

**THE HIGH COURT**

**[2024] IEHC 715**

**Record No. 2016 802P**

**Between**

**TREVOR KNOWLES**

**Plaintiff**

**and**

**THE MINISTER FOR JUSTICE AND EQUALITY, THE GOVERNOR OF MOUNTJOY  
PRISON AND THE IRISH PRISON SERVICE**

**Defendants**

**Judgment of Mr. Justice Conor Dignam delivered on the 18<sup>th</sup> day of December 2024**

**Introduction**

**1.** The plaintiff's claim arises from injuries which he suffered when he was assaulted by another prisoner whilst an inmate in Mountjoy Prison. The plaintiff claims that he was punched in the face, causing him to suffer a laceration to his upper lip, and that he fell backwards against an old-fashioned fluted radiator, causing two lacerations to the back of his head. These injuries, whilst denied in the Defence, are not really disputed by the defendants. They put the plaintiff on proof of his narrative of the incident and also deny any liability, primarily on the basis that the assault was sudden and unprovoked and was not reasonably foreseeable to the defendants.

**Applicable Principles**

**2.** The applicable general principles are well-established and there was little disagreement between the parties. I was referred to an extract from McDermott, *Prison Law* (2000, Round Hall) (paragraphs 7.18 – 7.31), *Muldoon v Ireland* [1988] *ILRM* 367, *Bates v Minister for Justice & Ors* [1998] *2 IR* 81, *Casey v The Governor of Midlands Prison & Ors* [2009] *IEHC* 466, and *Creighton v Ireland & Ors* [2010] *IESC* 50. It suffices to refer to the summary provided by Irvine J in *Casey* and to certain passages from Fennelly J's judgment in *Creighton*.

**3.** Irvine J said in *Casey*:

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

- (i) Prison authorities are required to take all reasonable steps and reasonable care not to expose prisoners to a risk of damage or injury, but the law does not expect the authorities to guarantee that prisoners do not suffer injury during the course of their imprisonment. (*Muldoon v Ireland* [1988] ILRM 367)
- (ii) The duty of care owed by prison authorities to its prisoners must be tested in the context of the balance to be struck between the need to preserve security and safety on the one hand and their obligation to recognise the constitutional rights of prisoners and their dignity as human beings on the other hand. (*Bates v Minister for Justice & Ors* [1998] 2 IR 81)
- (iii) In determining what is an appropriate standard of care, regard should be had to the hardship that any proposed system might impose on prisoners and whether any such system would place an excessive burden upon the prison authorities (*Bates v Minister for Justice & Ors* [1998] 2 IR 81)
- (iv) Cases of assault upon prisoners whilst in custody in general are likely to be decided upon by reference to what should have been anticipated by their custodians. (*Bates v Minister for Justice & Ors* [1998] 2 IR 81)"

**4.** In *Creighton*, Fennelly J said:

"4. A sentence of imprisonment deprives a person of his right to personal liberty. Costello J explained in *Murray v Ireland* [1985] IR 532 at 542 that "[w]hen the State lawfully exercises its power to deprive a citizen of his constitutional rights 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. (see *Muldoon v Ireland* [1988] ILRM 367 approved by this Court in *Bates v Minister for Justice and others* [1998]). Prisons may, as an inevitable consequence of the character of persons detained, be dangerous places. Prisoners are entitled to expect that the authorities will take reasonable care to protect them from attack by fellow prisoners. What is reasonable will, as always, depend on the circumstances. As the cases recognise, prison authorities may have to tread a delicate line between the achievement of the objective of protecting the safety of prisoners and the risks of adopting unduly repressive

and inhumane measures. They must balance the protective function and possible demand for intrusive searches against the need to permit prisoners an appropriate degree of freedom of movement and human dignity. Counsel for the plaintiff cited the following helpful passage from the judgment of Singleton LJ in *Ellis v Home Office* [1953] 2 All ER 149 at 154:

*"The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, and that includes those who are within against their wish or will, of whom the plaintiff was one. If it is proved that supervision is lacking, and that accused persons have access to instruments, and that an incident occurs of a kind such as might be anticipated, I think it might well be said that those who are responsible for the good government of the prison have failed to take reasonable care for the safety of those under their care."*

### **The Evidence**

**5.** Evidence was given by the plaintiff himself and by Governor Martin Galgey and Prison Officer Kit Mahon on behalf of the defendants. I have considered all of this evidence. It is not necessary to recite it in its entirety.

