THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 189
Record Number: 2019/261
High Court Record Number: 2015/2712P

Noonan J.
Haughton J.
Murray J.

BETWEEN/

P. McD

PLAINTIFF/RESPONDENT

-AND-

THE GOVERNOR OF X PRISON

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 14th day of July, 2020

1. This appeal is brought from the Order of the High Court (Baker J.) of the 1st February, 2019 awarding a sum of €5,000 in damages to the respondent together with a declaration that the appellant had breached the terms of the Irish Prison Service Prisoner Complaints Policy Document in his treatment of the plaintiff's written complaints dated 10th February, 2015. The principal written judgment appealed against was delivered by the High Court on the 1st November, 2018 with a subsequent written ruling on costs having been delivered by the court on the 1st February, 2019. In the latter ruling, Baker J. awarded the plaintiff 30% of his costs of the action together with the full costs of legal submissions and the issue paper agreed between the parties.

Background Facts

2. The trial of this action took some fifteen days at hearing in the High Court and the judgment sets out in considerable detail the facts of this matter, which I gratefully adopt. I therefore propose to set these out in a somewhat more summary manner for the purposes of this judgment.

3. The respondent is now fifty years of age and is a member of the travelling community. He has spent the majority of his adult life in prison, mostly in England. He became a prisoner in X Prison on the 7th December, 2011 following a conviction and sentence for burglary and assault on a 97 year old woman in her home. He was initially sentenced to nine years' imprisonment in the Circuit Criminal Court and this was increased on appeal to twelve years by the Court of Appeal. He was subject to significant abuse as a child and during his childhood and teenage years he abused alcohol and drugs, including hard drugs, and also developed a dependence on prescription drugs. When he was aged six, he was involved in a car accident and suffered injuries which left him with chronic back pain

and he also suffered the loss of his spleen. He has an extensive psychiatric history with a diagnosis of borderline personality disorder. Prior to the events arising in these proceedings, the respondent had a significant history of self-harming and food refusal while in prison.

4. When the respondent entered X Prison, due to self-expressed fears for his safety from other prisoners, he requested an isolation regime which resulted in him spending 23 hours a day in a single occupancy cell with one hour for exercise. Although this was at his own request, it was not disputed at the hearing that he would likely have had such a regime, known as a Rule 63 "protection from all others" regime, imposed by virtue of the nature of his offence which would be viewed as putting him at risk from other inmates.

5. For several years following his incarceration in X Prison, the respondent had been permitted to exercise during lunchtime in a yard in the company of members of staff. However, in or about July or August of 2014, this situation changed. He was changed to exercising in the Challenging Behaviour Unit (CBU) yard where he said he felt like a caged animal and self-harmed on the 28th July, 2014. As a result, he was changed to another yard which was overlooked by other prisoners who threw liquid at him that he believed to be urine. As a result of these events, the respondent declined to exercise and remained in his cell at all times.

6. Another source of difficulty for the respondent was a change in the way in which his meals were served. Up to the latter half of 2014, meals were delivered to the respondent by prison staff but this was altered so that from then on, designated prisoners delivered his meals to him. He objected to this because he was fearful that other prisoners would seek to contaminate his food with substances such as saliva or hair. The respondent sought to discuss these matters with the Governor and the Governor met with him on the 7th February, 2015 when the respondent raised these two issues. The Governor advised the respondent to avail of the complaints procedure in that respect, a procedure with which the respondent was familiar, having availed of it on previous occasions.

7. On the next day, the 8th February, 2015, the respondent began to refuse food. On the 10th February, 2015 the respondent wrote two letters of complaint pursuant to the prison protocol in that regard. One complained of the exercise issue, and the other of the food issue. The respondent received no response to his written complaints within the time stipulated by the protocol, to which I will refer further, and on the 19th February, 2015 he wrote a letter seeking copies of his complaints. The next day, the 20th February, 2015, the respondent wrote another letter which became known as the "disclaimer" letter indicating that if he became incapacitated as a result of what had by now become a hunger strike, he did not wish to be resuscitated.

