stress and anguish leading to feelings of hopelessness and worthlessness. This claim was not abandoned on the opening of the action and evidence was led in respect of that claim. In closing submissions counsel for the Plaintiff abandoned what he described as the common law claim but still asserted a right to claim damages including exemplary and punitive damages for breaches of his Constitutional rights.

340. The Defendants did not plead the Statute of Limitations other than the section 3 claim. The other matters raised were not pleaded in the Defence other than the general plea," that the pleaded entitlement to relief by way of declaration is wholly otiose and unnecessary in circumstance where relief by way of damages is sought."

341. The Defendants did not issue any motion seeking to have the action dismissed, because of the infirmities alleged. There was a full plenary hearing over thirty days, and these issues were raised in closing submissions. The Court gave an opportunity to the Plaintiff to present further written submissions, which were supported by further oral submissions on the 8th December 2016. The Defendants replied by way of oral submissions.

342. In addition on closing, counsel for the Plaintiff made further submissions that there was a legal entitlement to a determined square metre allocation in a cell. This was not canvassed in any detail in direct or cross-examination. The Court requested Mr Romeril, the engineer called by the Defendants to provide measurements of the furniture in the cell.

343. The Court has considered it appropriate to deal with all these preliminary issues.

The Convention claim
344. Section 3(5)(a) of the European Court of Human Rights Act 2003 states:

"Proceedings under this section shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings."

345. The Plaintiff issued his proceedings on 30th July, 2014. The Convention claim pursuant to s. 3 of the Act covers the period from 1st August, 2013 to 30th September, 2013. There is provision in the Act at 3(5)(b) for the court to extend the period provided it is appropriate to do so in the interests of justice.

346. As previously stated, the court must consider the claims alleging breach of Irish constitutional provisions before considering the Convention claim.

347. The Plaintiff had the benefit of legal advice during the relevant period of his imprisonment and his solicitors wrote letters to the Governor of Mountjoy Prison in respect of certain matters which I have already referred to. There are no grounds for extending the period so if the Plaintiff has to rely on his Convention claim, it covers the period of his imprisonment from 1st August, 2013 to 30th September, 2013.

Personal Injuries Assessment Board Act 2003.
348. The status of this submission is unclear. The Plaintiff in closing submissions acknowledged that this was not a claim for personal injuries. The preliminary objection in the Defence was not formally withdrawn. The Defendants arguments in their written submissions are set out at paragraphs 138 to 148 headed "The claim for damages for personal injuries." The pleadings in their original form included a claim for personal injuries which was not withdrawn at the commencement of the action. The Court considers it appropriate to consider this issue.

349. The Defendants contend that the Plaintiff has not properly pleaded his claim for personal injuries in that he has both failed to comply with the Personal Injuries Assessment Board Act 2003 and the Rules of the Superior Courts.

350. Section 4(1) of the Personal Injuries Assessment Board Act 2003 states:

"In this Act, unless the context otherwise requires—

"Act of 1961" means the Civil Liability Act 1961 ;

"Board" shall be construed in accordance with section 53 ;

"civil action" means an action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for—

(a) personal injuries, or

(b) both such injuries and damage to property (but only if both have been caused by the same wrong),

but does not include—

(i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is bona fide intended, and not for the purpose of circumventing the operation of section 3, to claim damages or other relief in respect of any other cause of action,

(ii) an application for compensation intended to be made under the Garda Síochána (Compensation) Acts 1941 and 1945,

(iii) an action intended to be pursued in respect of an alleged breach by the State or any other person of a provision of the Constitution,

(iv) an action intended to be pursued under section 3 of the European Convention on Human Rights Act 2003."

351. The Defendants in their written submissions stated,

"In Clarke v. O'Gorman [2014] IESC 72 the Supreme Court held that the term 'other cause of action' in section 4(1)(i) of the 2003 Act means a cause of action other than that in which personal injuries are claimed. O'Donnell J., delivering judgment on behalf of the Court, stated at page 18:

'I accept that some confusion can be caused by the terms of s. 4(1)(i) which excludes claims where in addition to a claim for personal injuries, it is bona fide intended to claim damages or other relief 'in respect of any other cause of action'. This might be read as implying that a claim for personal injuries is itself a cause of action. But I think that it is clear that 'other cause of action' means here, other than the cause of action giving rise to the claim for personal injuries. Indeed a reading of s. 4 as a whole makes this clear. A civil action is defined as an action for the purposes of recovering damages in respect of a wrong, for personal injuries. The term 'other cause of action' refers back to 'wrong' and not 'personal injuries'. The phrase 'other cause of action' in s. 4(1)(i) means therefore in my view a cause of action other than that in which personal injuries are claimed. Once this is understood much of the conceptual difficulties and complications disappear. The question then becomes whether this is one of those rare cases in which the claim is for damages for assault or trespass to the person not resulting in personal injury. Self-evidently this is not so. The claim for personal injuries is alleged to have been suffered as a result of an assault. The claim is accordingly one for personal injuries and consequently a civil action captured by the Act.'

1. It is clear from the aforementioned that O'Donnell J interpreted section 4(1)(i) as meaning that all actions in which damages are claimed in respect of another cause of action in addition to damages for personal injuries come within the scope of the Act of 2003. It is, therefore, submitted that an action within the meaning of section 4(1)(iii) and 4(1)(iv) which includes a claim for damages for personal injuries, or at least the element of the action directly relating to the claim for damages for personal injuries, is also captured by the Act of 2003."

352. On considering this issue further the Court notes that O'Donnell J went on to state at paras 30, 32, and 33

"30. The High Court in *P.R. v. K.C.* also found that the claim was one excepted from the definition of civil action under s. 4(1)(iii) as being an action intended to be pursued in respect of the alleged breach by the State or any other person of a provision of the Constitution. The court held that it was not possible to repackage standard personal injuries claims as claims for breaches of constitutional rights. However, it was considered that the claim here was properly a claim to vindicate a personal constitutional right to bodily integrity and the person, and was not ancillary to the claim for trespass to the person and accordingly was excluded by s.4(1)(iii) of the 2003 Act.

32. At first sight, it might appear that any cause of action for personal injuries can be characterised as a horizontal claim for breach of constitutional rights. It is not necessary to discuss here the theoretical basis for permitting claims to be brought by one individual against another for breach of the provisions of the Constitution, and any possible limits to such claims. Since *Meskell v. Córas Iompair Éireann* [1973] I.R. 121 such actions must be taken as permissible in Irish law even if the underlying theory was not there discussed or debated. The Act of 2003 recognises such a possibility. Furthermore, it might be said that there is nothing in the 2003 Act and in particular s.(4)(1)(iii) which qualifies the breadth of the exception. Thus, on the language of s.(4)(1)(iii) it can be argued that any claim which is either characterised, or perhaps is capable of being analysed, as a claim for breach of constitutional rights, is exempted from the statute. Such a conclusion would however, entirely subvert the operation of the statute. Thus a question arises as to whether such a broad interpretation should be given to s.(4)(1)(iii) since it is rare for a statute to provide an exception which swallows the entirety of the Act?

33 The intersection between claims for damages for breach of constitutional rights and claims in tort was discussed in *Hanrahan v. Merck Sharp and Dohme Ireland Ltd*. [1988] I.L.R.M. 629. The effect of that decision is that the existing torts and other causes of action known to common law are to be considered the method by which the State performs its obligation to vindicate the constitutional rights of the citizen. It is only therefore if it can be shown that the existing law does not adequately protect the constitutional rights of the citizen that a separate claim for breach of constitutional rights can be invoked. In my view, it is clear that it is this limited and residual sense that the Act refers to actions for breach of constitutional rights. This is also consistent with the internal logic and structure of the Act. The scheme of the Act is to deal with large numbers of routine claims which can be reduced to reasonably predictable valuations. Where there is any difficulty or complexity, the Act either excludes such claims *in limine*, or permits the Board to decline to make an assessment. By definition, any claim for breach of constitutional rights not itself capable of being pursued within one or

other of the established causes of action must be a matter of some novelty, and consequently difficult to assess. Furthermore, it is very unlikely that such claims, if dependent on a novel legal analysis, could result in a consensual settlement on a valuation provided by the Board. Such claims are better left to courts from the outset. It is therefore understandable that such novel claims would be excluded. The same cannot be said for a standard negligence action recast as a claim for interference with the constitutional protection of the person and bodily integrity. Consequently, in my view, quite apart from the pleading point, it is apparent that the plaintiff's claim does not fall within the category contemplated here. It is a claim which if valid, can be fully met by the law of trespass to the person. It does not fall under s. 4(1)(iii) of the Act."