**6.** The plaintiff's account, as stated in his direct evidence is, in summary, as follows.

**7.** On the 14<sup>th</sup> June 2013, he was working in the kitchen. There were approximately 15-20 other prisoners working there alongside a number of prison officers. Assignment to the kitchen is a privileged position and only prisoners who satisfy certain criteria will be assigned there, including that the prisoner is of good behaviour. He said that there was a prisoners' toilet in the kitchen area and that prisoners were allowed to smoke in the toilet and in fact there were three chairs in the toilet. He said that there had previously been designated cigarette breaks in a different area but that had changed and they were allowed smoke in the toilet. There was no CCTV or in-person supervision in the toilet.

**8.** On the day in question, he was sitting down smoking in the toilet along with at least three other prisoners. Another prisoner kicked the door open, entered the toilet and punched the plaintiff in the mouth/side of the face, knocking him back in the chair and dazing him. The plaintiff came forward and then stood up and struggled with this prisoner to avoid being hit again. He said that he was dazed. He said that an alarm was activated and very quickly a large number of prison officers came from the landing outside the kitchen and burst into the toilet and this caused him to fall backwards against the radiator. He said that some of the other prisoners ran out of the toilet and some stayed. He was unable to say if any of them helped him. He said that he was frog-marched out and did not even get into the medical centre. He describes himself as oozing blood and passing out.

**9.** He said in his evidence that he was not seen to by the medical staff and was only brought to the Mater Hospital a number of hours later.

**10.** He said this was an unprovoked attack and that there was no issue between himself and the other prisoner, who I will refer to as Mr. AB.

**11.** The plaintiff stated in evidence that Mr. AB had been disciplined with what is called a P19 the previous day (Thursday) for an incident that happened on Wednesday. It is not disputed that Mr. AB was sanctioned. He received a caution. The plaintiff said that he had witnessed this earlier incident. He said that Mr. AB had tried to attack a prison officer by trying to jump over a counter and was restrained and that he threatened the life of the officer. His evidence was that it was his belief that Mr. AB should not have been working in the kitchen that day because he had been disciplined. He said that when Mr. AB attended for work in the kitchen it was a shock to everyone. Mr. AB was boasting about being in the kitchen when he was suspended. The plaintiff's evidence was also that as a result of being disciplined Mr. AB was not permitted to go to a funeral that morning for which he had previously been given leave. He said that Mr. AB was in a rage or temper at being disciplined and at being refused leave to go to the funeral and that is why he assaulted someone because he was lashing out. The plaintiff's evidence was that the kitchen is normally a calm place but there was a different atmosphere there that day.

**12.** He said that in the aftermath of the incident a senior prison officer came to his cell and told him that the way they were going to deal with the incident was to lock in the other prisoners and then let the plaintiff and Mr. AB out onto the landing. The plaintiff said that it was so he and Mr. AB could fight it out ('fisticuffs', or so they could "go at it", as the plaintiff described it). He also said in his evidence that the prison officer said it was so that he and Mr. AB could talk it out. In cross-examination he said that they did speak, and that Mr. AB implicitly threatened him. He described the senior prison officer as a "kind man".

**13.** Under cross-examination, the plaintiff said that the incident in the toilet was very brief and went on for a few seconds. He said that he was dazed and slipping in and out of consciousness even while the struggle was going on because of the initial punch to the face. He initially said that the force of the large number of prison officers coming in caused him to fall against the radiator. However, when it was put to him that only one prison officer came in (Mr. Mahon) and that he found the plaintiff, the plaintiff said that he does not know what caused him to fall against the radiator, that he does not remember anything, and that his account is based on what others told him. He said that he had no idea whether other prisoners broke up the struggle.

**14.** It was also put to him that, contrary to what he said in direct evidence, he was in fact seen by medical personnel. He said that this happened outside the medical area and that he was not examined. A medical record was shown to him which stated "*Claims to have received blows to head & face following an altercation in kitchen. Deep laceration to upper lip, approx.*

*2 inches long. 2 x lacerations to back of head, approx. 3 inches long...wounds cleaned & for transfer to A & E"* and he accepted that he was seen but maintained that he was not examined.