8. On the 25th February, 2015, the respondent's two complaints of the 10th February were categorised as "Category C" complaints, as appears further below, and on the 27th February, he was furnished with copies of his two complaints. On the 16th March, 2015, the Governor issued proceedings against the respondent for the purpose of determining whether the respondent had the requisite mental capacity to make the decision conveyed

by the disclaimer letter and thus, whether the Governor was required to give effect to that decision. Those proceedings were also heard before Baker J. who delivered a written judgment on the 31st March, 2015 determining that the respondent did have the mental capacity to decline resuscitation and the Governor was thus obliged to give effect to it.

9. Ultimately, after some 50 days on hunger strike, the respondent was persuaded to recommence taking nutrition and he ultimately recovered. Very shortly after the High Court delivered judgment in the first case, a plenary summons was issued by the respondent in the within proceedings on the 8th April, 2015. These proceedings in essence complain of the conditions of the respondent's detention which were alleged to have breached his rights under both the Constitution and the European Convention on Human Rights. 22 breaches of the respondent's rights are particularised, and of those, some 6 relate to a failure to deal properly with his written complaints of the 10th February, 2015. In the prayer for relief in his statement of claim, the respondent seeks various declarations concerning alleged breaches of his rights together with an injunction restraining such breaches and damages for breach of his constitutional and Convention rights and "damages for negligence and breach of duty including breach of statutory duty".

Judgment of the High Court of 1st November, 2018

10. The trial judge set out in detail the facts that I have summarised above. She also set out a summary of the respondent's claim and the appellant's defence. She described the respondent's borderline personality disorder and the expert evidence which dealt with it, particularly that of Professor Brendan Kelly, consultant psychiatrist. The judge noted that the respondent was an articulate and expressive witness, and despite the fact that he had only six months of formal schooling in his life, she found his command of language, both oral and written, to be remarkable even in an educated person.

11. All the witnesses accepted that he is highly intelligent. In terms of his reliability as a witness, the trial judge concluded that he was mostly honest but not a reliable historian. Because the respondent lived a very confined life, the only matters over which he ostensibly had any control, exercise and food distribution, assumed huge importance or salience for him. She noted that his tendency to self-harm and engage in so-called "dirty" protests was a feature of his borderline personality disorder.

12. The trial judge then embarked on an analysis of the applicable legal principles governing the rights of a prisoner and reviewed a number of authorities in that regard. She noted that there was not much difference between the parties on the law. She noted that counsel had agreed 14 key issues of fact to be determined by the court which she proceeded to examine. It is not necessary for the purposes of this appeal to refer to all of these issues but the judge's findings on some of them are material. Issue 3 was "To what extent has the plaintiff's physical and mental welfare deteriorated while in prison?" On this issue, the judge observed (at p. 22): -

> "88. I heard no medical evidence that would suggest that the plaintiff's physical condition has deteriorated as a result of prison rather than as a result of the normal

aging process, taken in conjunction with the fact that the accident that he had as a child has had long term *sequelae*."

13. The next issue, Issue 4 is also of importance in this appeal: -

> "To what extent is the deterioration of the plaintiff's conditions attributable to culpable acts or omission of the defendant?"

14. In dealing with this issue, the trial judge said (at pp 23 – 24): -

> "92. I am not satisfied that the failure to provide the plaintiff with more suitable accommodation arose as a result of the negligence of the defendant, and I am satisfied that every effort was made to give the plaintiff the benefit of reading materials, the gym, association with other prisoners should he wish, visits from outside, and that he was treated with great humanity and dignity by the persons who dealt with him day to day, especially by the nurse officer with whom he had a good relationship.
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> 93. The plaintiff's mental condition has deteriorated, but I am not satisfied that the deterioration was caused by any act or omission of the prison authorities, although I am of the view that the plaintiff's conditions of detention, and the fact that he is in prison in the first place, have not helped him to develop any social or interpersonal skills or to permit him to fully develop his undoubted natural intelligence."

15. The next issue was whether the plaintiff's detention was a form of "solitary confinement" and the trial judge held that it was not. Issue 13 was "What complaints has the plaintiff made to date about the conditions of his detention?" The judge noted that the respondent had made very many complaints but the pleadings complained of the two made on the 10th February, 2015 in particular. Although these were the complaints central to the respondent's claim and the ones referred to in his pleadings, the judge nonetheless allowed the respondent lead evidence of other prior complaints in support of his argument that the complaints process had entirely broken down. The court noted (at p. 32): -