353. The Court does not consider this action a constitutional action masking one of tort. It is an action claiming breach of his constitutional rights, where no tort is obvious. The Plaintiff comes within the exception of Section 4(1)(iii) of the Act. The Defendants were unlikely to have consented to PIAB dealing with it if the Plaintiff had commenced by way of Personal Injury Summons. The Plaintiff was not obliged to seek PIAB.'s consent.

Breach of the Prison Rules.

354. A breach of the prison rules is not a ground for an action to recover damages *per se*. The Plaintiff has acknowledged that in his closing submissions. Judicial review proceedings where specific relief is sought of a positive or negative nature is the appropriate remedy. The Plaintiff did not take judicial review proceedings at the time of his imprisonment to remedy the alleged breaches. The Court is entitled if it finds that there has been a breach of the Prison Rules to take that into consideration in deciding if the Plaintiff's constitutional rights have been breached.

It was not appropriate to initiate an action per se claiming declaratory relief that his constitutional rights had been breached by being subjected to inhuman or degrading treatment or punishment.

355. The right not to be subjected to torture or inhuman and degrading treatment or punishment is an unenumerated constitutional right. It is described as a negative right by McKechnie J in Holland v Governor of Portlaoise Prison [2004] 2I.R. p573. At p594 of his judgment he stated:

> "I also said, as White J. had in *Wolff v. McDonnell* (1974) 418 U.S. 539, that there is no iron curtain between the Constitution and prisoners in this country and that convicted individuals continue to enjoy a number of constitutional rights, including the right of access to the courts. One can, of course, add that several other rights also continue to be enjoyed by such a person, including the right to life, to bodily integrity, the negative right not to be tortured or to suffer any inhuman or degrading treatment, the right, as Barrington J. said in *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, to practice one's religion and the right to natural and constitutional justice. This enumeration is indicative only and is not in any way exhaustive."

356. This constitutional right was reaffirmed in the decision of McMenamin J in *Mulligan v. The Governor of Portlaoise Prison & Ors* [2013] 4 I.R.p1. The headnote at p4 states:-

> "4. That there was a separate constitutional right not to be exposed to inhuman or degrading treatment. Material considerations in determining whether such a breach had occurred were (a) the purpose and intention of the restriction and privations in particular whether they were punitive, malicious or evil in purpose and (b) whether there was evidence that State authorities were taking advantage of detention to violate constitutional rights or to subject an applicant to inhuman or degrading treatment."

The State (C.) v. Frawley [1976] I.R. 365 , *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82 , *Brennan v. Governor of Portlaoise Prison* [1999] 1 I.L.R.M. 190 and *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208 , [2004] 2 I.R. 573 approved. *Ireland v. United Kingdom* (App. No. 5310/71) (1979–1980) 2 E.H.R.R. 25 considered.

357. The Defendants relied in their written submission on an extract from McMahon & Binchy (4th Ed., 2013) para. 198:-

> "One should not conclude from Kearney that all infringements of constitutional rights are actionable per se. Of necessity some constitutional rights simply cannot be infringed without damage: the rights not to be tortured or have one's health impaired, for example."

358. It is appropriate to recite the whole paragraph 1.98 and the two subsequent paragraphs:-

> "1.98. One should not conclude from Kearney that all infringements of constitutional rights are actionable per se. Of necessity some constitutional rights simply cannot be infringed without damage: the rights not to be tortured or have one's health impaired for example. Other infringements of constitutional rights are more controversial. Take the right to privacy and communications, for example. In Kennedy and *Arnold v. Ireland* [1987] I.R. 587 Hamilton P. awarded £20,000 damages to two of the plaintiffs and £10,000 to the third plaintiff where their telephones were unlawfully tapped. He noted that damages, may be compensatory aggravated exemplary or punitive. He considered that the plaintiff's were entitled to substantial damages and that it was in the circumstances of the case, irrelevant whether they were described as aggravated or exemplary. He was satisfied that the plaintiff's had not suffered any loss though they had significant distress as a result of the injury done to their privacy.
>
> 1.99 Hamilton P.'s observations make it difficult to state with confidence that his holding was to the effect that all infringements have the right to privacy of communications are actionable per se. It is perhaps significant that his list of the categories of damages did not include nominal damages, which would be appropriate and some cases where the plaintiff's right was infringed without damage occurring.
>
> 1.100. A strong argument can be made that infringement of the constitutional right to privacy of communication should be actionable per se. Protection of privacy interests is one of the functions of the trespassory torts which are actionable without proof of damage. The point of wider importance, however is that *Meskell* offers no guidance on the general question whether some, or all infringements of constitutional rights are actionable per se. Simply characterising a claim for damages for an infringement of a constitutional right as a tort, as McDonnell does, does not advance the analysis of the issue as to actionablility per se."

359. An action can be commenced alleging a breach of the constitutional right to privacy, without proof of actual damage or injury. It is actionable per se. The Court considers the constitutional protection of freedom from torture or exposure to inhuman or degrading

treatment or punishment a superior unenumerated constitutional right to that of the protection of one's privacy.

360. It would be illogical, if such an alleged breach was not actionable per se.

361. A factual finding of torture, automatically implies intent and damage. There may be an objective finding of inhuman and degrading treatment without intent. Because of the seriousness of such a finding of itself, this court does not consider it necessary that proof of actual injury or damage is essential. The Plaintiff was entitled to commence an action alleging inhuman and degrading treatment actionable per se.

The Plaintiff should have brought judicial review proceedings and as the proceedings were not brought in that form, the action is statute barred.

Even if brought in Plenary form, the Plaintiff was bound by Judicial Review time limits.

He was not entitled to seek declaratory relief, when the issues complained of were remedied, with no loss, damage or injury to him.

That the actions of public officers acting bona fide without negligence, were immune from damages even if declaratory relief granted.

Damages if granted should only be nominal.

He should have initiated a claim for misfeasance in public office.

362. The Defendants written submissions on these issues are set out in Part VI, at paras 124 – 137 and Paras 149 – 161. These were augmented by oral submissions (T27 19/10/16 Ps 107-108, ps 122 – 125. T28 20/10/16 Ps 115 – 132. T30 8/12/16. Ps 109 – 121). which dealt with the alleged constitutional breaches, and (T28 20/10/16 ps135 -136. T29 21/10/16 ps 55 -58) which dealt with the alleged breaches of the Convention.

363. The issues were dealt with by the Plaintiff in the Replying Legal Submissions of 23rd November 2016. at Part 4 Paras 90 – 154, in respect of the alleged constitutional breaches, and at Paras 160 -166 in respect of the alleged Convention breaches.

364. They were augmented by oral submissions (T30 8/12/16 Ps 17 –to – 55)

365. The Defendants have submitted as follows:

> •that the whole approach of the Plaintiff to the claim was wrong, that he is no longer in custody and ought to have brought the challenge when in custody and to have allowed the prison authorities the opportunity if necessary to remedy the breach.
>
> • The prison rules could have been challenged or relief sought alleging the prison authorities had improperly exercised their discretion
>
> • Where the Plaintiff has not suffered any personal injuries he is not then entitled to maintain a claim either for declaratory relief or for damages.
>
> • The prison authorities should be allowed a margin of discretion.
>
> • There is a remedy for breach of constitutional rights if misfeasance in public office is established.
>
> • In circumstances where the Plaintiff did not have any physical or mental damage which is a prerequisite to recovery in tort he should have taken judicial review proceedings.
>
> • Because the Plaintiff's action has a context in tort, the normal remedy was a right of action in tort. Where constitutional remedies have a connection to tort, there is no right to damages unless damage or personal injury has been proved. For other constitutional rights which do not have a tort connection, damages if any should be nominal. This claim started out as a personal injuries claim which was abandoned.
>
> • Public officials acting in good faith interpreting prison rules are immune from damages, unless here is a deliberate breach by them, or misfeasance in public office.
>
> • It is not only a matter of financial consequences of the claim to the State but also the maintenance of discipline and organisation in a prison.
>
> • The Defendants rely on the case of *O'Donnell v. Corporation of Dun Laoghaire*, 1991 I.L.R.M. 301, to argue that judicial review time limits apply. The Defendants in their written submissions at para131 stated, "Clearly, the fact that the Plaintiff seeks the relief he does by means of plenary summons alters neither the substantive character of the relief sought, nor the procedural requirements that attend it (see *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301). *O'Donnell* demonstrates that the fact that damages are claimed does not alter the position in this regard."

