THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 310

Appeal Nos. 2014, No. 868

[Article 64 transfer]

Irvine J.
Hogan J.
Hedigan J.

BETWEEN/

DARIUS SAVICKIS

PLAINTIFF/APPELLANT

- AND -

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

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of October 2016

1. This is an appeal by the plaintiff against the findings of the High Court (Dunne J. and a jury) delivered in May 2013. The plaintiff had sued the defendants for assault, negligence and breach of constitutional rights arising from an altercation in Castlerea Prison, the details of which I will later describe. As we shall later see, the jury rejected the majority of the plaintiff's claims, but they did find – although, perhaps, not quite in terms – that he had been assaulted and awarded him €4,500 in damages. The jury also found, however, that the plaintiff was 95% contributorily negligent and his award was thus reduced to €225. Before considering the issues which arise in this appeal, it is first necessary to set out the background facts.

2. As a preliminary, however, I should observe that there was no professional transcript available in respect of the six day witness action in the High Court. Although there is a helpful solicitor's note of the evidence which has been agreed, the absence of a professional transcript in such an important, fact specific witness action has proved to be a huge handicap to this Court. It has made the task of assessing the evidential and factual basis for the jury's verdict an extremely difficult one. This is especially so in the present case where there were sharp divergences in the evidence given by the respective witnesses for each side with the credibility of many being put in issue.

3. In addition to the note, however, the jury had available to it closed camera television ("CCTV") recordings of the incidents which were taken from a variety of different angles within the prison. At the hearing of the appeal the Court ruled that it should view these recordings and did so in the present of the parties. The CCTV evidence has proved to be of very considerable assistance.

The background facts

4. The present proceedings arise from an incident which took place in Castlerea Prison on 29th September 2009. The plaintiff had been convicted of rape in February 2009 and he was then serving a six year prison sentence. The plaintiff is Lithuanian and his command of English at the time was poor.

5. On the day in question the plaintiff had just finished making a telephone call from prison and was taken from his cell by a prison officer for that purpose. When the call was ended, he was brought back to his cell, but the cell door was now locked. A prison officer instructed the plaintiff that he was to go out into the exercise yard of the prison. The plaintiff gestured to his feet and to his top in order to point out that he was wearing neither socks nor a jumper and that he was not dressed to go outside. The prison officer nonetheless insisted that the plaintiff go to the yard, but he declined to do so.

6. At this point, the prison officer in question suddenly confronted the plaintiff and placed his head in a head lock while the plaintiff clung to the railings, presumably in an effort to resist being moved towards the exercise yard. At that point perhaps four to five more prison officers quickly arrived and prised the plaintiff from the railings and totally subdued him. While the plaintiff is clearly a tall, athletic and strong man, he did not respond to the actions of the prison officer in an aggressive manner. He did not attempt to strike out at the prison officer and did no more than cling to the railing. It is clear, however, that as he was being subdued by the prison officers using control and restraints ("C & R") techniques, he was struck some three to four times by a particular prisoner officer with punches to the chest. The striking of the prisoner in this fashion was clearly evident in the CCTV footage which each member of the Court witnessed.

7. Quite independently of the CCTV evidence, the plaintiff's account of the manner in which he said he had been assaulted is entirely consistent with the medical evidence given at the trial. The plaintiff was subsequently brought to Roscommon County Hospital later evening and the medical and nursing notes on admission showed bruising on his face and forehead, trauma injury to his chest and traces of blood in his urine. Mr. James Binchy, a consultant in emergency medicine attached to Galway University Hospital, gave evidence that he had reviewed these notes and he concluded that these injuries were consistent with "a blunt blow to the patient." Mr. Binchy also thought it was possible that the plaintiff could have had a crack in his ribs which had not been picked up by the x-rays.

8. The then Deputy Governor of Castlerea Prison, Ms. Ethel Gavin, also gave evidence for the plaintiff. She had reviewed the relevant CCTV footage at the time and she was of opinion that the events captured thereon required investigation. She said that the punching of a prisoner who was subjected to C & R restraints was unacceptable. It should be noted, however, that each of the prison officers who gave evidence for the defendants denied that the plaintiff had been punched in the manner described. I shall return presently to this issue.