**15.** In relation to the incident for which Mr. AB was disciplined the plaintiff said that Mr. AB was aggressive towards the prison officer and "went for him" in a very aggressive manner. When asked about his earlier evidence that Mr. AB tried to get over the counter and had to be restrained, he incorrectly said that he had not said that Mr. AB had tried to get over the counter and explained that Mr. AB threatened the officer over the counter though he later referred to the prison officer being subjected to physical abuse and that Mr. AB had threatened the prison officer's life. The contents of the P19 report form were put to him.

**16.** Under cross-examination he described Mr. AB as boasting or being full of bravado at being in the kitchen when he should have been suspended but explained that he was angry at not being permitted out for a funeral. However, crucially, the plaintiff said that he had no conversations or interactions with Mr. AB in the kitchen and that he did not hear Mr. AB saying anything and that this is what he was told by other prisoners. He said it was being talked about in the kitchen.

**17.** It was put to him that the system in relation to smoking was that there were designated smoking breaks in the outside loading area or outdoors. He agreed that had been the case at one stage but said that it had changed to the prisoners being permitted to smoke in the toilets. He did not accept that when prisoners were caught smoking in the toilets they were punished. He strongly disagreed that there were no chairs in the toilet and said that prisoners also used it to get changed. He agreed that smoking should not be allowed near a food preparation area.

**18.** Mr. Galgey gave evidence on behalf of the defendants. He is currently Governor of the Midlands Prison and at the relevant time was Assistant Chief Officer and Acting Chief Officer of Mountjoy Prison. He gave general evidence about the disciplinary regime in prisons including the P19 process. He confirmed that a caution is the lowest form of sanction. He said that the mere fact that someone got a caution would not in itself lead to removal from the kitchen. He was referred to the P19 documentation relating to Mr. AB and said that the type of conduct described in the report, i.e., verbal abuse, is not an unusual offence in a prison. Governor Galgey also explained that the record showed that this was Mr. AB's first P19. I understand that at that stage Mr. AB had been a prisoner for approximately six months. He rejected any possibility of a prison officer allowing two prisoners out onto a landing to fight out their differences. He did explain that on occasions the prison staff would go to both prisoners who had been involved in an incident and ask if it was over and, if they confirmed that it was, would bring them together to shake hands and put it behind them.

**19.** In cross-examination, he disagreed that the sanction of a caution was inadequate and that letting Mr. AB back to the kitchen after received a P19 sanction was a "rash idea". He explained that the governor and the ACOs involved were extremely experienced. He said that

other prisoners in the kitchen would have P19s. He also explained that he did not believe there was any significance to the P19 stating "caution and warning" and explained that when he issues a caution in respect of behaviour he would also advise the prisoner in relation to his behaviour and felt that this is what the note was referring to. He agreed that it is bad practice to allow smoking in the toilet.

**20.** Mr. Galgey stated that he had examined the prison records over lunch after the plaintiff had given evidence about Mr. AB being angry about not being permitted to go to a funeral after previously being given leave and that there was no record of Mr. AB having sought or being granted such leave for that day. There was an objection to this evidence and I deal with it below.

**21.** Evidence was also given by Mr. Kit Mahon on behalf of the defendants. Mr. Mahon is a prison officer who works in the kitchen. He has worked there for twenty-five years. At the specific time of the incident, he was the officer-in-charge because other officers were on their break. He described the kitchen as being a harmonious environment and that there had never previously been an assault. He went on to say that a P19 was not necessarily a reason for a prisoner to lose his job in the kitchen, that it would depend on the circumstances. There would be between fifteen and twenty prisoners working there and five or six prison officers. He explained that in the prison recreation area there would be between thirty and fifty prisoners and two prison officers.

**22.** Mr. Mahon explained the way the kitchen worked and said that between 1 and 2pm was a quiet time and they used it to bring rubbish from the morning out to the bins area outside. This was taken as an opportunity to allow the prisoners to take a cigarette break and they would smoke either outdoors or under the covered loading bay. He said this was the official smoking break. He said that smoking was not allowed in the toilets and that smoking could not be permitted near a food preparation area under legislation. He did make clear that he was not saying that prisoners never smoked in the toilet. He was clear that there were no chairs in the toilet generally or on the day in question and that chairs would not be tolerated in a toilet.

**23.** His evidence was that Mr. AB had worked in the kitchen for approximately five months prior to this incident and there had been absolutely no issues.