366. The Plaintiff submitted that the courts have never considered the absence of personal injury as something that would debar a remedy for constitutional breach, and argued this issue with others was not pleaded.

367. The Plaintiff sought to distinguish his action from the principles set out in *Hanrahan v. Merck, Sharp and Dohme*, [1988] I.L.R.M. 629, by relying on McMenamin J.'s decision in *Mulligan*, where he stated at para 105, 106 and 107 as follows:

> "[105] Clearly then the rights asserted by the applicant in this case cannot be absolute. Having analysed the wide range of facts in the case, I am not satisfied that the established norms of tort law are adequate fairly and justly to address the range of issues which arise. The tort of negligence in itself, for example, would not be sufficient to encompass the issues in question nor would any other nominate tort.

> [106] The questions which arise in this case are not simply "tort" concepts they go further into the realm of rights only protected under the Constitution of Ireland 1937 such as those identified. "Slopping out" is not encompassed in the law of tort, nor are inadequate ventilation or substandard hygiene conditions.
>
> [107] Primarily the applicant's case is reliant on asserting constitutional rights in tort form – but, as a corollary, the defendant is entitled to assert that no such rights have been violated, that such rights are limited, or where appropriate, to rely on defences arising in the law of torts. On the facts of this case, I consider that the invocation of the alleged violation of constitutional rights must entail other incidents; the defences in tort law such as causation, consent and foreseeability. There are, too, other 'tort' aspects to this claim; the applicant seeks a redress (including damages) for an alleged past wrong (involving injuries), not the vindication or protection of a right in being (see *McDonnell v. Ireland* [1998] 1 I.R. 134 , per Keane J. at p. 159)."

368. The Plaintiff argued that an allegation of breach of privacy was actionable *per se* once the threshold sufficient to cause it to be a breach is exceeded and it attracts compensation for that breach, and as this is a constitutional tort, one may seek a declaration in aid of attempting to prevent the State from continuing with the breach. It does not mean that a right to damages has become extinguished by reason of the fact that declaratory relief is sought subsequent to the damage inflicted.

369. The Plaintiff submitted that it could not be the law that a person who has been the subject of unconstitutionally tortious behaviour on the part of the State does not have a right of action against the State, or that that right of action has been lost because declaratory relief was not sought at the time of the alleged harm.

370. The Plaintiff has relied on the Rules of the Superior Courts to argue that declaratory relief is available per se in plenary proceedings, and further submitted that he was entitled to declaratory relief as a token that his constitutional rights had been breached because the court should not tolerate such a breach without at the very least offering vindication for that breach occurring and thus incorporating a deterrent to those who might later breach those constitutional rights.

371. The Plaintiff submitted that the action was properly a plenary action and not judicial review. It was an action for damages for breach of his constitutional rights, and that the appropriate time limit for bringing the action was six years from the date of the alleged breach and sought to distinguish the action from *O'Donnell v. Corporation of Dun Laoghaire*, as Costello J. had held that judicial review time limits should apply because it was a public law relief sought against a public authority.

372. He further submitted that it was ironic that the Defendant had argued that a three month time limit should apply when submitting that the Plaintiff should have taken an action for misfeasance in public office which has a time limit of six years, stating that the tort of misfeasance in public office does not just involve an *ultra vires* action but must be accompanied by objective and subjective malice. It was described as a particularly circumscribed tort needing a high degree of malicious deliberation to give a right of action to the Plaintiff.

373. Order 19 Rule 29 of the Rules of the Superior Courts deals with declaratory orders. It states:

> "29. No action or pleading shall be open to objection on the ground that a merely declaratory judgement or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."

374. Clarke J in *Omega Leisure Ltd v Barry & Ors* [2012]IEHC 23 stated at Para 4.4:-

> "In approaching claims for declaratory relief, the court must first be satisfied that there is a good reason for so doing. Second, there must be a real and substantial, and not merely a theoretical, question to be tried. Third, the party with carriage of the proceedings must have sufficient interest to raise that question and finally, that party must be opposed by a proper contradictor. It should, of course, be borne in mind that, by its very nature, a declaration is a discretionary relief and involves a jurisdiction which must, therefore, be circumspectly exercised and in accordance with the circumstances of the case"

375. The Court has already decided that the Plaintiff can bring an action alleging breach of the constitutional right not to be subject to inhuman and degrading treatment, and alleging breach of his right to Privacy without proof of personal injury or actual damage.

376. It is important that the relevant passages of the O'Donnell judgment are quoted in full, to determine the validity of the type of action taken by the Plaintiff. The headnote to the judgment states:

> "(4) A plaintiff will not be barred from obtaining declaratory relief simply by failing to seek an order of *certiorari*, since the courts have a statutory discretion to grant declaratory relief, neither can O. 84 RSC 1986 be construed so as to provide an exclusive procedure for persons seeking declaratory relief in matters of public law, since the courts cannot decide as a matter of public policy that litigants who ask the courts to exercise their said statutory discretion are in abuse of process. Transport Salaried Staffs' Association v CIE [1965] IR 180 followed; *O'Reilly v Mackman* [1983] 2 AC 237 not followed.
>
> (5) Delay will not be a bar when seeking declaratory relief in plenary proceedings if the court is satisfied that, had the relief been sought in an application for judicial review, there would have been good reasons for extending the time in which to issue proceedings."

377. Costello J went on to state:

> "The main relief claimed by Mr O'Donnell is declaratory relief by which the court is asked to make the declarations on the matters to which I have just referred. A declaratory judgment is one which declares the rights of the parties and because defendants, and in particular public bodies, respect and obey such judgments they have the same legal consequences as if the court were to make orders quashing the impugned orders and decisions. The Chancery (Ireland) Act 1867 conferred, by s. 155, jurisdiction on the courts to make declaratory orders by providing that no action would be open to the objection that a merely declaratory decree or order was sought and rules of court have since been made with similar provision. The 1905 rules provided (by O. XXV, r. 5) that no objection could be taken to a claim merely because declaratory relief was claimed by a plaintiff and an identical provision is to be found in the current rules (O. 19, r. 29). But a declaratory judgment is a discretionary remedy and the defendants have advanced four separate grounds as to why I should refuse the relief claimed.

Firstly, it is urged that the plaintiff could have obtained relief by way of orders of *certiorari* and his failure to apply for this relief disentitles him to a declaratory judgment. In support of this submission reliance is placed on the judgment of Gavan Duffy J in *O'Doherty v Attorney General* [1941] IR 569. That was a case in which the plaintiff claimed entitlement to a military service pension under the provisions of the Military Service Pensions Act 1934. His application to the minister was referred to a referee who by notice informed the plaintiff that he was not a person to whom the Act applied, but that additional evidence could be submitted to him. The plaintiff instituted proceedings claiming a declaration that he was a person to whom the Act applied. The court held that although it had jurisdiction to make the declaration claimed in the exercise of its discretion it would decline to do so being of the opinion that an order of *mandamus* was the more convenient, beneficial and effectual remedy for the misconstruction of his statutory duty by the referee, pointing out that it was not the practice to make a declaration where there was an appropriate remedy to which the plaintiff ought to have resorted, and that the courts have shown a strong reluctance to depart from this rule, unless, for example there was doubt as to the availability of the alternative remedy (p. 583).

But judicial attitudes have changed since 1941. By 1965 the Supreme Court had made it clear (*Transport Salaried Staffs' Association v CIE* [1965] IR 180) that there was no requirement that an applicant should establish an inability to obtain a state-side order before the court would grant declaratory relief, holding that a declaratory order would be made if there were good reasons for making it. The use of declaratory orders has become widespread both in this country and in England as a public law remedy and such orders are made even in cases where the court had jurisdiction to make orders of *certiorari* quashing impugned administrative decisions (*Pyx Granite Co. Ltd v Minister of Housing and Local Government* [1960] AC 200). Mr O'Donnell's failure to apply for such orders is not in itself a ground for refusing him the declaratory orders he now seeks."

