

Neutral Citation No. [2013] NIQB 141

Ref: **HIG9100**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **19/12/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

WESLEY SMYLIE

Plaintiff;

-and-

**THE GOVERNOR OF HER MAJESTY'S
PRISON MAGILLIGAN**

Defendant.

HIGGINS LJ

[1] On 22 May 2008 the plaintiff was a prisoner in H2 Wing of Her Majesty's Prison Magilligan (Magilligan) having pleaded guilty and been sentenced for an offence contrary to section 18 of the Offences against the Person Act 1861. Around 8pm just before 'lock up' he was standing in his cell with the door open during a period of free association, when another prisoner named Smith entered his cell and said 'what's happening' and then reached behind him and slashed the plaintiff's face with a bladed object. The plaintiff left his cell and raised the alarm. He was in a state of shock. Several prison officers came to his assistance. They inquired who had caused the injury. Initially the plaintiff was reluctant to say but eventually named Smith. The plaintiff was taken to Altnagelvin Hospital where it was noted that he had sustained a deep 7cm horizontal laceration which extended from the left side of the chin to the left side of the angle of the mandible. Seventeen stitches were inserted in the wound and he was detained overnight and then returned to the prison where ten days later the stitches were removed. He has been left with a scar which is conspicuous and disfiguring.

[2] It was the plaintiff's evidence that he first encountered Smith when he was in Her Majesty's Prison Maghaberry (Maghaberry) some six or seven months earlier. About two months after he arrived at Maghaberry he was transferred to Magilligan.

Smith was also in H2 Magilligan at that time. The plaintiff stated that because of Smith's presence he was not comfortable there. He said that the day after his arrival in Magilligan he voiced his concerns to a Senior Officer. He described Smith as someone who was always agitating and wanting to start something and he learnt to stay away from him as he knew he was 'trouble'. He described him as confrontational verbally not just with himself but with others. A few times he felt that Smith was going to assault him but then Smith backed down. He said Smith was on a different landing and that he only saw him when they were allowed exercise a few hours per day, but that he saw him on the first day he was in Magilligan. However there had been no other confrontations between January and May 2008. He had no idea why Smith had attacked him. On his return to prison from the hospital he was placed on the opposite landing in H2 Wing and Smith was in the cell opposite and he could hear him shouting abuse at him, boasting about what he had done and what he would do to the plaintiff's sister's face.

[3] The assault on the plaintiff was investigated by the police and the prison authorities. Following the assault Smith was removed from H2 to the Special Supervision Unit. Later the cell he occupied was searched and a razor-type blade was found in his bedding. This was rectangular in shape measuring 7.3cms by 1.7cms. 'Made in the USA' was stamped on one side and the blade appeared to have been sharpened. One end was broken and there were nicks present along the cutting edge. It was examined for the presence of blood and none was found. Smith was interviewed by the police. He said he had known the plaintiff for a few years and that he had met him in Maghaberry. He denied assaulting the plaintiff stating that it was not him who did it but that he had walked into the Plaintiff's cell to ask him for a DVD. He noticed the injury sustained by the plaintiff. He tried to talk to the plaintiff who was shouting and then he walked back out again. He was shown the blade found in his cell and identified it as his and that he used it for 'cutting dope' on the landing. Subsequently Smith pleaded guilty at Londonderry Crown Court and was sentenced.

[4] The plaintiff made a statement to the police the following day in which he described the assault and named Smith as the assailant. In that statement he said - I have no idea why Joe Smith attacked me, we passed ourselves when we met and during the five months on this wing I've had no problems with anyone. I never put a finger on Joe Smith.

[5] In this statement the plaintiff made no mention of any of the problems he said he had encountered with Smith earlier. When cross-examined about this he said that months had passed without incident. He said that the concerns he had about Smith came back to him a few days later when thinking about why he had been attacked. The day after the assault he was exhausted and shocked by the incident. He consulted his solicitor about a week later who, on 30 May 2008, wrote the following letter of claim.

“We represent the above named who instructs that he suffered severe injuries as a result of your negligence and breach of statutory duty on the date, time and place indicated above.