9. The plaintiff was then brought to high security cell where, for security reasons, his clothing was removed and he was offered a

blanket. Some two hours later the prison officers returned to the cell and the plaintiff was offered a poncho or a blanket to cover him while he was transferred from one cell to another. It would seem that the plaintiff refused to wear this garment or to take the blanket as covering before he was removed from the cell. He was then taken through the prison while entirely naked from one cell to another by a troupe of about twelve to fifteen prison officers. This second incident lasted about three minutes.

10. The plaintiff was taken later that evening to Roscommon General Hospital. He was bruised, had been bleeding and was in pain. No fractures were seen on x-ray, but the plaintiff was prescribed a course of painkillers.

The hearing in the High Court
11. The plaintiff subsequently commenced these proceedings for damages for assault, negligence and breach of constitutional rights. The action was heard over six days by Dunne J. and a jury in April and May 2013. I will refer later in more detail to the evidence given at the trial, but in summary the jury seems to found that although the plaintiff had been assaulted, he was guilty of 95% contributory negligence. The jury also found that the State authorities had been negligent in the manner in which they had provided training for staff in control and restrain techniques. All other claims were rejected by the jury.

12. The jury ultimately awarded the plaintiff the sum of €225, *i.e.*, representing a gross award of €4,500 reduced by 95%. The plaintiff originally appealed to the Supreme Court against all adverse jury findings, but this appeal was transferred to this Court by order of the Chief Justice (with the concurrence of the other members of the Supreme Court) on 28th October 2014 in accordance with Article 64 of the Constitution following the establishment of this Court. No cross-appeal has been taken by the State against so much of the jury award as found against the defendants.

13. At the close of the evidence, five questions were put to the jury on an issue paper. The questions and answers were in the following terms.

> Question 1:
>
> In all the circumstances was it necessary for the defendants to apply force to the plaintiff for the purpose of maintaining good order in Castlerea Prison? If the answer to this is 'No', proceed to assess damages. Answer – Yes.
>
> Question 2:
>
> If the answer to (1) is 'Yes', in all the circumstances was the force used only such as was reasonably necessary and proportionate for that purpose? If the answer to this is 'No', proceed to assess damages. Answer – No.
>
> Question 3:
>
> Did the defendants fail to discharge their duty to provide safe and secure custody to the plaintiff and to treat the plaintiff with the appropriate dignity to which he is entitled:
>
> > (a) in failing to train prison officers to the degree necessary to avoid the occurrence of the incident on 29th September 2009? Answer – Yes
> >
> > (b) in allowing prison officers to apply C & R techniques otherwise than in a proper and reasonable fashion? Answer – No
> >
> > (c) in allowing the plaintiff to be removed from one section of the prison to another in a state of undress? Answer – No.
>
> Question 4:
>
> Was the plaintiff guilty of contributory negligence in obstructing or resisting prison officers? If the answer to this is 'No', proceed to assess damages without regard to any apportionment for contributory negligence. If the answer to this is 'Yes', apportion blame in percentage terms to: (a) the defendants; and (b) the plaintiff; and proceed to assess damages on the basis of such apportionment.
>
> Answer: (a) = State and Prison Officers, (b) Darius Savickis (a) = 5% (b) = 95%.
>
> Question 5
>
> Was the conduct of the defendants, up to and including at the trial of the action, inappropriate in all the circumstances such that aggravated damages should be awarded? If the answer to this is 'Yes', proceed to assess aggravated damages. Answer: No.

The appeal to this Court
14. Before this Court the plaintiff contended that these adverse jury findings were essentially perverse and unsupported by the evidence. The plaintiff further contends that the findings of contributory negligence have no basis in law and even the gross monetary award was far too low. For its part, the State defendants maintained that the jury findings and the jury award are justified on the evidence and should not be disturbed.

15. I now propose to consider in turn the various issues raised on appeal, following closely for this purpose the specific questions put to the jury and their answers to these questions, albeit not always necessarily in quite the same sequence as the jury answers themselves.

Was it necessary for the defendants to apply force to the plaintiff for the purpose of maintaining good order in Castlerea Prison?
16. While there is no doubt but that the incident escalated rapidly following the original altercation between the plaintiff and the prison officer, the jury were nonetheless entitled to conclude that the defendants were entitled to apply force to maintain order in

the prison. It may be that the original altercation came about by reason of a simple linguistic misunderstanding between the plaintiff and the prison officer, yet the fact remains that the prisoner did not obey a lawful direction given by the officer in question. Maintenance of good order is vital in prisons, since without it serious incidents can arise and can quickly get out of hand.