"The second argument advanced is that since the adoption of the 1986 Rules of Court it is now an abuse of process to claim declaratory relief in a plenary action when relief in an application for judicial review is available and so the relief claimed should be refused……

I find myself siding with the minority view of the English judges. Firstly, as a matter of construction, I cannot construe the new rules as meaning that in matters of public law O. 84 provides an exclusive remedy in cases where an aggrieved person wishes to obtain a declaratory order and that such a person abuses the courts' processes by applying for such an order by plenary action. Secondly, I do not think that the court is at liberty to apply policy considerations and conclude that the public interest requires that the court should construe its jurisdiction granted by the new rules in the restrictive way suggested, (a) because the jurisdiction it is exercising is one conferred by statute (the 1867 Act) and it is not for the courts to decide that as a matter of public policy litigants who ask the court to exercise this jurisdiction abuse the courts' processes, and (b) because it is not necessary to call in aid the doctrine of public policy to avoid the mischief which would otherwise result."

"I should develop this latter point a little more fully. O. 84 contains significant safeguards in favour of public authorities. Leave to bring an application for judicial review must first be obtained (r. 20 (1)); leave will not be granted unless the applicant can show sufficient interest (r. 20(4)); the application must be brought promptly and in any event within three months, subject to a power to have this time extended (r. 21(1)).

But, as Ackner LJ pointed out in O'Reilly (at p. 265) on a motion to try a preliminary issue in a plenary action the court could determine whether an application was so frivolous or vexatious or so devoid of merit that leave to issue it under O. 84 r. 20(1) would never have been granted and so stay the plenary action, or it could conclude on such a motion that the plaintiff had no standing and dismiss it as it would have done under r. 20(4) had an application for judicial review been brought.

A declaratory order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders (see Wade, *Administrative Law* 5th ed., p. 523) and it is well established that a plaintiff's delay in instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in O. 84, r. 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under O. 84 time would have been extended. The rules committee considered that there were good reasons why public authorities should be protected in the manner afforded by O. 84, r. 21 when claims for declaratory relief were made in applications for judicial review and I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should determine the relief to be granted and this might well be the result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy. And in plenary actions the effect of delay can in many cases be determined on the trial of a preliminary issue and as speedily as if the issue fell to be determined in an application for judicial review.

For these reasons it seems to me that the apprehended use of plenary actions as a device to defeat the protections given by O. 84 is not a real danger and does not justify the court in concluding that proceedings by plenary action for declaratory relief against public authorities must be an abuse of process."

378. The judgment affirms the right of a litigant to seek declaratory orders by Plenary action, without availing of judicial review remedies. The action by the Plaintiff is an action asserting constitutional rights in tort form but not based on any existing tort. The Defendants can rely on traditional tort defences. Keane J in *McDonnell v Ireland & Ors* [1988] 1I.R. 9134 at p157 had no difficulty in classifying this type of action as a civil wrong. As Costello J pointed out in *O'Donnell* a Defendant in a Plenary action has the option to issue a motion to have the action declared frivolous or vexatious, and devoid of merit, and also to argue laches or delay. It is open to a court in such circumstances to take the view that an action should have been commenced by way of judicial review.

379. The Plaintiff alleges a serious breach of constitutional rights because of the conditions of his imprisonment over a period of seven months. There is no factual dispute that he was on a restricted regime, in a cell with another prisoner, with no access to in cell sanitation. This case is distinguishable from *O'Donnell* which was a dispute over water rates due to a Local Authority where there had been considerable delay by the Plaintiffs in seeking relief.

380. The Plaintiff in this action commenced his plenary proceedings on 30th July 2014, nine months from the date he alleges his unconstitutional treatment ceased. He was within the two year period to commence a personal injuries action.

381. The appropriate time to consider the failure of the Plaintiff to take judicial review proceedings to remedy the conditions of his imprisonment, is if and when a court finds there has been a breach of constitutional rights, then the court is quite entitled to consider that failure in mitigation of damages, but it is not a bar to commence proceedings in the first place.

382. It is not a matter for the Defendants to dictate the type of action commenced by the Plaintiff. The tort of misfeasance in public office requires malice, and would have been unsuitable in the present proceedings.

383. I do not consider this a suitable case, to hold that the Defendants have immunity in respect of their decisions. I have already dealt with the facts of the case at length.

384. The Defendants were on notice for some time of the undesirability of the lack of in cell sanitation, and that doubling up in a cell should not happen in a restricted regime. While not deliberately setting out in any way to ill treat or demean the Plaintiff, the Defendants knew that the conditions of his imprisonment were unsatisfactory.

385. This is a different type of case from *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 and *Glencar Explorations plc v. Mayo County Council (No 2)* [2002] 1 I.R. 84. The Defendants do not have immunity.

386. In many of these types of cases nominal damages is warranted. That is not to say that nominal damages are awarded in any way to demean a Plaintiff whose constitutional rights have been breached but to mark the seriousness of the breach even though there has been no injury or damage. It would go too far to hold that nominal damages should be standard, as ultimately that is a matter for the discretion of the trial judge

Restriction on Constitutional Rights by Imprisonment
387. The Plaintiff's constitutional rights were restricted by imprisonment.

388. The nature of those restrictions and the qualification of those restrictions, was helpfully summarised in the decision of McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573.

389. The head note states:

> "2. That, by virtue of a lawful sentence of imprisonment being imposed on and being served by a prisoner, that person, for the duration of his sentence, had to suffer not only interference with the exercise of his constitutional right to liberty but had to suffer such restrictions on other constitutional rights which were necessary in order to accommodate the serving of that sentence. However, all other rights survived a prisoner's incarceration and must be capable of exercise by him in the context of his incarceration.
>
> *The State (Fagan) v. Governor of Mountjoy Prison* (Unreported, High Court, McMahon J., 6th March, 1978); *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82 ; *Murray v. Ireland* [1985] I.R. 532 and *Kearney v. Minister for Justice* [1986] I.R. 116 applied. *Breathnach v. Ireland* [2001] 3 I.R. 230 distinguished."
>
> "3. That any infringement or restriction on the exercise of a constitutional right of a prisoner must be not more than what was necessary or essential for the protection of the interest or objective which grounded the justification for such interference or restriction in the first place. *Kearney v. Minister for Justice* [1986] I.R. 116 followed."
>
> "4. That, given that the right in issue was constitutionally based, any permissible abolition, even for a limited period, or any interference, restriction or modification on that right should be strictly construed with the onus of proof being on he who asserted any such curtailment."
>
> "5. That a test of proportionality was applied when considering constitutional rights. *Heaney v. Ireland* [1994] 3 I.R. 593 followed."

The Proportionality Test
390. The parties agreed that this test applied to the alleged breach of the constitutional right to privacy. It is more nuanced in an allegation of torture, or inhuman and degrading treatment.

391. The test is that as set out in the judgment of Costello J. in *Heaney & Anor v. Ireland & Anor* [1994] 3 I.R. 593 at p. 606:-

> "Restrictions on the exercise of the right
>
> "But this conclusion does not end the case. Once it is established that an asserted right is a constitutionally protected right the court must then go on to examine the validity of the restrictions imposed on its exercise by the enactment impugned in the case. In this case the plaintiffs have accepted, and correctly so, that the exercise of the right to silence may in certain circumstances be abridged by parliament and so the issue for resolution (as so often in cases on claimed infringements of constitutional rights) is the constitutional validity of the impugned statutory restriction.
>
> In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example *Times Newspapers Ltd. v. United Kingdom* (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and

(c) be such that their effects on rights are proportional to the objective: *Chaulk v. R.* [1990] 3 S.C.R. 1303 at pages 1335 and 1336."

392. If there has been a finding of torture or inhuman or degrading treatment, no issue of proportionality can arise. You cannot have proportionate torture or inhuman or degrading treatment. If torture arises intent is automatically imputed.

393. When one is considering what is material to a finding of inhuman and degrading treatment a type of proportionality test is applied, Once that finding is made, there can be no excuse for it based on proportionality.

That discretion has to be afforded the Prison Authorities in maintaining good order and security in the prison
394. The Defendants have submitted that a wide latitude should be afforded, the first and second Defendants in the implementation of a prison regime for any particular prisoner.