**24.** In relation to the morning in question he said that there was nothing out of the ordinary and that he had no cause for concern. Mr. AB was not agitated. He said that if a prisoner is agitated, he would speak to him and, if necessary, suggest that he take time out. He had no reason to speak to Mr. AB that morning. He did not know anything about the claim that Mr. AB had been denied leave to go to a funeral that morning.

**25.** He said that he became aware that something had happened in the toilet area. He could not say exactly how he became aware but that it was probably movement of people. He said

that you are constantly monitoring the area so you would become aware of something after happening. He went to the toilet area. He crossed paths with Mr. AB just outside the toilet area. He described him on his Incident Report Form as being heightened. He then went into the toilet and found the plaintiff with blood on him. He then brought Mr. AB back to his cell and returned, spoke to the plaintiff, and then brought him out to the landing where a nurse saw him. That was the end of his involvement and he returned to the kitchen. He said that an alarm was not activated and that prison officers did not come in from the landing. He explained that for them to do so would require the gates to the kitchen to be opened and it would take a few minutes.

**26.** Under cross-examination, it was put to Mr. Mahon that he would have been too busy to notice agitation on the part of Mr. AB. He did not accept this and also said that he did not see anything to cause concern and that none of his colleagues brought anything to his attention. He confirmed that he was aware that Mr. AB had received a P19 the previous day. When it was put to him that this should have meant that the staff were on special watch, he repeated that there was no concern and no escalation. He also said that the mere fact that someone was involved in an incident a few days earlier does not mean that he would be agitated and that everyone moves on. It was put to him that it was clear that Mr. AB had not moved on as he was riled up and assaulted someone. Mr. Mahon said there was nothing of concern on the morning to suggest that.

**27.** Dealing with the system for smoking, he said that smoking was not permitted in the toilet, but he accepted that it did sometimes happen. He said that if he caught a prisoner smoking there, he would threaten them with being sacked from the kitchen.

**28.** He said that there was no CCTV in the kitchen area.

### **Discussion and Conclusion**

**29.** Against that backdrop, the plaintiff's case was stated by Senior Counsel in the following terms. He correctly accepted that the duty of care on the defendants is the duty to take reasonable care but emphasised that this must be assessed in the context of the environment and therefore there must be vigilance and supervision that does not apply outside of a prison. He posed the test as being whether the defendants, in that context, took all reasonable steps to prevent the type of injury that occurred and whether the injury could have been reasonably foreseeable or reasonably anticipated. I accept those propositions. He highlighted the following important facts and issues:

- (i) the evidence of the defendants that the fact that a prisoner receives a caution does not necessarily mean that anything else needs to be done (the defendants did not go so far as to say that it did not necessarily mean that

anything else needs to be done). Senior Counsel submitted that this was a dangerous policy and that something further should be done, including:

- (a) there should at least be added vigilance to ensure that the underlying disciplinary incident or the imposition of the caution does not lead to further action;
  - (b) there should be a risk assessment;
  - (c) there should have been a pause in Mr. AB's privileges in the kitchen.
- (ii) even if the policy of not moving Mr. AB from the kitchen was appropriate there should at least have been some consideration given to whether he should be temporarily denied his assignment to the kitchen to allow him to cool off;
  - (iii) the evidence of Prison Officer Mahon that all was normal and calm in the kitchen prior to the incident should be treated with caution because there is no other possible explanation for Mr. AB's actions. If the Court accepts the evidence in relation to Mr. AB being denied leave to attend the funeral that would be a catalyst for his behaviour;
  - (iv) it was a breach of duty for the toilets not to be supervised in circumstances where the prisoners were allowed use them for smoking.

**30.** The plaintiff's case was very persuasively stated by Senior Counsel, but I am not satisfied that the plaintiff has discharged the burden of proof for the following reasons.

**31.** I am satisfied that the plaintiff was assaulted and that the assault was sudden (from the perspective of the plaintiff, i.e., there had been no lead up between the plaintiff and Mr. AB) and unprovoked. I do so because, while the defendants put the plaintiff on proof and tested his narrative in cross-examination, the sudden and unprovoked nature of the assault was not seriously contested. Indeed, it is expressly pleaded in the Defence that if the incident occurred, which is denied, it was a sudden, unprovoked attack and that it occurred in circumstances which the defendants could not reasonably foresee. Furthermore, it seems that Mr. AB was sanctioned in respect of the incident and the plaintiff was not, which tends to support the plaintiff's claim that it was an unprovoked assault. There is, of course, a dispute as to whether, from the prison's perspective, it was "sudden" because the plaintiff claims that there signs that something might happen and the prison should have foreseen an incident of this nature.