> "134. The Prisoner Complaints Policy Document (the "Policy Document") issued on 16 June, 2014 contains a categorisation of the type of prisoners' complaints reflecting r. 57B of the Prison Rules (Amendment) 2013, S.I. No. 11/2013. In general, at para. 4.1.5 of the Policy Document, it is stated that complaints shall be investigated 'forthwith' in accordance with the policy criteria. There are four complaints categories defined in the Prison Rules:"

16. The final sentence of the quoted passage is not entirely accurate as there are in fact six complaints categories, which the judge sets out, but they are not defined in the Prison Rules but in the Policy Document. The distinction is of some significance as will become apparent. The Prison Rules (Amendment) 2013 amended another Statutory Instrument, the Prison Rules 2007 (S.I. No. 252/2007). The amendment provided for the insertion of two new rules, rules 57A and 57B. Rule 57A is concerned with complaints by prisoners of

alleged criminal offences and provides that certain steps be taken where such complaint is made. Rule 57B specifically refers to complaints "by any person" alleging assault or use of excessive force against a prisoner, or ill treatment, racial abuse, discrimination, intimidation, threats or any other conduct against a prisoner of a nature and gravity likely to bring discredit on the Irish Prison Service. Complaints coming within rule 57B are subject to a detailed protocol concerning notification, recording and investigation of such complaint.

17. Unlike the Prison Rules, the Policy Document has no statutory force and is, as the title suggests, a document which outlines the policy of the Irish Prison Service in relation to complaints by prisoners. The complaints categories to which the Policy Document applies are conveniently set out in summary fashion on the final page as follows: -

> "Category A:
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> Category A complaints are complaints alleging assault or use of excessive force against a prisoner, or ill treatment, or racial abuse, discrimination, intimidation, threats or any other conduct against a prisoner of a nature and gravity likely to bring discredit on the Irish Prison Service. *All Category A complaints will be managed under rule 57B, Prison Rules*.
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> Category B:
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> Category B complaints are complaints of a serious nature, but not falling within any other category of complaints. Examples of Category B complaints could include verbal abuse of prisoners by staff, inappropriate searches or any other conduct of a nature likely to bring discredit on the IPS. Category B complaints will be investigated by a Chief Officer with recourse to appeal to the Governor.
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> Category C:
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> Category C complaints are basic service level complaints (complaints about visits, phone calls, reception issues, missing clothes, not getting post on time, not getting appropriate exercise etc.)
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> Category D:
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> Category D complaints relate to complaints against professionals such as dentists, doctors etc.
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> Category E:
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> Category E complaints are complaints made by visitors to the prison.
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> Category F:
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> Category F complaints are complaints against decisions made by IPS headquarters in relation to the granting of temporary release and prison transfers."

18. As appears from the foregoing, Category A, in effect, reproduces rule 57B of the Prison Rules and the manner in which those complaints are dealt with are, as explained, governed by those rules. The subsequent categories of complaint are not covered by the Prison Rules and are governed by the terms of the Policy Document. The trial judge set out the various categories as I have done above and examined a number of complaints of the respondent referred to in evidence, including the two complaints of the 10th February, 2015. Although the respondent's complaints were made on the 10th February, 2015, they were not categorised until the 25th February, 2015, when they were accorded a Category C status. As already noted, they were finally dealt with on the 27th March, 2015 when they were rejected as having no basis. It will be recalled that High Court proceedings were already in being at this stage at the suit of the Governor.

19. The final issue dealt with by the High Court, Issue 14, was: -

> "How were the plaintiff complaints dealt with by the defendant?"

20. This issue is central to the within appeal.

21. The judge noted with regard to Issue 14 that the appellant's witnesses accepted that the complaints procedure was not functioning effectively or efficiently at the relevant time. With regard to Category C complaints, the Policy Document provides: -

> "4.4.5 Category C complaints should be resolved as soon as possible – it is expected that a reply or acknowledgement could be provided within 24 hours – although resolution may not be possible within that time frame. The complainant should be kept aware of ongoing developments in relation to the complaint."

22. The Policy Document stipulates that the Governor may delegate the investigation of Category C complaints to an officer not below the position of Class Officer and the Policy Document further provides: -

> "4.4.9 The Senior Chief Officer in the prison shall maintain constant oversight of the Category C complaints procedure and shall take immediate action to resolve any matters outstanding in excess of 48 hours."

23. Accordingly, although the Policy Document does not provide for absolute time limits within which complaints must be dealt with, it clearly envisages a very short time frame and appears to suggest that such complaints should be dealt with within 48 hours.