Our client instructs that before he was placed onto this wing he expressed serious concerns about being on the same wing as Mr Smyth as there had been a previous history of Mr Smyth threatening him when they were both on remand at H.M.P. Maghaberry. Mr Smylie expressed his deepest concerns to the S.O. in the committal wing, however, was told that he would just have to deal with it.

It will be our contention that the prison has failed in its duty of care to Mr Smylie, as a serious assault on him by Mr Smyth was entirely foreseeable. In light of this Mr Smylie should have been placed onto one of the other seven landings which were available thus minimising any contact between Mr Smyth and himself.

We trust you will pass this correspondence onto your insurers with whom we would be pleased to discuss the matter further.”

[6] The plaintiff said that this letter was wrong to suggest that he expressed his concerns about Smith to a Senior Officer on his committal to prison. He maintained that it was the day after he was placed in the wing in which the assault took place. At the time of his committal on 26 December 2006 he was asked if he felt at risk or under threat or if he had any concerns about his safety while in custody and replied ‘no’. The plaintiff was interviewed again by police on 8 June 2010 and made a second statement. In this he recounted the incident again and described his medical treatment thereafter. He referred to the abuse shouted by Smith when he was in the cell opposite and stated that he had to endure this for approximately one week. He then recounted the effect the assault had on him until he was released from prison in June 2009 and thereafter. In this statement he was also critical of the steps taken by the prison authorities to move him to another wing following the assault. He did not mention that he had expressed concerns about Smith to the prison authorities prior to the assault.

[7] Smith was born on 14 July 1984 and was twenty three years of age in May 2007. To that date he had, inter alia, convictions for burglary, dangerous driving, dangerous driving causing grievously bodily harm, assault on police, hijacking and robbery. The conviction for robbery occurred at Belfast Crown Court on

21 November 2007 when he was sentenced to a custody probation order comprising four years imprisonment and two years' probation from which sentence he was released on 6 January 2009. He was regarded by the prison authorities as a violent person, a drug user and as someone who assaulted prison staff. His prison record demonstrated that he spent periods of time in SSU (solitary confinement). He was so confined, inter, alia between 28 April and 3 May 2008, between 22 May and 23 June 2008 and between August and December 2008. A search of his cell on 7 April 2008 revealed a razor blade broken in two pieces and an improvised smoking device. An amended Statement of Claim was served without objection on 19 November 2012. The Particulars of Negligence and Breach of Statutory Duty were pleaded in the following terms.

“PARTICULARS OF NEGLIGENCE OF THE
DEFENDANT HIS SERVANTS AND AGENTS

- (a) Allowing the Plaintiff to be in and about an area, which was dangerous and unsafe in the circumstances.
- (b) Failing to have any or adequate to the concerns expressed by the Plaintiff that he would be assaulted.
- (c) Failing to arrange for the Plaintiff to be detained in a wing other than the H2 wing.
- (d) Failing to supervise the H2 wing adequate or at all.
- (e) Failing to maintain any or adequate control over inmates.
- (f) Failing to carry out any or adequate searches of inmates.
- (g) Failing to take any or adequate steps to reduce the risk of assault on the Plaintiff after being made aware that the Plaintiff was likely to be attacked.
- (h) Allowing and permitted an inmate to have a knife which could be used in an assault.
- (i) Allowing and permitted the Plaintiff to be seriously assaulted.

- (j) Failing to exercise any or adequate control of H2 wing.
- (k) Failing to have an adequate amount of prison officers to supervise and maintain control of H2 wing.
- (l) Failing to take any or adequate risk assessments in relation to the danger of inmates being attacked by other inmates.
- (m) Failing to have any or adequate regard for the safety of the Plaintiff.
- (n) Failing to provide the Plaintiff with any or adequate warnings of the dangers that were present.
- (o) Causing or permitted the Plaintiff to sustain personal injuries, loss and damage.
- (p) Failing to carry out any or adequate searches of prisoners cells, including searches of beds, in order to check whether any weapons were hidden in the cells.
- (q) Failing to carry out any or adequate searches of prisoners when they left the workshops.
- (r) Failing to have any or adequate metal detectors to search prisoners for prohibited items and concealed weapons when they were leaving the workshop.

PARTICULARS OF BREACH OF STATUTORY DUTY OF THE DEFENDANT, HIS SERVANTS AND AGENTS.