395. They rely on the following judgments: In the matter of Article 40.4 of the *Constitution of Ireland* 1937: *Wayne Kinsella v. The Governor of Mountjoy Prison* [2012] 1 I.R.467. *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334. *McDonnell v. The Governor of Wheatfield Prison* [2015] 2 ILRM 361.

396. The Defendants' submissions stray into another issue where they rely on the defence of "*volenti non fit inuria*" which the court will deal with in its conclusions. They contend that by opting to be a protection prisoner pursuant to r. 63 of the Prison Rules and having been transferred to the separation unit on two occasions, facilities which had in cell sanitation, and having been through no fault of the prisoner authorities transferred back to D1, the Defendants should not be found in breach of any constitutional rights of the Plaintiff.

397. The Defendants argue that all the criteria applicable in the *McDonnell* case are relevant in this action. Those are set out at para 105 of the judgment which states:

> "105. In particular, the declaration that Mr McDonnell was being kept in solitary confinement in breach of his constitutional rights did not reflect a sufficient or correct analysis of the complex issues in the case because:
>
> a. The nature of the threat to Mr McDonnell is grave;
>
> b. The only purpose of the conditions is protection;
>
> c. These arrangements are temporary;
>
> d. The authorities wish to alleviate conditions as much as they can and as soon as possible;
>
> e. The situation is reviewed constantly;
>
> f. The actual conditions, although harsh, are not intolerable;
>
> g. Mr McDonnell does have contact with other persons besides prison officers, for example, listeners and family, as well as legal advisers, medical personnel, psychology and psychiatry services;
>
> h. Opportunities for prisoner social contact on this wing are limited because of the circumstances consigning them to that location;
>
> i. Part of the problem is in the control of Mr McDonnell himself, which is not a matter of blame but recognition of a fact, because of
>
> i. his own status
>
> ii. his relationship with the other two suitable fellow occupants of the wing;
>
> j. There is no element of punishment;
>
> k. The governor accepts that the situation is difficult and harsh and is endeavouring to improve conditions."

398. The Plaintiff sought to distinguish the judgment in *McDonnell* from the present action by submitting that it was about solitary confinement and not about substandard prison conditions. At p. 27 of his written submissions, in reply, he stated:

> "It should be remembered that McDonnell was a case about one protection prisoner who was in an exceptional category of risk. He was held on a very restricted regime for his own protection. McDonnell was a case about solitary confinement, not about substandard prison conditions. That point of distinction is of the utmost relevance in the context of the present case. The case made here is not about a particular measure taken against the Plaintiff for his own protection. It is that years of neglect and of failure to invest by the State, coupled with an indifference within the Irish Prison Service to the particular problems faced by protection prisoners on D1 wing, led to a situation whereby the Plaintiff was denied the most basic measures of privacy or dignity."

399. *Kinsella* and *Connolly* have limited relevance as they are both Article 40 applications. In *Kinsella* the applicant contended that his detention had become unlawful by reason of his prison conditions. The court stated that the conditions of his imprisonment amounted to a breach of his constitutional rights but considered it appropriate to give the authorities an opportunity to remedy this breach. This Plaintiff accepted the legality of his imprisonment. The court has already decided that the Plaintiff is entitled to bring a Plenary Action alleging historical breach of his constitutional rights.

400. In *Connolly* the applicant was in a single cell with in cell sanitation the only comparison with the present case was that he was on 23 hour lock up. Despite the court describing the conditions of his imprisonment as immeasurably better than that as described in *Kinsella*, the court stated:

> "22. Yet the locking up of prisoners under such circumstances for very long periods of time – which I would rather measure in terms of an extended period of months – must be regarded as an exceptional measure, which might, in some

instances, at least, compromise the substance of the detainee's right to the protection of the person and the safeguarding of his human dignity. Certainly, the indefinite detention of a prisoner under such circumstances for periods of years would undoubtedly violate the guarantee to protect the person in Article 40.3.2, since it would be hard to see how the integrity of the detainee's personality – the very essence of the guarantee of the protection of the person and preservation of the human dignity of the prisoner – could be preserved under such circumstances."

"26. In these circumstances, it cannot presently be said that the circumstances of Mr. Connolly's present detention violate the substance of the guarantees of Article 40.3.2 to protect the person, even if he is denied effective access to human contact for 23 out of 24 hours. Mr. Connolly has, however, now been so detained – even if it has been at his own request – under these conditions for the best part of three months. Doubtless the longer Mr. Connolly is so detained the more carefully and intensely his case will be considered and reviewed by the prison authorities who, it may be assumed, will be on guard for signs of psychological or psychiatric distress."

"27. Yet if Mr. Connolly's detention under these conditions were to continue indefinitely for an extended period of months with no sign of variation, the point might very well come in which the substance of these constitutional guarantees would quickly be compromised and violated. It would, however, be premature just yet to anticipate what might yet materialise at some future time or in some future case."

401. The court accepts that the complex issues referred to in the *McDonnell* case already cited are matters which the court is obliged to take into consideration in considering the claim of inhuman and degrading treatment. The Court does not consider they all apply in considering the allegation of the breach of the Plaintiffs constitutional right to privacy. A prison governor and his staff are allowed a wide margin of tolerance from a court in ensuring good order and safety and security of prisoners.

THE SEPARATION OF POWERS

402. The Defendants have argued that there is no version of the Plaintiff's claim that does not involve the court in directing how the executive should allocate scarce resources.

403. In their written submissions they have summarised the jurisprudence which they rely on which states. The principle that the Courts should not become involved in the allocation of public resources is well established. In *O'Reilly v. Limerick Corporation* [1989] ILRM 181, Costello J. dismissed a claim brought by a group of members of the travelling community claiming they had a constitutional right to be provided with serviced halting sites. Costello J. in refusing the Order, stated as follows, at p. 195:

"What could be involved … would be the imposition by the Court of its view that there had been an unfair distribution of national resources. To arrive at such a conclusion, it would have to make an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the Plaintiff's claim. As the present case demonstrates, it may also be required to decide whether a correct allocation of physical resources available for public purpose has been made. In administering this function the Court would not be administering justice as it does when determining an issue relating to the communicative justice but would be engaged in an entirely different exercise, namely, an adjudication on the fairness or otherwise of the manner in which other organs of the State had administered public resources. Apart from the fact that members of the Judiciary have no special qualification to undertake such a function, the manner in which justice is administered in the Courts, that is on a case-by-case basis, make them a wholly inappropriate institution for the fulfilment of the suggested role. I cannot construe the constitution as conferring it on them."

404. This approach was endorsed by the Supreme Court in *Synnott v. The Minister for Education* [2001] 2 IR 545 and *TD v. Minister for Education* [2001] 4 IR 259. In *TD*, Murray J stated that a fundamental distinction existed between the Courts determining whether policies of the executive or Oireachtas were compatible with their legal or constitutional obligations, and the Court taking control of such matter. He stated:

"In incorporating the policy programme as part of a High Court Order the policy is taken out of the hands of the executive which is left with no discretionary powers of its own. It becomes the policy and programme of the Court that cannot be varied or any decision taken which might involve delay (or adjustment of policy) without the permission and order of the Court. A judicial imperative is substituted for executive policy. The Judge becomes the final decision maker. In short he is administrator of that discrete policy. That is not his official function within the ambit of the Constitution"

405. The Supreme Court (Murray J.) was in this instance considering the question of mandatory orders against the State.But it is submitted that in so far as the Court is being asked by the Plaintiff to make a positive finding that (1) in-cell sanitation was not in the past correctly prioritised by the Prison Authorities and the State and (2) that the financial resources were not properly allocated within the Prison Service, the question of justiciability becomes relevant. This is especially so given that such a finding, albeit in the form of declaratory relief, would effectively render prison policy, and decisions about priorities within spending within prisons accountable to the judiciary in the future. Such a finding would also compel the State to reprioritise spending within the prison system, the manner in which operational prisons are upgraded and refurbished, the order in which the various wings of any particular prison must be closed for refurbishment, matters to be taken into account when constructing new prisons and a host of other operational concerns.