24. The trial judge noted that there had been a delay of six weeks in dealing with the plaintiff's complaints and no explanation was forthcoming for this delay. The judge also observed that even before the written complaints were made by the respondent, the prison authorities knew about them (at p. 37): -

> "138. The Governor accepted that he had a meeting with the plaintiff on 7 February 2015, the day before the hunger strike started, and that he was aware from that meeting that the plaintiff had difficulty with the two matters that became the subject matter

of the hunger strike… The Governor directed the plaintiff to the designated process but in the events, the process was ineffectual and did not deal in any meaningful way with the complaints during the currency of the hunger strike."

25. The trial judge went on to say (at pp. 37 – 38): -

"139. The Governor agreed with the conclusion of Professor Kelly that the limited range of the plaintiff's life meant that some factors assumed salience which would not be found in other circumstances. He also accepted the description of Professor Kelly that the complaints process, had it been processed effectively, would have a positive effect on the plaintiff.

140. He very fairly said that there were failures in the complaints process, and that the offer of the enclosed [Challenging Behaviour Unit yard] was not an acceptable alternative to comply with the entitlement of the plaintiff to exercise every day. He said in evidence that 'we could not keep up with the complaints' because of lack of personnel.

141. The Governor said it was unusual for a prisoner to 'take things into his own hands' in the way the plaintiff did, and the plaintiff's response was 'highly unusual'. He very fairly said that he was concerned with the plaintiff's wellbeing and he did have some contact with him in early 2015 but that the system that he recommended him to use failed."

26. Central to her overall conclusions, the trial judge made the following findings (at pp. 39 – 40): -

"148. The manner in which the plaintiff's complaints has been dealt with is much less than satisfactory, the failures being attributed to a failed system rather than to any individual failures of the persons engaged with the management of the complaints systems within the prison. This system is grossly under resourced, one person bears the responsibility for fact finding, and even he, the relevant Chief Officer in charge of complaints, was singularly unclear about the precise extent of his role. The system dealing with complaints was unsatisfactory and not compliant with basic levels of fairness or procedural correctness.

149. I conclude, on the facts, that the method of dealing with complaints in X Prison was considerably less than satisfactory…

150. It is not for me to determine whether the complaints were valid or justified any intervention by the prison authorities, but I find, as a matter of fact, that the prison authorities did encourage the plaintiff to use the complaints process to resolve his grievances, that the plaintiff did take this advice in good faith, that the complaints procedure was one of the few 'pro-social' methods of resolution available to the plaintiff having regard to his isolated status in the prison, and that the prison authorities actually knew that, on account of the plaintiff's particular vulnerability

and his personality and cognitive distortions, he was likely to pursue with enthusiasm, if not a degree of obsessiveness, his complaints, and that a robust and functioning complaints process ought to have been put in place. I am satisfied that the process was not functional and that the plaintiff was poorly served at a time when his health and wellbeing were at serious and life-threatening risk."

27. In a section entitled "The Importance of the Complaints Procedure", the trial judge said that the prison authorities were well aware of the respondent's borderline personality disorder and of the importance of regularity in his life. The judge regarded it as of critical importance that neither the prison psychologist nor the prison Chief Nurse Officer, with whom the respondent had good relationships, were informed of his hunger strike until the application to the High Court. She held that the failure to even acknowledge the existence of the respondent's complaints and to deal with them in a reasonably speedy manner led him to take a particularly intractable approach to food refusal. In dealing with the management of the respondent in the prison environment, the trial judge considered that the conditions in which he was required to exercise in the CBU yard were wholly unsuitable. She summarised the effect of the relevant authorities at p. 45: -

"172. Thus, the authorities would suggest that, while a prisoner may not be deprived of all of his rights, certain rights of self-determination and the management of day to day conditions of one's life may be removed in the interest of the general management of the prison in regard to which the courts have indicated a reluctance to intervene."

28. The trial judge turned to the nature of the respondent's cause of action and the cases concerning claims by prisoners. She referred to *S.F. v. Director of Oberstown Children's Detention Centre* [2017] IEHC 829 and *Simpson v. Governor of Mountjoy Prison* [2017] IEHC 561 as examples of cases which engage questions of the reasonableness and proportionality of the response of prison authorities with regard to prison conditions. Notably, she held that the hunger strike embarked upon by the respondent was not a consequence of the change in food delivery and exercise regime. However, she considered that there was a direct connection between the failure of the authorities to deal with these two complaints and his determination expressed in the disclaimer letter to continue the hunger strike, even should it cause is death.