The Plaintiff repeats the foregoing particulars and submits that the same constitute a breach by the Defendant, his servants and agents of Rule 116(2) of The Prison and Young Offenders Centre Rules (NI) 1995 for failing to be responsible for the safe custody of the Plaintiff whilst he was in custody and Rule

116(3) of The Prison and Young Offenders Centre Rules (NI) 1995 for failing to be responsible for the safeguarding of the Plaintiff's rights and for the maintenance of discipline in the prison."

[8] At the conclusion of the hearing the claim for breach of statutory duty was not pursued and the case proceeded on negligence alone. While the Particulars of Negligence are widely drawn the Plaintiff's case was in reality two fold. Firstly that he had made the prison authorities aware of his concerns about Smith and they had failed to react to protect him and secondly that the systems in place to prevent prisoners from acquiring or bringing bladed instruments on to the wing from the workshops, were inadequate.

[9] Principal Officer Savage was at the material time the Senior Officer in H2 Magilligan. He said he had no recollection of the plaintiff ever voicing his concerns about Smith to him and that he had never raised concerns with him. Concerns of such a nature are referred to the Security Department where a database of records relating to prisoners between whom there may be issues are kept. Where a prisoner may be a threat to another prisoner he is flagged up as an 'enemy'. Governor Taylor was the Head of Operations and Security at Magilligan in May 2008. He said that there was no such listing of any 'enemies' relating to the plaintiff. If there were they would be passed to him. If there was information about an 'enemy' then the prisoners would be kept apart. On committal, in addition to the interview with the prisoner, the prison authorities obtain information from the police about risks to or from a prisoner. 'Markers' are kept on prisoners who are known to be violent, drug users or have assaulted prison staff. Governor Taylor was not aware of any circumstances which would have made the plaintiff vulnerable or at risk from Smith. Prisoners are subject to random searches. In addition cells are searched once a month and records maintained of these searches. Furthermore when moving between wings or to the gym, workshops or to the visits area, prisoners are searched going to and from these locations. In the workshops prisoners have access to various tools including Stanley knives. The plaintiff contended that he was injured by the blade of such a tool. On leaving a workshop to return to his wing a prisoner is subjected to a 'rub down' search. If this reveals something then a full body search is carried out. This takes about ten minutes to complete but because of its nature it must take place out of sight of other prisoners and staff. There are no facilities for such a search in the workshops of which there are six. Prisoners also have access to razor blades for shaving daily and can request to have certain tools within their cells during 'association' when they are supervised by Wing staff. At the end of association the tools are handed back and a record maintained. Evidence was given about the finding of various items in different parts of the prison over the twelve month period from January to December 2007. Of 350 items found only three were classified as weapons - a saw blade recovered in the ablutions, a Stanley knife type blade with 'Made in USA' on it found behind the servery and a pair of broken scissors. Several four inch nails were also found. Evidence was also given of incidents between

prisoners during the period May 2007 to May 2008. Of 14 incidents some were fights between prisoners, others assaults but in only one was a weapon involved and this was the attack on the plaintiff.

[10] The attack on the plaintiff was investigated by the Health and Safety Manager, Governor McMullan. His report dated 19 June 2008 indicated that there had been similar 'accidents' within the previous two years and contained the following information and recommendation -

"It is difficult to legislate for this type of attack. Regular searches are being carried out within the prison. Prisoners may conceal illegal items such as a knife and sometimes rub down searches may not detect this item. The alleged incident took place in C5683 Smylie cell (sic), where we have no camera coverage the only coverage we have is on the landing. At present the alleged assault is being investigated by the PSNI and we await their findings. I would recommend due to the increase in prohibited items that 4 hand held metal detectors (sic) be purchased for searches on inmates when they leave the workshops, this may act as a deterrent."

[11] No evidence was produced by the defendant about the outcomes of searches in the prison during the period from December 2007 to May 2008 nor was any specific evidence given about the 'increase in prohibited items' referred to in the above report nor were local (wing) security documents provided. Nor was Governor McMullan called as a witness. Apparently he has retired. It was submitted on behalf of the plaintiff that an adverse inference should be drawn from these omissions in particular that the defendant had failed to carry out an assessment of the risk to prisoners and to the plaintiff.