17. The jury were accordingly entitled to reach the conclusion that the initial administration of force by the prison officers (i.e., first head locking the plaintiff and then subjecting him to C & R techniques) was in principle justified.

Was the plaintiff assaulted by a prison officer?
18. The jury found in answer to the second question that the force used by the prison officers was not such as was necessary and proportionate in all the circumstances. While the jury was not asked in terms to make a finding as to whether the plaintiff had been assaulted, it may be observed that in her address to the jury, Dunne J. expressly remarked that if the jury considered that the plaintiff had been punched, this would have constituted the use of excessive force.

19. In these circumstances, I would interpret the jury's answer to the second question as a finding that the plaintiff had been assaulted. Quite apart from the fact that there was no appeal against this finding, in my view, the evidence clearly established that, regrettably, the plaintiff was struck some three to four times in quick succession by a particular prison officer while he was subjected a C & R restraint by other officers. This force was excessive, disproportionate and unjustified. The plaintiff must therefore succeed in respect of his claim for assault.

Damages for assault
20. The punches delivered to the plaintiff's chest in all likelihood accounted for the majority of the symptoms he was experiencing when admitted to Roscommon County Hospital. There he reported extreme tenderness over the rib cage. He underwent x- ray examination for suspected fractured ribs. While no displaced fractures were found, non displaced fractures could not be ruled out. The plaintiff also had traces of blood in his urine, injuries consistent with blunt trauma and a number of bruises were noted. He was prescribed pain killing medication and in the course of his evidence described feeling uncomfortable as a result of his injuries for several months. While the assault was a serious matter, it did not leave the plaintiff with long-term consequences and he recovered from his injuries after a number of months. His injuries were such that I consider an award of €10,000 would be appropriate compensation. If perchance I am incorrect as to causation and any part of the plaintiff's injuries which may have been inflicted by one or more kicks from a prison officer, it matters not, as any such action amounted to an unwarranted assault on the plaintiff for which he must be compensated.

Whether the award of damages for assault should be reduced by reason of contributory negligence
21. Although the jury found that the plaintiff was assaulted by a prisoner office, they nonetheless reduced the award by 95% on the ground of the contributory negligence on his part. This immediately raises the question of whether the law on contributory negligence is capable of applying to an intentional tort such as assault and, even if it is, whether the jury's attribution of fault to the plaintiff in this manner was justified.

22. I recognise immediately that, judged from the standpoint of principle, there is much to be said for the proposition that the doctrine of contributory negligence should have no application to an intentional tort, precisely because the latter species of tort is not itself negligence based. No one would, I think, suggest that a car thief should be able to set up a defence of contributory negligence even if the owner had foolishly left her keys in the car. Nor would the courts countenance a state of affairs where an award of damages to a tourist who was set upon, assaulted and robbed should be reduced on this account because he had unwisely walked late at night in an area of a city which he did not know and had thereby exposed himself to an unnecessary risk, even if such imprudent conduct could itself be properly described as negligent. As Lord Rodger pointed out in Standard *Chartered Bank v. Pakistan National Shipping Corporation* [2002] UKHL 43, [2003] 1 A.C. 959, 975 jurists as learned in the field of civil wrongs and private law as Pollock have consistently protested at the idea that the defence of contributory negligence should be available in the case of intentional torts.

23. Regardless of any question of principle, however, the matter is put beyond doubt by the opening lines of s. 34(1) of the Civil Liability Act 1961 ("the 1961 Act"):

> "Where, in any action brought by one person in respect of a wrong by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff….and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant…."

24. Section 2 of the 1961 Act provides that "wrong" is defined as meaning:-

> "…a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the act is intentional…."

25. The definition of "wrong" in s. 2 thus expressly extends to an intentional tort, so that in principle at least the rules regarding contributory negligence in s. 34(1) are not confined to negligence based civil wrongs.