29. The trial judge then arrived at her conclusion (at p. 49): -

"185. For these reasons, the plaintiff fails in his claim that the prison conditions are in breach of his rights under national and/or international law. However, there was, in my view, a failure to deal reasonably and with expedition with his complaints, that failure was negligent, it did not cause the plaintiff to go on hunger strike but made his protest much harder than a fleeting and transient one.

186. I consider that there was a breach of the obligations of the prison authorities to properly manage the plaintiff's grievances and the difficulties that he had with the change of prison regime."

30. The court accepted that a breach of the Prison Rules is not actionable but nonetheless, actionable negligence had been established (at p. 50): -

> "187. I accept, as was held by White J. in *Simpson v. The Governor of Mountjoy Prison*, at paragraph. 354, that a breach of the Prison Rules of itself is not actionable, and that the Prison Rules governing complaints (apart from Category A complaints) are regulatory, and not mandatory. However the fine line between the proper regulation and management of the complaints procedure and negligence was, in my view, passed in this case, and the defendant does bear some responsibility for the escalation of the plaintiff's protest to a point where, in the light of his very difficult personal and psychological makeup, it became impossible, or, at least, very difficult for him to turn back, and this was a reasonably foreseeable consequence of the failure to deal with the plaintiff's written complaints."

31. The court's conclusion therefore, on the liability issue was that the respondent failed on all headings of his claim concerning his prison conditions. The court however, was of the view that the failure to deal with his complaints was negligent and that negligence caused him personal injuries for which he was entitled to be compensated. The trial judge therefore turned to the issue of damages, saying (at p. 50): -

> "188. As to damages, I consider that the actions on the part of the prison authorities did not cause the plaintiff to go on hunger strike, but I do consider that the negligent failure of the prison authorities to take his protest seriously and to understand the extent to which it was different from other protests did accelerate and exacerbate the hunger strike to a point where it became not mere food refusal but, by 20 February 2015, a hunger strike which could have led to the plaintiff's death.
>
> 189. The plaintiff says it is self-evident that the hunger strike caused him physical and psychological harm, and it did. No evidence was adduced as to any physical or psychological *sequelae*, and therefore, the injury of which the plaintiff suffered was the injury of pain or distress of being on hunger strike.
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> 190. It is difficult to put a monetary value on any such injury or pain, and especially difficult with the hunger strike itself, even without its acceleration or continuation, would have caused pain and distress for the plaintiff, for which the defendant cannot be blamed. I believe that compensation should be nominal and that is because the plaintiff has, in effect, recovered, if that is the correct word, and his physical and mental state are, broadly speaking, that which existed before the hunger strike had commenced."

32. The judge then considered another case in which nominal damages had been awarded for breach of prison conditions, *S.F. v. Director of Oberstown Children's Detention Centre*, in which the plaintiffs each received a nominal €100 in compensation. She also referred to *Simpson v. Governor of Mountjoy Prison* where, although a breach of rights was found, no damages were in fact awarded because the plaintiff had exaggerated his conditions. Taking these matters into account, the judge said (at p. 51): -

"192. I propose awarding the plaintiff €5,000, but I stress that this sum is not intended to do any more but mark damages in respect of a matter for which the plaintiff is primarily responsible, but where the inaction of the defendant led to the circumstances becoming far more grave and dangerous than those even the plaintiff himself intended in the early days of the hunger strike."

33. The trial judge's ruling on costs, which is also appealed, was delivered on the 1st February, 2019 wherein the trial judge awarded the respondent 30% of his costs of the action for the reasons set out therein.

The Issues on Appeal

34. Eleven grounds of appeal are raised but I think they can be summarised relatively briefly. The appellant says that the trial judge erred in finding that the manner in which the respondent's complaints had been dealt with amounted in law to negligence and breach of duty. Although the trial judge held that a breach of the Prison Rules is not actionable, she nonetheless held that the breach of the internal complaints procedure was cognisable via the tort of negligence. It is further claimed that the court was wrong to award damages in circumstances where no underlying breach of the respondent's rights was found. It is argued that the High Court erred in failing to properly identify the basis upon which damages were awarded. No cross appeal has been brought by the respondent in respect of the High Court's finding that no breach of his rights arose from the conditions under which he was detained in prison.