406. In *Doherty v. South Dublin Council* [2007] 2 IR 696, Charleton J. considered an application by members of the travelling community for declarations that the failure of the relevant authorities to provide them with a caravan with running water, central heating and insulation was in breach of their duties under the Housing Acts, 1966 – 2000 and in breach of their duty under Section 2 and 3 of the European Court of Human Rights Act, 2003. The Applicants also sought injunctive relief and an Order for Mandamus. It is submitted that the decision is relevant to the present proceedings to the extent that Charleton J. having refused the reliefs sought and found there to be no breach of Articles 3, 8 or 14 of the Convention, commented obiter on the role of the Court where issues of priorities and allocation of resources arise. He said at p. 723:

"I would add that decisions to date show a reluctance to require State Authorities to intervene with forms of welfare as an aid to the exercise of rights. Whether welfare is provided, and at what level, and in what particular circumstances, is essentially a matter of political decision. The discourse of politics in this area tends to move between the poles of urging self-reliance and of offering cradle to grave support. Like a family, the resources of any nation are limited and it is a matter for political executive decision as to what resources should be committed to what problems and with what priority. A breach of legislation prescribing such an allocation, as in housing, caused for judicial intervention. Where, however, a plea is made that the Court should declare the absence of welfare support to be wrong in a particular situation of itself, the Applicant should show a complete inability to exercise a human right for his or her own means and

a serious situation that has set the right at nought with the prospect of serious long term harm. Any proposed intervention by the Court should take into account that it is the responsibility of legislature and executive to decide the allocation of resources and the priorities applied by them."

407. In their written submissions the Plaintiff has argued that the *T.D.* case was obliging the State to build according to a particular schedule ten different high support units for troubled adolescents. He relied on the dictum from Keane C.J. at p. 284 from a judgment which illustrated that the Supreme Court did not indicate unwillingness or an inability to require the executive to comply with its constitutional obligations. Keane C.J. stated at p. 284:-

> "If it was established in any proceedings that the Government had acted in a manner which is in contravention of the Constitution, then the exclusive role afforded to them in the exercise of the executive power of the State would not prevent the courts from intervening with a view to securing compliance by the Government with the requirements of the Constitution. It is, however, not in dispute that the orders made by the trial judge in this case and in the earlier case of *D.B. v. Minister for Justice* [1999] 1 I.R. 29 are without precedent in that they not merely find the Executive to have been in breach of their constitutional duties: they also require the executive power of the State to be implemented in a specific manner by the expenditure of money on defined objects within particular time limits. No precedent has been cited for so far reaching an assumption by the courts of what is, prima facie at least, the exclusive role of the Executive and the Legislature."

408. The court is not directing the executive to do anything. To argue that the courts cannot come to a conclusion on how the executive has responded to criticisms by respected international bodies such as the CPT or to examine its historical response to those criticisms in particular its commitments to remedy the continuing deficit in its prison estate, or to prevent the court drawing conclusions from the various reports on Mountjoy by the Inspector of Prisons, a person appointed by statute, in my view, is unsustainable. The court is quite entitled to examine and come to a conclusion on the substantial delay in installing in cell sanitation in the State's main prison.

409. However, the court has carefully in the context of both allegations of the breach of the constitutional rights given credit to and allowed for the substantial progress in improving the prison estate, both in overcrowding and providing in cell sanitation. By February 2013, when the alleged breaches occurred, the Defendants had at their disposal a very substantial number of prison places already completed in an expanded prison estate as the court has already outlined in paras 43 and 44 of its judgment.

Volenti Non fit Inuria.
410. The Defendants have argued that because the Plaintiff requested protection, and had to be protected and was transferred on two occasions to the separation unit, and transferred back to D1 out of necessity, that this Defence arises, as he has subjected himself to the relevant conditions of imprisonment.

411. The court cannot come to the conclusion that the Plaintiff was responsible for his transfer back to D1 on 12/04/13. His cellmate Jason Walsh accepted responsibility for setting their cell on fire. The Plaintiff was responsible for the transfer back on 31/07/13. He was not transferred back on 31/07/13 as a designated punishment pursuant to the Prison Rules.

412. The Plaintiff made a number of complaints about the conditions of his imprisonment, both personal and through solicitors. He sought a transfer.

413. Requesting protection in prison and being placed on a restricted regime, is not a voluntary surrender of constitutional rights. Each case has to be considered on its merits. The defence does not arise in this case.

Measurement of cell.
414. The Plaintiff has submitted that including furniture, he had less than 3 square metres space in his cell which is the minimum requirement set out in European Court of Human Rights judgments.

415. The court does not consider it appropriate to fix a defined measurement of space to a prisoner in a cell for the purpose of assessing any breach of constitutional rights. The court notes the Plaintiffs submissions that this has been the practice of the European Court of Human rights, and that the Inspector of Prisons has made recommendations on minimum space.

416. That would be an inflexible test. It is more appropriate as the court has done to take it into consideration combined with the length of time in cell and other considerations.

The allegation of breach of the Plaintiffs constitutional rights not to be subject to inhuman and degrading treatment.
417. The Court although presented with findings of the Committee for the Prevention of Torture and the Inspector of Prisons that slopping out and overcrowding were inhuman and degrading, cannot accept those conclusions as breaches of constitutional or convention rights, as it has to consider a wider definition and a more onerous threshold before making that finding. Slopping out and lack of in cell sanitation have not of themselves been deemed to be unconstitutional practices.

418. It is common cause, that the Court must consider first, the alleged constitutional breaches, before turning its attention to an alleged breach of Article 3 and 8 of the Convention. Section 3(2) of the Act states:

> "(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate."

419. Irish constitutional law on protection from torture or inhuman or degrading treatment or punishment, is at least equal to or greater than the protection afforded by the Convention.

420. This was the view expressed by Hedigan J. in *Dumbrell v. Governor of Castlerea Prison* (unreported High Court 6th October, 2010) recited in *AG v. Damache* [2015] IEHC 339 at p255.when he stated: "Irish law has set higher standards than those of the European Convention on Human Rights. It is fundamental to the Convention system that each country can take up as much more rights as they choose but no less.

421. Clarke J in *DPP v. Gormley and White* [2014] 2 I.R. 591 defined the role of the case law of the ECtHR in considering the proper approach to the interpretation of the Constitution. He stated at paras 37, 52 and 88:

"[37] In considering the proper approach to the interpretation of Bunreacht na hÉireann, it is, in accordance with the jurisprudence of this court, of course, appropriate to consider the case law of the ECtHR and also the constitutional jurisprudence of the superior courts of other jurisdictions which have a similar constitutional regime to ourselves. Also, it clearly follows that, if a constitutional right of the sort urged on behalf of both Mr. Gormley and Mr. White is found to exist, then questions as to the applicability, in an indirect fashion, through the European Convention on Human Rights Act 2003, of the Strasbourg jurisprudence do not really arise. On that basis, it seems appropriate to deal first with the Irish constitutional position.

[52] As already noted, in considering such a question, it is appropriate for this court to have regard to both the jurisprudence of the ECtHR and that of the superior courts of other common law countries which have like constitutional provisions. Such jurisprudence can be of assistance in analysing similar rights guaranteed under the relevant legal regimes. In that context, I propose to turn first to the jurisprudence of the ECtHR and thereafter to the relevant international jurisprudence.

[88] It must also be recalled that the issue which falls squarely for decision in this case is not one which could reasonably be said to have taken the authorities by surprise. The Executive long since committed Ireland to compliance with the ECHR as it is interpreted, from time to time, by the ECtHR. The decision of the ECtHR in *Salduz v. Turkey* (App. No. 36391/02) (2009) 49 E.H.R.R. 19 was delivered in 2009 and the possibility that such a view might be taken by that court must have been clear for some time before that. Likewise, the Irish courts have made specific reference to difficulties arising out of questioning in garda custody, not least in *The People (Director of Public Prosecutions) v. Ryan* [2011] IECCA 6 , (Unreported, Court of Criminal Appeal, 11th March, 2011), where the Court of Criminal Appeal, in a judgment delivered by Murray C.J., drew specific attention to the potential interaction between the questioning in custody obligations of the State which arise under the ECHR and the questioning practices then typically in place."

422. The court cannot over-interpret the Convention. This was emphasized by the Supreme Court in *McD v. L* (Unreported, Supreme Court, 10th December 2009), who warned against the over-interpretation of the Convention. Fennelly J, in issuing this warning, stated as follows, at p. 100:

"Lord Bingham correctly outlined the respective tasks of the European Court and the domestic courts in the following passage from his speech in R. (Ullah) v. Special Adjudicator [2004] 2 AC 323:

> *'In determining the present question, the House is required by Section 2(1) of the Human Rights Act, 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that Courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court … This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court. From this it follows that a national Court subject to a duty such as that imposed by Section 2 should not without strong reason, dilute or weaken the effect of the Strasbourg case law … It is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national Courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'."*

423. The importance of this principle has been recently restated by the Supreme Court in *O'Donnell v. South Dublin County Council*. [2015] IESC 28.