26. It is true, of course, that the definition of "wrong" in s. 2 is not for all possible statutory purposes. Rather, the statutory definition is subject to the qualification that it is expressed to apply "save where the context otherwise requires". The context of the application of the contributory negligence rules contained in s. 34 of the 1961 Act is not, however, such that it would necessarily be inconsistent with the application of those rules if they were to apply in the case of intentional torts. In other words, as it is quite possible to apply the contributory negligence rules to intentional torts – even if in the past some venerable jurists thought it would be wrong in principle to do so – the context of s. 34 does not *require* the application of a different and more confined meaning to the word "wrong" such as would include intentional torts.

27. All of this means that for the purposes of the 1961 Act, the definition of "wrong" includes intentional torts and the contributory negligence rules apply to that species of wrong just as much as to the ordinary action in negligence. It follows, accordingly, that there may well be cases where the contributory negligence rules apply in the case of intentional torts.

28. What is clear, however, is that such cases are exceptional: as Elias J. said in *Bici v. Ministry of Defence* [2003] EWHC 786, it would be a "very rare case where damages should be reduced in circumstances where the defendant's conduct is intentional and unjustified." An example, perhaps, is the decision of Hutton J. in *Wasson v. Chief Constable of the Northern Ireland* [1987] N.I. 420. In that case Hutton J. found that the plaintiff had been assaulted by the wrongful firing of a plastic baton round, but he reduced the

damages by half for contributory negligence by reason of the fact that the plaintiff had voluntarily participated in a riot.

29. In the present case, nothing of the kind arises. It is true that the plaintiff was a convicted person, serving a prison sentence in respect of a very serious crime. It is also true that this entire incident initially came about as a result of the plaintiff refusing to comply with a lawful direction of a prison officer. But, as I have already stated, the plaintiff did not participate at all in the fracas and beyond endeavouring to cling on to the railing when first confronted by a prison officer, did not thereafter offer resistance when subdued by the prison officers. The plaintiff, moreover, was already subject to a C & R restraint when he was punched.

30. In these circumstances, there is simply no basis at all for the jury's finding that the plaintiff was guilty of contributory negligence in respect of the assault. It could not be suggested that the repeated punching of the plaintiff by a prison officer had any lawful justification. Quite the contrary: as Article 40.3.2 of the Constitution requires the State to protect the person, it followed that the State and its officials were under a particular duty to ensure the personal safety of detained persons such as the plaintiff. As Fennelly J. said in *Creighton v. Ireland* [2010] IESC 50:

> "A sentence of imprisonment deprives a person of his right to personal liberty. Costello J. explained in *Murray v Ireland* [1985] I.R. 532,542 that "[w]hen the State lawfully exercises its power to deprive a citizen of his constitutional right to liberty many consequences result, including the deprivation of liberty to exercise many other constitutionally protected rights, which prisoners must accept." Nonetheless, the prisoner may continue to exercise rights "which do not depend on the continuance of his personal liberty…." I would say that among these rights is the right to personal autonomy and bodily integrity. Thus, it is common case that the State owes a duty to take reasonable care of the safety of prisoners detained in its prisons for the service of sentences lawfully imposed on them by the courts. This does not amount, however, to a guarantee that a prisoner will not be injured…"

31. Measured, therefore, by reference to these standards, it could not be said that the plaintiff was guilty of contributory negligence in respect of this intentional assault. This Court can, of course, reverse a jury finding of contributory negligence where it is one that no reasonable jury could have arrived at or where, in the words of Irvine J. in *Buckley v. Mulligan* [2016] IECA 264 "such apportionment was grossly disproportionate having regard to the evidence". In the present case, the jury's verdict that the plaintiff was guilty of contributory negligence in respect of these assaults was unreasonable and grossly disproportionate in the light of the evidence.

32. In these circumstances, I would reverse the jury's finding of contributory negligence in its totality so far as these assaults were concerned.

Is the plaintiff entitled to exemplary damages for breach of constitutional rights in respect of the assault?
33. The jury found that the plaintiff was not entitled to aggravated damages by reason of the conduct of the State and the prison officers. (I will treat aggravated and exemplary damages as effectively synonymous, at least for the purposes of this judgment). In view of the established legal authorities, it was not open, in my view, for any reasonable jury to arrive this conclusion.

34. The leading authority on the question of the award of exemplary damages remains that of the Supreme Court in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305. That was a case which arose out of industrial action taken by the defendant trade union in a particular area of west Cork which had the effect of depriving certain primary school students of schooling for the best part of six months. The Supreme Court concluded that it was appropriate to award the plaintiffs exemplary damages by reason of the breach of their constitutional right to free primary education.