**32.** However, I am not satisfied that the plaintiff's recollection is accurate. He stated under cross-examination that he remembers very little of the incident and that he is relying on what he was told by other people after the event. This may be because he was dazed. Indeed, he described himself as slipping out of consciousness during the assault and after.

**33.** As set out above, he describes the incident as lasting a very brief period of time, a matter of seconds. He says that an alarm was activated and that a large number of prison officers came from the landing and burst into the toilet to break up the struggle and this caused him to fall backwards against the radiator. I am not satisfied that this account is correct. Firstly, the evidence of Mr. Mahon was that no alarm was activated. I prefer the evidence of Mr. Mahon on this point in circumstances where, on the plaintiff's own evidence, he does not remember very much. Furthermore, Mr. Mahon also said that for prison officers to get from the landing to the kitchen toilet, the kitchen gates would have to be opened and this would take a few minutes. This was not seriously challenged. This is inconsistent with the plaintiff's evidence that the incident took a very brief period of time. It is also inconsistent with the account that the plaintiff gives in his pleadings. He pleads in his Personal Injury Summons that "*The assault continued while the Plaintiff was on the floor before being broken up by other prisoners.*" In Replies to Particulars, he said that "*The incident was reported to the prison officer who was present and supervising the prisoners at the time. It was also reported to the acting chief officer and he in turn took the Plaintiff to the prison medical centre.*" He also stated, in response to a query as to whether there were any witnesses to the incident, that there were "*a number of people present*" and provided the names of three prisoners. There is no reference in any of those accounts to any prison officers witnessing the incident or intervening. I therefore conclude that an alarm was not activated and that a number of prison officers did not come into the toilet.

**34.** I also find that the plaintiff's account of the involvement of medical personnel was not accurate. In direct evidence he said that he did not get into the medical centre (this is correct) and, crucially, that he was not seen to by medical staff. When the medical records were shown to him in cross-examination, he accepted that he met a nurse but said that she did not examine him. That is contradicted by the medical records, which describe his injuries and state that "*Wounds cleaned & for transfer to A & E*".

**35.** I also find that the plaintiff is not correct in his recollection that after the incident a senior prison officer told him that they were going to let him and Mr. AB fight it out on the landing. Governor Galgey said that would not happen. In my view, it is simply implausible that prison authorities would have let two prisoners out onto a landing in full view of other prisoners to have a fight. Governor Galgey did say that he would sometimes ask two prisoners if an issue was over and, if it was and they agreed, he would get them to shake hands. This may have been what occurred, and that the plaintiff is confused about the conversation with the senior prison officer, though he did repeat the assertion on a number of occasions during his evidence.

**36.** The plaintiff's evidence in relation to the incident involving Mr. AB and the prison officer was inconsistent. In his direct evidence, he said that Mr. AB tried to get over the counter but under cross-examination said that he had not said that.

**37.** However, the fact that I am not satisfied that the plaintiff is correct in his recollection in a number of respects can not, in itself, be determinative in circumstances where I am satisfied that the plaintiff was assaulted. Therefore, the real question is whether this type of incident was reasonably foreseeable to the defendants, but where I am satisfied that the plaintiff's account is inaccurate in these fundamental respects, it is relevant to my assessment of other aspects of the evidence.

**38.** The plaintiff's case in relation to reasonable foreseeability and breach of duty has a number of different limbs, many of them overlapping. I accept the point made on behalf of the plaintiff that it is not necessary that the specific assault, i.e. on the plaintiff, must have been reasonably foreseeable, but simply that an assault of that nature on any individual must have been reasonably foreseeable.

**39.** Part of the plaintiff's case is that the prison officers should have foreseen this type of incident from Mr. AB's demeanour and conduct on the morning in question. He stated that Mr. A.B. was in a rage or temper in the kitchen and was giving out about not being permitted to go to a funeral for which he had previously been given leave and therefore the prison officers should have anticipated that an incident of this type was going to occur or might occur. The plaintiff's evidence about Mr. AB was somewhat unclear. On the one hand he said that Mr. AB was in a rage or temper and on the other hand he said that Mr. AB was boasting about being in the kitchen when he was suspended. There is insufficient evidence upon which I can accept the plaintiff's account either (i) that Mr. AB was in rage or temper and the defendants should therefore have anticipated an incident of this type or (ii) even if he was in a rage or temper, of the reasons for same.