424. There were two passages in previous judgments on slopping out that gave the Plaintiff some concern that a finding of inhuman and degrading treatment could not be established by a court unless it was established that there was malicious intent. In *the State (at the Prosecution of C.) v. John Frawley* [1976]I.R. 365 Finlay CJ stated at p374:

"The question which has given me the most trouble in this case is whether the conditions under which the prosecutor has been and is detained in prison constitute a failure to protect him from torture or from inhuman or degrading treatment and punishment—thus making his detention unlawful. Notwithstanding the harshness of the privations which he has undergone and, to a lesser extent, continues to suffer, I have finally come to the conclusion that those conditions do not constitute such failure.

I am quite satisfied that the purpose and intention of the restrictions and privations surrounding the prosecutor's detention are neither punitive nor malicious. The strongest confirmation of this would appear to be that the restrictions have been somewhat relaxed since the improvement in his condition noted by Dr. McCaffrey in the last six or seven months. There was no evidence before me of any privation or hardship which does not appear related to one or other of the main purposes of keeping the prosecutor from escaping and preventing him from injuring himself. In seeking to achieve these two purposes, the respondent is discharging two duties which appear to me to be constitutional in origin.

I must construe the entire concept of torture, inhuman and degrading treatment and punishment as being not only evil in its consequences but evil in its purpose as well. It is most commonly inspired by revenge. retaliation, the creation of fear or improper interrogation. It is to me inconceivable to associate it with the necessary discharge of a duty to prevent self-injury or self-destruction."

425. In *Mulligan* McMenamin J at p 110 stated. "Moreover the essential ingredients of malice, evil purpose, taking advantage, demeaning or humiliating conduct are all absent".

426. There were concerns that these dicta implied that there had to be intention to inflict inhuman and degrading treatment before the court could come to the conclusion that Irish constitutional principles had been breached. Reading the *Mulligan* judgment as a whole that is clearly not the case. The Defendants accept that intent is not determinative of the breach but submitted it is a material matter to be taken into consideration in determining if there has been inhuman and degrading treatment.

427. In applying Irish Constitutional law, taking into consideration the developing jurisprudence of the European Convention on Human Rights, if the treatment of an individual complained of amounts to inhuman and degrading treatment, and attains an appropriate threshold of severity, then the Court can conclude that there has been a breach of constitutional rights without attributing intent to those responsible for that treatment. However as noted in *Bakhmutskiy v Russia* (App. No. 36932/02, 25th June 2009), and *Mulligan* the court cannot focus on one or a number of aspects of the treatment, all the circumstances must be taken into consideration.

428. In the Plaintiff's submissions the Court was urged to take considerable guidance from the case law of the European Convention on Human Rights in determining whether conditions of detention crossed the threshold necessary to amount to inhuman or degrading treatment. The court accepts it must have regard to the totality of the conditions of detention and while some aspects of a prison regime may be unacceptable, other positive aspects can be treated as a balancing element.

429. The court has been referred to and the Plaintiff relies on substantial case law from the European Court of Human Rights, about conditions of imprisonment which had been considered in the context of Article 3 of the Convention. Extracts have been recited in some detail in the written and oral submissions of the parties. The Defendants have sought to differentiate the facts as found in most cases from the conditions of the Plaintiff's imprisonment which they contend for.

430. These cases are

- *Kasperovicius v. Lithunia* 54872/08 20/11/2012
- *Canali v. France* 40119/09 25/7/2013
- *Firstov v. Russia* 42119/4 20/2/2014
- *Peers v. Greece* 28524/95 April 2001
- *Cenbauer v. Croatia* 73786/01 9/3/2006
- *Malechkov v. Bulgaria* 57830/00 28 September 2007
- *Radkov v. Bulgaria (No. 2)* 1838 2/05 10/5/2011
- *Ramishvili v. Georgia* 1704/06 27/01/2009
- *Ayanyev v. Russia* 35972/05 24/07/2012
- *Stanciu v. Romania* 35972/05 24 July 2012
- *Petrov v. Bulgaria* 22926/04 24/1 2012
- *Vasilescu v. Belgium* 64682/12 25 November 2014
- *Varga v. Hungary* 1497/12/10 /3/2015
- *Story v. Malta* 56584/13 29/10/2015
- *Radev v. Bulgaria* 37994/09 17/11/2015
- *Iovchev v. Bulgaria* 41211/98 2/2/2006
- *I.I. v. Bulgaria* 44082/98/6/2005
- *Gavazov v. Bulgaria* 54659/00 6/3 2008
- *Dobrev v. Bulgaria* 55389/00 10/8/2006
- *Kostadinov v. Bulgaria* 55712/00 7/2/2008
- *Sabev v. Bulgaria* 27887/06 28 May 2013
- *Harakchiev and Tulumov v. Bulgaria* 15018/11 8/7/2014

431. The Court has been urged by the Plaintiff and Defendants to extract a number of general principles from a combination of these judgments in assessing conditions of detention. There was substantial factual controversy in the course of the action about the conditions of the Plaintiff's imprisonment. A substantial portion of this judgment deals with those controversies. It is appropriate and helpful for the Court to have regard to these European decisions, but the Court is reluctant to extract a factual matrix from those decisions and apply it to the present case.

432. The Courts duty is to apply the facts found to Irish constitutional law principles having regard to the Convention cases which the court should rely on. I agree with the Defendant's written submissions at para 72 that "no fact or set of facts can be taken in a vacuum. Instead the focus of any analysis, as already outlined, ought to be whether the totality of the conditions of detention constitutes a violation of the Convention."

433. In *Bakhmutskiy v Russia* (App. No. 36932/02, 25th June 2009). where a violation of the Convention was found to have taken place in circumstances where the applicant had less than 1m2 of personal space in his cell. The Court in that case stated as follows:

> *"88. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see Labita v. Italy [GC], no. 26772195, § 119, ECHR 2000-IV). However, to fall under Article 3 of the Convention, ill treatment must attain a minimum level of severity. The assessment of this minimum level of severity depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see ValaJinas, cited above, §§ 100-101). When a person is held in detention, the State must ensure that he is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see Valasinas, cited above, § 102, and Kudla v. Poland [GC], no. 30210196, § 94, ECHR 2000-XI). When assessing conditions of detention, one must consider their cumulative effects as well as the applicant's specific*

allegations (see Dougoz v. Greece, no. 40907198, § 46, ECHR 2001-11). The duration of detention is also a relevant factor" (emphasis added).

434. The court has considered the relevant Northern Irish, Scottish and English cases on in cell sanitation and is satisfied that the approach of this Court does not vary from the general principles applied in those cases. Extracts from these cases have been opened in detail to the court both in written submissions and oral submissions, and the relevant cases are:-

- *Re: Carson's Application for Judicial Review*. 2005 NIQB 80.
- *Martin v. Northern Ireland Prison Service*. [2006] NIQB 1.
- *Napier v. Scotish Ministers* 2005 SC 229
- *Callison v Scottish Ministers* 2004 Scot (D) 1/7.
- *Greens & Ors Petitioners* 201 Scot (D) 16/5
- *Grant and Gleaves v Ministry of Justice* [2011] EWHC 3379 (QB)
- *Grant & Anr v. Ministry of Justice* [2012] EWCA Civ 1447
- *Ashton & Ors v. Ministry of Justice* [2014] EWHC 1624 (QB).

The court has also considered the reported cases in this jurisdiction on in cell sanitation and slopping out, which are as follows

- *The State (Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82.
- *Brennan v. Governor of Portlaoise Prison* [1999] ILRM 190
- *Mulligan v. Governor of Portlaoise Prison* [2013] 4 I.R. 1.

The court has followed the jurisprudence in *Mulligan*.