35. Finlay C.J. enunciated the test to be applied in cases of this kind ([1991] 2 I.R. 315, 321):

> "..this is an appropriate case in which the court should feel obliged to mark its disapproval of the conduct of the defendants to the extent of awarding exemplary damages against them for the following reasons:-
>
> (a) the right which was breached on this occasion was one expressly vested in a child by the Constitution;
>
> (b) the right which was breached was one which, having regard to the education and training of a child was of supreme and fundamental importance;
>
> (c) it must be presumed that the defendants were aware of that importance;
>
> (d) the breach of the constitutional right involved was an intended, as distinct from an inadvertent, consequence of the defendants' conduct."

36. Each of these considerations apply to the present case. First, while the assault upon the plaintiff was itself a tort, it also amounted to clear breach of the plaintiff's constitutional right in Article 40.3.2 to the protection of his person and to associated or cognate constitutional rights such as his right to bodily integrity. Second, the right which was breached was one which, having regard to the State's duties to persons in its custody, was of supreme and fundamental importance. Third, it may equally be presumed that the defendants were aware of the importance of that right in a prison setting. Fourth, the violation in question was intentional and not simply inadvertent.

37. There is also a further consideration. The trial in question lasted for six days in which the prison officers who were called to give evidence on the behalf of the State repeatedly denied that the plaintiff had been punched, even when the relevant CCTV evidence of the episode was shown to them. One prison officer went so far as to make the claim that that the prison officer who is clearly seen on the CCTV administering the punches was "putting his hand in two or three times to remove [the plaintiff's] clothing." It is, I regret to say, very difficult to avoid the conclusion that some of the witnesses tendered by the State told lies regarding this matter in the course of their evidence.

38. This is conduct which this Court should not tolerate for an instant. Accordingly, just as in Conway, this conduct calls for the award of exemplary damages to mark not only a grievous breach of the plaintiff's constitutional rights, but also to mark the strong disapproval by the Court of an endeavour by agents of the State (namely, the relevant prison officers who denied in evidence that there had been an assault on the plaintiff) to hide their complicity in this wrongful conduct in the face of overwhelming evidence to the contrary.

39. When awarding exemplary damages for breaches of constitutional rights, the High Court has in recent years tended to award a plaintiff 50% of the sum awarded as compensatory damages: see, *e.g.*, the judgment of Dunne J. in *Herrity v. Associated Newspapers*

Ltd. [2008] IEHC 249, [2009] 1 I.R. 326 and my own judgment in *Sullivan v. Boylan (No.2)* [2013] IEHC 104, [2013] 1 I.R. 510. While this is not a firm practice – still less a settled rule of law – it provides a useful yardstick for measuring any award of exemplary damages, especially where (as here) the award of compensatory damages is itself (relatively) modest.

40. In these circumstances, I would propose to award the plaintiff the sum of €5,000 by way of exemplary damages in respect of the assault.

The application of the C & R techniques
41. The question of the training in and the use of C & R techniques was addressed in parts (a) and (b) of question 3. While the jury found that the prison officers had been given inadequate training in these techniques, they also found that the prison officers had used these techniques in an appropriate fashion. While these C & R techniques are frequently deployed by law enforcement agencies to subdue violent or dangerous persons, the evidence led by the plaintiff suggested that these techniques are potentially dangerous, especially where inappropriate pressure is placed on the neck such that breathing is obstructed.

42. There was certainly evidence by which the jury could conclude that the training given to the prison officers in respect of these techniques was inadequate. Thus, for example, the then Deputy Governor Gavin acknowledged that while every prison officer should do an annual refresher course on C & R techniques, shortages of resources in 2009 meant that this did not occur. Many of the other prison officers were unclear as to when they had received a refresher course.

43. The jury also found that the restraint techniques had been appropriately deployed by the defendants in the present case. This was a verdict which they were entitled to reach on the evidence in view of the necessity to preserve good order within the prison.

44. To some extent, however, the verdicts are at least superficially inconsistent with each other. Without a view to resolving any such possible inconsistency, I would, however, interpret these different answers as saying, in effect, that while the defendants were entitled to use C & R techniques in the circumstances, the plaintiff suffered injury by reason of their deployment by prison officers who lacked the appropriate degree of training in these techniques.