**40.** In relation to the first, under cross-examination the plaintiff stated that he did not have any interactions with Mr. AB on the morning in question. His evidence was based on what he was told by other people and on the general atmosphere. He said the atmosphere that day was different to the normal atmosphere in the kitchen. The evidence of Mr. Mahon was that everything was normal and calm. He described the kitchen as generally being a harmonious place and this was not disputed by the plaintiff. I am therefore satisfied that if someone was as heightened as it is claimed Mr. AB was, Mr. Mahon would have been aware of it and would have taken steps in relation to it. He said that when a prisoner is agitated the prison officers would be aware of it and that if he was aware of it he would speak to the prisoner and, if necessary, suggest that the prisoner take time out. He said had no reason to speak to Mr. AB that morning. In circumstances where the plaintiff has an inaccurate recollection and very fairly accepts that he does not remember much about the incident I think it is more likely that Mr.

Mahon's recollection is more accurate. It also seems to me to be likely to be more accurate because being aware that a prisoner is agitated is a matter of self-interest because if a person is heightened, furious or in a temper that is going to have an impact on the working of the kitchen.

**41.** I therefore find that Mr. AB was not so obviously in a rage, temper or heightened state that it should have been noticed by the prison officers.

**42.** In relation to the second, i.e., the reason for any such agitation, there is simply no admissible evidence before me upon which I can conclude that, even if Mr. AB was heightened, it was because of the imposition of a disciplinary sanction or a refusal to allow him leave to attend a funeral.

**43.** The plaintiff's evidence on this was entirely based on what he had been told by other people or heard around the kitchen. It was urged on me that there could be no other explanation for the assault. There is an attractiveness to this, but it involves too much speculation about what was in the mind of Mr. AB.

**44.** It also disregards the fact that it is also possible that Mr. AB was not at all annoyed about the imposition of a caution. It is important to note that, as discussed below, the sanction that was imposed is the lowest form of sanction. Indeed, if the incident for which he was sanctioned was as described by the plaintiff then it is at least equally possible that Mr. AB would have considered a caution as being light. I am, of course, not finding that it was, but simply highlighting why the evidence is insufficient for me to conclude that Mr. AB was in a rage or temper and, even if he was, that it was caused by the imposition of the caution.

**45.** In relation to Mr. AB's attendance at a funeral, the plaintiff fairly acknowledged under cross-examination that he did not have any interactions or conversations with Mr. AB on the day in question and that his source of knowledge on this is what other prisoners were saying. The point was made by Senior Counsel for the plaintiff that the plaintiff was not cross-examined in relation to his claim that Mr. AB was denied leave to attend a funeral. However, at the beginning of the plaintiff's evidence Senior Counsel for the defendant had made it clear that there was an objection to any hearsay. In those circumstances, and in circumstances where the plaintiff stated that his only source of knowledge is what other prisoners were saying, it was not necessary to cross-examine him on this point. When Governor Galgey gave his evidence he said that he had checked the prison records and that in fact there had been no application by Mr. AB for leave to attend a funeral on that day. In submissions, Senior Counsel for the plaintiff objected to the admissibility of this evidence in circumstances where the records had not been produced. In those circumstances I have not had regard to this evidence.

**46.** It is also significant that refusal of leave to attend the funeral is not referred to in the P19 documentation.

**47.** I am therefore not satisfied that there is sufficient evidence to discharge the burden of proof that it was reasonably foreseeable from Mr. AB's demeanour and conduct that an incident might occur.

**48.** It was also part of the plaintiff's case that it was reasonably foreseeable from the nature of the incident involving Mr. AB and the prison officer on the Wednesday and the fact of the imposition of the sanction that an incident such as happened in the toilet would occur and that it was therefore a breach of duty not to remove Mr. AB from the kitchen either permanently or temporarily. It was submitted that in circumstances where Mr. AB was issued a P19 just two days earlier he should have been denied access to the kitchen either by virtue of having been disciplined, i.e. removal from the kitchen should have been a consequence of his being disciplined, or in order to ensure that he would not react adversely to having been disciplined, i.e. he should have been removed temporarily for a cooling off period. Considerable emphasis was placed on the specific nature of the underlying incident.