435. In this case, the court is entitled to take into consideration.

- The Plaintiff's request to transfer from Wheatfield where he was housed in a cell, with in-cell sanitation to Mountjoy.
- The request for protection by the accused pursuant to Rule 63 of the Prison Rules, and the regular monitoring of his protection status.
- His transfer to the Separation Unit, which had in-cell sanitation from 8/4/2013 –to- 12/4/2013 and from 12/7/2013 –to- 31/7/2013.
- Access to medical, nursing and counselling facilities.
- Regular and special visits, access to telephone calls and to the Tuck Shop.
- The specific facility of the Governor's Parade to facilitate protection prisoners.
- Transfer to the Medical Unit on 30/9/2013 and access to a Drug Treatment Programme in prison.
- Access to his Legal Advisors, by telephone and visits, to the Prison Chaplain and Visiting Committee, and the ability to make serious complaints.
- The fact that both management and staff, volunteered for Governor's Parade, dinner Guard, toilet patrols and the provision of showers.
- That the Prison was undergoing refurbishment to install in-cell sanitation, and that the Plaintiff was kept up to date with developments.

436. The negative factors the Court considered were:-

- The Plaintiff was obliged to share a cell with another prisoner, and for a short period two others.
- No in-cell toilet or running water.
- Limited time out of cell.
- Inability to know in advance, the time out of cell.
- Inability of Prison Authorities to facilitate requests to go to the toilet, when Plaintiff locked in cell.
- Infrequency of showers for a prisoner on a restricted regime.
- No access to education or work.
- The inadequacy of space in the cell, not by way only of physical allocation of space, but combined with length of time in cell.

437. The Plaintiff considering the totality of the conditions of his imprisonment was not subject to torture, inhuman or degrading treatment or punishment.

438. The Court also refuses relief pursuant to Section 3 of the European Court of Human Rights Act 2003.

The Constitutional Right to Privacy
439. The constitutional right to privacy is an unenumerated constitutional right.

440. In *Kennedy v. Ireland* [1987] I.R. 587, Hamilton P. at p. 590 stated:

> "Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality"…
>
> "As stated by Mr. Justice Henchy in his judgment in *Norris v. The Attorney General* [1984] I.R. 36 at p. 71:—
>
> > 'Having regard to the purposive Christian ethos of the Constitution, particularly as set out in the preamble ('to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations'), to the denomination of the State as 'sovereign, independent, democratic' in Article 5, and to the recognition, expressly or by necessary implication, of particular personal rights, such recognition being frequently hedged in by overriding requirements such as 'public order and morality' or 'the authority of the State' or 'the exigencies of the common good', there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.
> >
> > Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy.
> >
> > The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society."

441. Article 8 of the Convention states, Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

442. In considering the allegation of the breach of the Plaintiff's constitutional rights, the court has had regard to two decisions of the European Court of Human Rights, where it decided there might be circumstances in which Article 8 could be regarded as affording a protection in relation to conditions during detention which do not attain the level of severity required by Article 3.

443. In *Raninen v. Finland* (152/1996/771/972), a judgment of the court of 16th December, 1997, which stated at para. 63 as follows:

> "According to the Court's case-law, the notion of "private life" is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the moral and physical integrity of the person (see the *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, p. 11, 22; the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 215-B, p. 11, 29; and the *Costello-Roberts v. the United Kingdom* judgment of 25 March 1993, Series A no. 247-C, pp. 60–61, 34 and 36). The Court further recognises that these aspects of the concept extends to situations of deprivation of liberty. Moreover, it does not exclude the possibility that there might be circumstances in which Article 8 could be regarded as affording a protection in relation to conditions during detention which do not attain the level of severity required by Article 3."

444. In *Szfranisky v. Poland* Application No. 17249/12, a judgment of the court of 15th December, 2015.

445. At paras. 34, 35 and 36, the judgment stated:-

> "34. The Court reiterates that even though a measure falls short of treatment prohibited by Article 3, it may fall foul of Article 8 of the Convention (see, in another factual context, *Wainwright v. the United Kingdom*, no. 12350/04, 43, ECHR 2006-X).
>
> 35. Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention (see *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, 69, ECHR 2005-IX).
>
> 36. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in ensuring that respect for private and family life is effective. Those obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests (*see Odièvre v. France* [GC], no. 42326/98, 40, ECHR 2003-III, and *Evans v. the United Kingdom* [GC], no. 6339/05, 75, ECHR 2007-I)."

446. The court on the allegation of inhuman and degrading treatment considered a broad range of matters touching on the Plaintiff's imprisonment, when considering the Plaintiff's constitutional right to privacy it has had a narrower focus.

447. The matters deemed appropriate to take into consideration in considering the allegation of the constitutional breach of the right to privacy of the Plaintiff were matters which directly touched on the ability of the Plaintiff to be out of his cell for some periods of time The court also considered relevant access to visits, telephone calls and medical and nursing facilities

448. The following are relevant

- The governor's parade from 7am to 8am and the ability of the Plaintiff to slop out.
- The provision of time out of his cell for exercise.
- The provision of out of cell time to make telephone calls.
- The facilitation of visits to the Plaintiff in the visiting area.
- The provision to the Plaintiff of medical and nursing facilities on demand by him.
- Access to the Prison chaplain, confidential legal advice and the Visiting Committee.
- The facilitation of extra staff on duty at dinner guard, toilet patrol and for the provision of showers.

449. The Defendants have submitted that company in his cell assisted his right to privacy as solitary confinement would have been to his detriment. The Plaintiff had no choice on the doubling up in his cell. This was contrary to the recommendation of the Inspector of Prisons. For a number of days there were three in the cell.

450. It was very difficult, if not impossible, to respond to a request by the Plaintiff to go to the toilet when locked in the cell because of the arrangements on D wing of the prison which the court has described in detail with non-protection prisoners being housed in D2 and D3 and passing through D1 regularly. The Plaintiff did not know in advance when he would be released from his cell. The court can only come to the conclusion definitively that the Plaintiff had an average of two showers a week in the evening from 8 – 10pm.

451. The number of protection prisoners increased on D1 landing, and eventually they filled the landing. The exigencies of keeping them separate from non-protection prisoners and also from separate groups within the cohort of protection prisoners was a significant challenge, which meant that time out of the cell was severely restricted. There was no access to any form of education or work.

452. Apart from the governor's parade in dealing with individual complaints of protection prisoners and the provision of extra help from prison officers for the dinner guard, toilet duty at night and for the provision of showers, no steps were taken by the prison authorities to ameliorate the toileting arrangements for these protection prisoners. The court has not received any satisfactory evidence as to why mobile toilets were not canvassed with the protection prisoners nor why assurances given by the Defendants to the CPT in writing that modesty screens would be installed was not advanced.

453. The issue was left for the Governor of the prison to deal with and what commenced as a small number of prisoners, seven in total, being housed on the D1 landing ended up with the whole of D1 landing being used. In the decision in *Mulligan*, MacMenamin J. stated at para.117

> "The applicant found using the pot deeply humiliating. It undoubtedly had a depressive effect. But each prisoner had a private cell. Absent evidence of overcrowding or "doubling up" in cells I am unable to find that the use of the chamber pot in the cell actually violated the applicant's rights of privacy or human dignity to a degree to give rise to a cause of action. While in many aspects objectionable I cannot find the slopping out process was substantially invasive of these rights. The degree of invasion was limited to the transfer of the pots to the sluices. I am not convinced that this engages a privacy right to the degree necessary to give rise to a cause of action. The prisoners on E2 landing enjoyed a level of privacy not available to many other prisoners."

454. The Plaintiff in this action was in a cell for most of his imprisonment with another inmate, on a restricted regime with no in cell sanitation.

455. There was a breach of the Plaintiff's constitutional right to privacy. Having determined the issue on constitutional principles, it is not appropriate to make any order pursuant to Article 8 of the Convention.

Damages

456. While the court sympathised with the Plaintiff in his distress about the conditions of his imprisonment which were unacceptable in many respects, he exaggerated the harshness of his conditions of imprisonment and frequently gave untruthful evidence. His credibility was seriously damaged in a fair, methodical cross examination.

457. The Court could not contemplate awarding the Plaintiff damages because of his untruthful and exaggerated evidence.

458. If it were considering damages as already stated. It would be entitled in mitigation to take into account the failure of the Plaintiff to apply for judicial review at the time of his imprisonment seeking to remedy the conditions of his imprisonment, also his time in the separation unit, and the refurbishment work being undertaken in the prison to remedy the lack of in cell sanitation.