45. The evidence of the plaintiff's expert on C & R techniques, Mr. Duggan, was to the effect that the use of these techniques without appropriate training is harmful and potentially dangerous. While Mr. Duggan was, of course, cross-examined, much of his evidence on this topic was not seriously challenged. No expert evidence on C & R techniques was given on behalf of the State.

46. Mr. Duggan pointed in his evidence to a number of examples where this had occurred in the present case. Thus, for example, he considered that the headlock applied by the first prison officer was "dangerous" and "involved force against the throat and neck". He also stated that the use of a "guillotine" hold on the prisoner by the prison officers presented a risk of positional asphyxia and unconsciousness in the manner in which he was pushed down a stairs with his head below his heart and diaphragm.

47. In these circumstances, the conclusion must be that the jury decided that the C & R techniques were applied in a negligent fashion by prison officers who lacked the appropriate training. As Mr. Duggan observed in evidence, this must have been extremely painful and, indeed, frightening for the plaintiff.

Damages for negligence in respect of the C & R techniques
48. It is difficult to assess the damages in an unusual case of this kind. The vast majority of the plaintiff's injuries must be ascribed to actions which are already covered by his claim for damages for assault. Nonetheless, it is perfectly clear from his oral evidence and from the CCTV footage viewed by this court that the plaintiff was entitled to separate compensation in respect of the defendant's negligent use of C & R techniques. The plaintiff's own evidence was that he was pushed to the ground. He found it difficult to breathe. His airway was compromised and he ensured what was undoubtedly a very frightening experience when his head and body were pushed off the landing and into the stairwell where his head was held beneath level of his body and his chest obviously crushed against the top step.

49. When asked to assess damages for the defendant's negligence in this regard, the jury awarded a sum of €4,450. I cannot say that was an inappropriate figure to compensate the plaintiff for any injuries sustained by him over and above those which were inflicted upon him by way of assault.

50. Where I part company with the jury is its apportionment in respect of liability of liability of 95%.

51. An appellate court is free to interfere with a finding of contributory negligence if satisfied that it is grossly disproportionate to the plaintiff's causative contribution to his injuries. While the plaintiff's conduct in refusing to obey the lawful instruction of a prison officer was the proximate cause of the application of the C & R techniques, I would reduce this award by 50% to reflect the plaintiff's contributory negligence. In these circumstances, I would propose that the gross award under this heading should be reduced to a net €2,225.

The removal of the plaintiff while naked from one cell to another
52. It is clear from the evidence that the jury were entitled to find that the State authorities were entitled to require that the plaintiff remove all his clothes as a suicide precaution prior to his removal to a padded cell following the first incident. They were further entitled to find that the prison officers were entitled to remove those clothes from the prisoner when he was left in the cell with a blanket.

53. Although the plaintiff denied that he was offered any clothing, the prison officers denied this: they said that he had refused to accept or wear the poncho style-garment which they offered him when he was in the cell. They also stated that he had refused to accept the blanket he was offered as a covering before he was taken from the cell. The jury were obviously entitled to believe the prison officers' accounts in this regard and in that respect their verdict cannot be disturbed by this Court.

54. It is clear from the CCTV recording that the plaintiff was taken out of the cell at about 4.25pm, which is some two hours after the first incident. The CCTV evidence shows that the plaintiff was taken from the cell and effectively frog-marched by prison officers while under a form of C & R restraint through the prison to another cell. The plaintiff was entirely naked, although he was surrounded by a troupe of perhaps twelve to fifteen prison officers, one of whom is seen carrying what appears to be either a grey blanket or poncho style garment as he walked behind a procession of the other officers. This entire incident lasted some three minutes.

55. It goes without saying that the removal of a prisoner entirely naked from one part of a prison to another is a very serious procedure which requires a very high degree of justification. The jury were, however, clearly entitled to prefer the accounts of the State's witnesses that the removal of the plaintiff to a cell in another part of the prison was necessary and that the plaintiff had

refused to wear the clothing or covering which had been offered to him.

56. The Preamble of the Constitution commits the State to upholding the "dignity…of the individual". As I have already pointed out, Article 40.3.2 requires the State to protect the "person" and the recognition of an unenumerated personal right to privacy has long been recognised since the major decisions in *McGee v. Attorney General* [1974] I.R. 287 and *Kennedy v. Ireland* [1987] I.R. 587. All of these rights are engaged by the circumstances of the present case and, in a sense, run into each other. To be taken forcibly while entirely naked for some three minutes through a prison is undignified and humiliating and the basic protection of personal privacy is obviously an element of the protection of the person in Article 40.3.2.