**49.** I am not satisfied that the plaintiff has established that this is the case.

**50.** Firstly, I am not satisfied that the plaintiff's account of the incident for which Mr. AB was sanctioned is supported by the P19 documentary record. I am therefore not satisfied that it was as serious as suggested by the plaintiff and that the nature of the incident in itself made it reasonably foreseeable that Mr. AB would assault someone else. The plaintiff's description of the incident is that it involved physical aggression, attempted assault, restraint and a threat to the prison officer's life. However, the P19 Report to the Governor (made by the prison officer to whom Mr. AB's conduct was directed) simply states that Mr. AB "*verbally abused me in the locker area of reception. This was because I wouldn't issue items which the above named prisoner had in his locker. The reason I would not issue the items was because their (sic) was no permission on the governor's parade. I advised the prisoner to get permission and there would be no problem. His response was to be abusive towards me. At around 6.05pm approx. the above-named prisoner came to reception again with officer ... and when he was not issued with his items for abusing me in the first place he continued to abuse me again...*" Following receipt of the P19 Report the Governor held a hearing on the 12<sup>th</sup> June 2013 and Mr. AB is recorded as accepting that he abused the officer. The hearing was adjourned for the Governor to speak with the ACO in relation to Mr. AB's behaviour record – it appears that this was Mr. AB's first P19 - and on the 13<sup>th</sup> June the Governor cautioned and warned Mr. AB with regards to behaviour. It is important to note that a "caution" is the lowest form of sanction provided for in section 13 of the Prisons Act 2007. It simply lacks credibility that if a prison officer had been subject to the type of behaviour described by the plaintiff, he would simply report that he had been verbally abused by Mr. AB. Thus, I am not satisfied that Mr. AB's conduct, as reported to and found by the Governor, was as serious as described by the plaintiff or was as serious as to make it reasonably foreseeable to the defendants that he might subsequently engage in a

violent assault on a prisoner. The evidence given by Governor Galgey was that verbal abuse of a prison officer is not an uncommon event.

**51.** Secondly, it seems to me that the case that Mr. AB should have been removed from the kitchen as a consequence of this incident, requires me to review the decision of the Governor as to the appropriate sanction and to conclude that it was wrong or unreasonable. This is so because the removal from the kitchen would in itself have been a sanction. The plaintiff in his evidence was of the belief that the imposition of a caution automatically led to a dismissal from the kitchen, i.e. the withdrawal of privileges. The evidence from the defendants' witnesses was clear that this was not the case. Furthermore, the legislation provides for a number of different sanctions and does not support the plaintiff's belief that one automatically follows the other. I do not believe that I can review the Governor's decision and conclude that it was wrongful or unreasonable absent expert evidence. The Governor is charged with determining appropriate sanctions and is given a range of such sanctions. The determination of the appropriate penalty must be a balancing exercise between the misconduct, the behavioural record of the prisoner, the other rights of the prisoner, the interests of staff and other prisoners, and the effective running of the prison. The Governor must bring his experience, expertise and judgment to bear in doing so and this Court must be slow to intervene. The only evidence before me was the evidence of Governor Galgey. He was clear in his view that the Governor's decision was a reasonable one. I obviously can not treat Governor Galgey as an expert for these proceedings.

**52.** Thirdly, the case was made that even if Mr. AB should not have lost his job in the kitchen, he should have been temporarily removed from the kitchen to ensure that he had cooled down or at least that there should have been consideration given to doing so. However, there is no evidence that Mr. AB continued to be agitated or that there were any signs that he required a cooling-off period when the Governor was making his decision. Thus, it is impossible to see how it could have been a breach of duty not to temporarily remove him. I do not believe that the mere fact that a prisoner verbally abuses a prison officer on Wednesday must or should always lead to the conclusion that a cooling-off period must be given. It will, of course, depend on the circumstances. It was also submitted that Mr. AB should not have been permitted to return to the kitchen because the dispute which gave rise to the incident on the Wednesday had not been resolved but there is no evidence that this issue had not been resolved.

**53.** Senior Counsel for the plaintiff accepted that the Court could not review the Governor's decision as to the appropriate sanction but emphasised that the breach of duty in this regard was the failure to carry out a risk assessment. However, in circumstances where (a) there is no evidence of any continued agitation when the Governor was making his decision, and (b) there is insufficient evidence that the assault on the plaintiff was as a result of the original incident, the imposition of the caution, or the denial of leave, I am not satisfied that the fact that a risk assessment was not conducted was a breach of duty.