[12] It was submitted that the evidence of the plaintiff that he had alerted the prison authorities to the threat posed by Smith to him should be preferred as Governor Savage merely stated that he had no recollection of such. The steps taken by the defendant in light of this complaint were inadequate. It was clear that the weapon used to injure the plaintiff was a bladed item removed from a workshop. Metal detectors of the type referred to by Governor McMullan should have been in use prior to the attack on the plaintiff. The Senior Prison Officers who gave evidence did not consider such metal detectors, which had been considered, would provide an answer to the removal of items from the workshops. They are activated by all types of metal objects and if something was detected the prisoner would have to be subjected to a full body search and the frequency of such searches would bring the prison 'to a standstill'. In addition the prison authorities were aware of the problem

of items being removed from the workshops and no effective procedures were in place to deal with this problem.

[13] On behalf of the defendant it was submitted that there was no evidence that Smith was a danger to the plaintiff and the authorities had no reason to suppose that such an attack was likely or possible. The attack was a 'one-off' incident. The extent of supervision on the wing was not in dispute. The systems employed by the defendant were adequate in the circumstances.

[14] The authorities charged with the responsibility for running prisons owe a duty of care for the safety of all who are within the prison. This is an onerous duty given the character of many of those incarcerated within the prison system. The duty is to take reasonable care for the safety of those, including prisoners, who are within the prison – see Ellis v Home Office 1953 2 QB 135. Actions will lie where a prisoner sustains injury as a result of the negligence of prison staff or for injury sustained at the hand of another prisoner due to negligent supervision, the more so where the authorities are aware that a particular prisoner is at risk from another prisoner – see Steele v NIO (1988 unreported decision of Kelly LJ). To succeed a plaintiff must establish a defined breach of duty on the part of the authorities and that this breach was the cause of the injury sustained.

[15] If there was a history of incidents between the plaintiff and Smith it is surprising that the plaintiff should say in his statement to the police that he had no idea why Smith had attacked him. It is equally surprising that he omitted to mention in the same statement that he had warned the prison authorities about the danger Smith posed to him on his arrival in prison. It is equally surprising that if the plaintiff had so warned the prison authorities that there was no record of him having any 'enemies', which I am satisfied there would have been had he reported it to the prison authorities as he stated. Therefore I am not persuaded that the prison authorities were aware of any danger posed to the plaintiff by Smith before the incident in question occurred. This attack had all the hallmarks of a spontaneous attack on the plaintiff. If there were issues between the plaintiff and Smith, the prison authorities were not aware of them. Nor am I persuaded that the situation required the introduction of hand-held metal detectors. I do not think the number of incidents would have justified their use and the consequences of their deployment would have been counterproductive, as the senior officers deposed.

[16] The main issue in this case was whether the systems employed by the prison authorities were sufficient, in the circumstances known to them or which should have been known to them, to provide reasonable care for the safety of prisoners within the prison. Those in charge of prisons and prisoners have a difficult task. They have to maintain a secure location in which to incarcerate prisoners who do not wish to be there, many of whom may be violent or have violent tendencies and at the same time provide a regime which engages the time and interest of the prisoners and

contributes to their rehabilitation. This is no easy task involving as it does fine judgments balancing different difficult issues all within a secure regime.

[17] It is probable that the item used to injure the plaintiff came from a workshop. I doubt if it was the item found in Smith's cell. There was no blood on it and it is extremely unlikely he would have concealed it in his cell thereafter. If it came from a workshop it was not taken out by Smith as he did not attend a workshop. Workshops are an indispensable part of the prison regime and they will necessarily involve access to potentially dangerous items. A system to prevent removal of such items from the workshops is essential, but it must fit in with the rest of the prison regime. I am satisfied that the system for rub-down searches after workshop access together with periodic and random searches of cells and prisoners was a reasonable system to employ in the circumstances. The failure to produce security documents and the absence of witnesses do not improve the case made on behalf of the plaintiff. The real issue in this case was whether the authorities were aware of an enmity between Smith and the plaintiff such that chance contact between them should have been prevented or greatly reduced or closely supervised. The plaintiff has failed to establish such a case and the claim for damages must therefore be dismissed.