57. Not without hesitation, however, I believe that this Court is constrained by the findings of the jury to accept that the State authorities were entitled to remove the prisoner in a state of nakedness where his removal to another cell within the prison was deemed necessary and essential in the interests of good prison order and where he had already refused to accept the blanket and the clothing which had been offered to him. While it was, of course, nonetheless incumbent on the State authorities to take the greatest possible steps to minimise this otherwise gross intrusion into the prisoner's dignity, person and privacy, the jury have found in effect that there were no further steps which the authorities could usefully or appropriately have taken in this regard given the steadfast refusal by the plaintiff to accept the clothing or covering which he had been offered while in the cell prior to his transfer.

58. In this regard it must be observed that – to their credit - as they pointed out in evidence, the prison officers ensured that no female staff or other prisoners were in the area as the prisoner was so transferred. On the note of the evidence available to this Court there was no evidence, for example, that the prison officers ought as a matter of good practice to have attempted to cover the plaintiff in some way once he emerged from the cell. As Irvine J. has pointed out in the judgment she has just delivered, there was evidence from the prison officers that the plaintiff at that point was still not compliant with authority and it might have been difficult or even unsafe to have attempted to cover him in the face of his objections.

59. While the courts must, in the last resort, uphold the and vindicate the constitutional right of prisoners to the protection of their person and their personal dignity, they also must do so in a context where the difficulties and dangers regularly faced by prison officers who daily undertake a challenging task on behalf of the State are also acknowledged.

Conclusions
60. In summary, therefore, I would conclude as follows:

61. First, I would uphold the jury's conclusion that the State authorities were entitled to use appropriate force against the plaintiff once he had refused to obey a lawful direction from the prison officer to go outside.

62. Second, the jury's conclusion that excessive force was used in the circumstances must be understood as amounting to a finding that the plaintiff was unlawfully struck three or four times by a prison officer while he was subject to a C & R restraint. This finding is clearly supported by both the CCTV evidence and the relevant medical evidence.

63. Third, I consider that the jury's award of a gross figure of €4,450 damages in respect of this assault is manifestly inadequate. I would substitute an award of €10,000 in place of the jury's award.

64. Fourth, while it is clear that the principles of contributory negligence provided for in s. 34(1) of the 1961 Act can apply to an intentional tort such as assault, there was no basis at all for the jury's finding that there had been contributory negligence on the part of the plaintiff so far as the assault was concerned. I would accordingly set aside that finding of contributory negligence in its entirety.

65. Fifth, while the jury found that this was not a case which called for the award of exemplary damages so far as the assault was concerned, this conclusion cannot be sustained as a matter of law. This is rather a case which in the light of the principles articulated by the Supreme Court in *Conway* calls for the award of exemplary damages for breach of constitutional rights. I would therefore award the plaintiff some €5,000 as exemplary damages in respect of the assault.

66. Sixth, I would uphold the jury's finding that the staff had received inadequate training in the application of the C & R techniques. I would interpret that finding as a finding that while the use of the C & R techniques was appropriate these techniques had been applied in a negligent fashion.

67. Seventh, I consider that the jury's award of damages in respect of the negligent use of the C & R techniques under this heading cannot be disturbed. I would, however, reduce that gross award by some 50% in view of the contributory negligence of the plaintiff, since it was his refusal to obey a lawful direction from the prison officer which was the proximate cause of the application of the C & R techniques in the first place. The jury's finding of 95% contributory negligence is, however, disproportionate and cannot be sustained. I would accordingly substitute therefore a figure of 50% contributory negligence in respect of the negligence award, so that the gross sum of €4,450 should be reduced to a sum of €2,225.

68. Eight, I would uphold the findings made by the jury having regard to the special circumstances of this case that the transfer of the prisoner from one cell to another while entirely naked was appropriate and justified. There was sufficient evidence upon which the jury could have made these findings and, in these circumstances, this Court cannot interfere.

69. It follows, therefore, that I would allow the appeal to the extent indicated in this judgment and I would accordingly award the plaintiff the total sum of €17,225 in damages.