**54.** The plaintiff also makes the case that it was a breach of duty not to have CCTV or supervision in the toilets in the kitchen area in circumstances where prisoners were allowed to smoke in the toilets. It was submitted that it was reasonably foreseeable that if such an incident was going to take place it would take place in such an unsupervised place. I prefer the evidence of Mr. Mahon on the question of whether prisoners were in fact allowed to smoke in the toilets and find that they were not. I also find that there were not three chairs in the toilet area. Mr. Mahon gave evidence that it was a small space. I have seen the photographs of the area and, while I did not hear any engineering evidence, it seems to me that this would be highly unlikely given the size of the area. However, that does not determine the issue because it was acknowledged by Mr. Mahon that he could not say that prisoners never smoked in the toilets but, when that happened, he threatened the prisoner with dismissal from the kitchen. I understand this to mean that on occasions prisoners did smoke in the toilet and that the prison was aware of this. I am in fact satisfied that while prisoners were not permitted to smoke in the toilets, they did so more frequently than was acknowledged by Mr. Mahon. The evidence of Mr. Mahon was that prisoners who worked in the kitchen were released from the cells at 7am and commenced in the kitchen shortly after that and had their official smoking break between 1 and 2pm. I accept that evidence insofar as it goes but it seems to me highly unlikely that prisoners who smoked would not have availed of the opportunity to smoke somewhere, including in the toilet, at some stage in that 5-7 hour period. This then raises the question of whether the failure to have CCTV or in-person supervision in the toilets was a breach of duty. I am not satisfied that it was in the particular circumstances. The evidence is that only prisoners who are well-behaved (described by the plaintiff as model prisoners) are assigned to the kitchen. It is important to note that this is not to say that any prisoner who has been subject to sanction is disqualified from being assigned to or working in the kitchen. However, all of the evidence was that prisoners assigned to the kitchen are well-behaved. Both the plaintiff and Mr. Mahon described the kitchen as being relaxed, calm or harmonious. The uncontested evidence on behalf of the defendants was that there had never been an assault in the kitchen area. Supervision of a toilet area (whether by CCTV or in-person) is a particularly sensitive issue and raises specific issues about balancing the need for security and the rights of prisoners referred to in *Casey v The Governor of Midlands Prison* and *Creighton v Ireland*. That might not necessarily preclude such measures in all cases but against the backdrop of the kitchen being staffed by well-behaved prisoners and there having been no previous assault in the kitchen I am satisfied that it was not a breach of duty not to have such measures in place.

**55.** Thus, for all of those reasons I am not satisfied that the plaintiff has discharged the burden of proving that the defendants are liable for his injuries and I must dismiss the case.

**56.** However, it is necessary to refer to a particular issue. It arose during the hearing that there was no P19 documentation available in respect of the assault on the plaintiff. It was accepted on behalf of the defendants that there must have been such documentation but that

it was no longer available. It was not suggested by the plaintiff (and is not being suggested by the Court) that there is anything untoward about this. But the fact is that the documentation is not available. The relevance of this is that Mr. AB was sanctioned and the plaintiff was not, and this must have been based on a conclusion that Mr. AB was to blame or was the aggressor. Absent the documentation, we have no idea how this conclusion was arrived at in circumstances where no prison officer witnessed the incident. This means either that evidence was obtained from prisoners who witnessed the incident or that Mr. AB admitted wrongdoing. If it is the latter, Mr. AB may also have given an explanation for his actions. The absence of the documentation has the effect that any presumptions requiring to be made due to its absence must be made in favour of the plaintiff. However, this does not mean the absence of documentation is to be used to entirely compensate for the absence of admissible evidence and it seems to me that it is not possible to safely speculate as to what might have been said in the documentation. However, its absence may have meant that the plaintiff was not able to point to evidence which might have supported his case.

**57.** It seems to me that the fact that the plaintiff might have been deprived of an opportunity to point to evidence which may have supported his account must be taken into account in relation to the costs of the proceedings.

**58.** Taking all of the above into account, it seems to me that I must dismiss the plaintiff's case. As this judgment is being delivered electronically, it may be helpful to the parties if I indicate that my preliminary view in relation to costs, subject to what the parties may say, is that having regard to the fact that the defendants successfully defended the case and to the fact that the P19 documentation is not available, there should be no order. I will give the parties an opportunity to make submissions on the issue of costs.