Discussion

35. As appears from the foregoing, there are in effect only two issues to be determined in this appeal, first, whether the trial judge was correct in awarding damages to the respondent and second, whether it was appropriate to grant declaratory relief. It is important to identify at the outset both the nature of the wrong and the nature of the damages which were awarded in respect of that wrong. It is clear that the primary reliefs being sought by the respondent before the High Court related to alleged breaches of his constitutional rights with regard to the conditions of his detention in prison. The trial judge carefully analysed the relevant recent authorities in that regard and concluded that the respondent failed to establish any such breaches.

36. What therefore remained was a claim for damages for personal injuries allegedly suffered as a result of the negligence of the appellant together with the declaration referred to above. That negligence was identified as a failure to comply with the Policy Document insofar as it concerned complaints by the respondent. It is, I think, fair to say that this issue was somewhat secondary to the main issues concerning the conditions of the respondent's detention, all of which were determined against the respondent.

37. In the normal way, in claims for damages for personal injuries, the court is called upon to assess damages based on a consideration of, in particular, the medical evidence. Such a consideration will usually involve identifying the nature of the injury, the pain, suffering and, if relevant, the disability suffered by the plaintiff together with the length of time for which the plaintiff was affected by the injuries and is likely to be so affected in the future.

In any claim for negligence, the plaintiff must establish the existence of a duty of care and a breach of that duty resulting in damage to the plaintiff.

38. In that latter regard, negligence is not actionable *per se* unlike some torts such as defamation, trespass to the person and trespass to land. In the case of torts actionable *per se*, nominal damages may be awarded where no actual damage has been suffered by the plaintiff and such an award may be sufficient to entitle the plaintiff to his or her costs. However, it is clear that nominal damages may not be awarded for the tort of negligence. As noted in *Charlesworth and Percy on Negligence* (13th edn, Sweet & Maxwell) at para 1-28: -

> "Breach of a duty of care only becomes actionable if accompanied by proof of actual damage. There is no right of action for nominal damages."

39. In the present case, the issue thus arises whether the trial judge intended to compensate the plaintiff on a compensatory and restitutional basis, or on a nominal basis. If it is the latter, then a difficulty arises. Some aspects of the judgment under appeal might suggest that the trial judge may have had in mind an award of nominal damages. Thus, in para. 190, she observed "I believe that compensation should be nominal". That conclusion might to some extent be borne out by the trial judge's accompanying reference to the *S.F.* case where nominal damages of €100 were awarded to each of the applicants for breach of their constitutional rights while detained as minors in Oberstown Centre. Similarly, in *Simpson*, a breach of the plaintiff's constitutional rights was found by the High Court but no damages were awarded. On appeal to the Supreme Court, a sum of €7,500 was awarded.

40. The suggestion that the court awarded damages on a non-compensatory basis might arguably also be borne out by the fact that in awarding €5,000, the trial judge (para. 192) stressed that "this sum is not intended to do any more but mark damages in respect of a matter for which the plaintiff is primarily responsible…". The latter observation by the trial judge raises the question as to the extent to which the respondent was responsible for his own injury. The court accepted that the appellant was not responsible for the fact that the respondent went on hunger strike or necessarily, that he persisted for as long as he did, but rather found that the appellant's negligence had made "his protest much harder than a fleeting and transient one".

41. The judge recognised that the appellant could not be blamed for the respondent's choice to go on hunger strike. To that extent, it might be said that the issue of contributory negligence arose or perhaps looked at in another way, the extent to which the consequences of the hunger strike were made worse by the appellant's blameworthy conduct fell to be assessed by the court. This of course would have been an extremely difficult, if not impossible, exercise for the court to undertake in the unusual circumstances of this case, particularly as the medical evidence, as far as it went, did not really assist this exercise. Viewed in this light, it might be suggested that the intention of the court was to award nominal damages where no actual damage was suffered. However, the court clearly concluded, and was entitled to conclude, that the hunger strike

caused the respondent physical and psychological harm beyond that which would have ensued but for the appellant's negligence.

42. Separately from this issue, the appellant puts forward a causation argument. The appellant contends that even had he not been negligent as the trial judge found and dealt promptly with the respondent's complaints as required by the Policy Document, the outcome would have been the same. Thus, the appellant contends that the cause of the respondent's injury was not the delay in dealing with his complaints, but the appellant's refusal to accede to his demands. In this respect, the appellant places reliance on the evidence of Professor Kelly as contained in his report of the 18th March, 2015, commissioned in the context of the first proceedings concerning the respondent's capacity. At para. 2 of the Conclusions Section of that report, Professor Kelly states: -

> "[The respondent] is clear that he will eat if he can reach agreement with the prison authorities in relation to the two issues he highlights, relating to the exercise yard and distribution of food at mealtimes."

43. The appellant accordingly contends that the delay in dealing with the respondent's complaints, which were ultimately declined, had no material bearing on his decision to commence, or continue, the hunger strike. It seems to me that there is considerable force in that contention.

44. However, before any of these issues fall to be determined, the respondent has to establish the existence of a duty of care in this case, the breach of which led to the loss of which he complains. Of course, it is true to say that a duty of care is, in many situations, owed to a person in custody to ensure that he or she is not injured by the careless act of his or her custodians – see, for example, *Muldoon v Ireland* [1988] ILRM 367 and *Bates v Minister for Justice* [1998] 2 I.R. 91. Thus, if the respondent here had suffered a foreseeable injury as a result of, for example, tripping and falling on a hazard carelessly placed in his path by a servant or agent of the appellant, then of course he would be entitled to succeed in a claim for damages. Similarly, if he had been subjected to unconstitutionally harsh conditions of detention, he may also be entitled to damages for the injury suffered as a result. The duty arising in such cases is clear and requires no elaboration.

45. The circumstances of the present case are considerably different. The trial judge accepted that a breach of the Prison Rules, a statutory instrument, is not actionable. The appellant suggested that this is inconsistent with the approach adopted by the trial judge to a breach of the Policy Document, having no statutory force, and yet found to be actionable. The well-known judgment of the Supreme Court in G*lencar Explorations plc and Anor. v. Mayo County Council (No. 2)* [2002] 1 IR 84 is of considerable assistance in this regard. The applicants obtained mineral prospecting licences from the respondent council and expended money carrying out extensive prospecting on foot of those licences. The council subsequently introduced a mining ban in relation to the lands the subject of the prospecting licences in the County Development Plan which was successfully challenged as being *ultra vires*.

46. The applicants then sought damages for breach of statutory duty, *inter alia*, from the council. The claim failed in the High Court and on appeal in the Supreme Court, which held that no duty of care arose in the circumstances. Judgments were delivered by Keane C.J. and Fennelly J. and all the members of the Court agreed with each of the judgments. The Chief Justice carried out an extensive analysis of the law of negligence in considering when a duty of care could be said to arise. In the course of his judgment, Keane C.J. said (at p. 139): -

> "There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff …"

47. Keane C.J. went on to observe (at pp. 140 - 141): -

> "For the purposes of this case, it is sufficient to say that the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived does not of itself give rise to a duty of care at common law. The facts of a particular case, however, when analysed, may point to the reasonable foreseeability of damage arising from the non-exercise of the power and a degree of proximity between the plaintiff and the defendant which would render it just and reasonable to postulate the existence of a duty of care. … I am satisfied that there was no relationship of 'proximity' between the applicants and the respondent which would render it just and reasonable to impose liability on the respondent. … The applicants in the present case could rely on no more than a general expectation that the respondent would act in accordance with the law which is not, in my view, sufficient to give rise to the existence of a duty of care."

48. The court in *Glencar* was dealing of course with statutory powers that had been exercised *ultra vires* by a public body. Here, however, it cannot even be said that there is a statutory obligation with which the appellant has failed to comply. Fennelly J. further held that the doctrine of legitimate expectation could not be relied upon by the applicants to found a claim in damages. He observed that every citizen can assert an expectation that public authorities will act within the law but that of itself is insufficient. Something more is required, in the nature of an express or implied undertaking to act in a particular way upon which the applicant relies.

49. The Policy Document here cannot even be equated with the statutory provisions which, in *Glencar*, were held not to give rise to a duty of care. The Policy Document in this case emanates from the Irish Prison Service and is a general statement of the policy adopted by that body towards complaints by prisoners in its care. It seeks to improve the lot of

prisoners by providing a grievance procedure for their benefit. It provides a framework within which prisoners can make complaints which will be dealt with confidentially, properly investigated and with procedural fairness. These aims are identified in the document itself which states its purpose as being to provide prisoners with an accessible and effective means to make a complaint.

50. It is very difficult to see how, in adopting such a policy, the appellant could be said to be assuming a duty of care to the respondent. Indeed, if the appellant were held to owe a duty actionable via the law of negligence to operate its complaints procedure in a particular way, this would present a remarkable incongruity, with no liability at common law generally arising for a breach of the Prison Rules, but such a liability arising in respect of the functioning of the complaints process. If the theory animating liability in negligence in this circumstance is not that of voluntary assumption of responsibility, it is very hard to see what is. It does not arise from statute and has no obvious private law analogue. It is a liability that would arise on a basis specifically rejected by Keane C. J. in *Glencar* – that by reason only of their having adopted such a complaints process for the benefit of prisoners, the authorities have assumed a duty, the breach of which sounds in damages, to operate that process in a particular way.

51. The Policy Document is aspirational in nature and, as the evidence in the present case shows, dependent to a significant degree on having the resources available to implement it. While it could be said that prisoners are reasonably entitled to expect that the Prison Service will endeavour to adhere to its own policies, that is far removed from suggesting that a failure to do so gives rise to an action in damages at the suit of the prisoner concerned. As pointed out by Keane C.J. in *Glencar*, the court is entitled to have regard to whether or not it is just and reasonable that a duty of care should be imposed in this case. I do not believe that it is. To impose such a duty here would potentially represent a significant disincentive to prison authorities against the voluntary adoption of policies, procedures and practices designed to improve and enhance the situation of prisoners in their care. The imposition of such a duty would thus not be in the interests of prisoners as a whole and indeed the wider public.

52. Although the trial judge held that the risk of injury to the respondent in this case was reasonably foreseeable, that of itself, absent a duty of care, cannot be sufficient to establish liability. It is certainly regrettable that there was such a total failure by the prison authorities to comply with their own policies in this case, as found by the trial judge. It is to be hoped that the shortcomings identified by the judge have, by now, either been remedied or are in the course of being remedied.

53. With regard to the claim for declaratory relief, the parties in their written and oral submissions did not address themselves to the principles to be applied in determining whether to grant such an order. As to the approach to be adopted by the court to claims for declaratory orders, Clarke J. (as he then was) in *Omega v Barry* [2012] IEHC 23 had this to say (at para. 4.4): -

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

54. I would therefore hesitate to make any finding in this regard other than to say that in the circumstances of this case, even if it were permissible to grant such declaration, as a matter of discretion I would decline to do so as no breach of a justiciable right has been identified by the respondent and the issue is in any event largely moot given that the respondent has now been released from prison.

55. Finally, I would mention in passing that as this matter primarily resolved itself down to a personal injuries claim, it would in the normal way have required the issuing of an authorisation to proceed by the Personal Injuries Assessment Board. It is perhaps understandable that sight was lost of this fact given the primary substantive claims of the respondent but as this issue was neither raised by the parties in the High Court nor considered there, it would not be appropriate to consider it *de novo* in this court.

Conclusion

56. I would accordingly allow this appeal and set aside the award of damages and costs and also the declaratory relief obtained. My provisional view with regard to costs is that although in the normal way these should follow the event, it seems to me that there are special factors in this case that would warrant the court departing from the normal rule. First, the point determined in this judgment concerning the justiciability of the Policy Document is an important one of potential application beyond the confines of this case in the context of prisoners' rights. Secondly, the High Court was very critical of the manner in which the respondent was dealt with by the prison authorities and considered that this resulted in significant and foreseeable harm to him. There was little or no dispute about the facts and in particular the fact that there was an abject failure by the authorities to comply with their own policy. In my view therefore, the justice of the case requires that there should be no order as to costs in respect of the appeal. However, as regards the costs in the High Court, given that the respondent failed to establish any of the many alleged breaches of his rights complained of, the appellant should be entitled to those costs. If either or the parties wishes to contend for an alternative form of order on costs, they will have liberty to deliver a written submission not exceeding 2,000 words within 14 days with the other party having the same period to respond. In default, an order in the proposed terms will be made.

57. As this judgment is being delivered remotely, Haughton and Murray JJ. have indicated that they are in agreement with it.