FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 36
PD1589/13

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in causa

DANIEL KAIZER (AP)

Pursuer and Respondent

against

THE SCOTTISH MINISTERS

Defenders and Reclaimers

Pursuer and Respondent: IG Mitchell QC, M Crawford; Drummond Miller LLP
Defenders and Reclaimers: D Ross QC; Anderson Strathern LLP

29 May 2018

Introduction

[1] This is a reclaiming motion against the interlocutor of the Lord Ordinary dated 22 August 2017, in which the defenders were found liable to the pursuer for the loss, injury and damage which he sustained on 4 December 2009 whilst he was on remand at HM Prison, Craiginches, Aberdeen. On that date another named prisoner, namely Keith Porter, attempted to murder him in the prison gym with a steel barbell.

[2] The pursuer is Polish. On 11 July 2009, Mr Porter had attempted to murder another Pole. He pled guilty to that crime about one week before the assault on the pursuer. The pursuer's contention, which was accepted by the Lord Ordinary, was that the attack upon him was in implementation of a threat made by Mr Porter also in the gym, occurring about a week prior to the assault.

[3] Although the matter was one of controversy at the proof, it is not now disputed that the pursuer had reported the threat to a prison officer on duty at the time. This officer, namely Gary Lumsden, did not make any report about the incident, as a result of which no further action was taken. The Lord Ordinary's finding that his failure to report was negligent is not challenged.

[4] This appeal is about causation; *viz.* whether it was established that, but for Mr Lumsden's negligence, for which the defenders are vicariously liable, the assault upon the pursuer would not, as a matter of probability, have occurred.

The evidence

[5] The threat in the prison gym took place in late November 2009. The gym consisted of a detached building on the upper floor of which was a weights room and an office containing an internal window, through which the weights room could, in part, be observed. The pursuer had been approached by two men, one of whom was Mr Porter. They had told the pursuer that they wanted the machine that he was already using. The pursuer offered to hand over the machine in two or three minutes, but this did not satisfy them. Mr Porter swore at the pursuer and said that he would "smash his f...g Polish face in"; addressing him as a "Polish bastard". The pursuer went to the prison officer on duty, namely Mr Lumsden, who was in the office, and told him "exactly" what had been said.

Mr Lumsden had said that he would sort the matter out but, beyond asking the pursuer's Polish friend, LR, to look after him, Mr Lumsden did not do anything further.

[6] After the incident, Mr Porter was transferred temporarily to HM Prison, Barlinnie, Glasgow. On 27 November 2009, at the High Court in Glasgow, he pled guilty to the attempted murder of the other Polish national and received an extended sentence of 15 years. He was transferred back to Craiginches on or about 3 December 2009. It was on the following day that Mr Porter and the pursuer chanced once more to be together in the gym. Only one prison officer, namely Kenneth Murray, was on duty in the gym. LR was also there and exchanged words with a co-accused of Mr Porter. Three men then assaulted LR. At about the same time, Mr Porter attacked the pursuer, "smashing me like he promised" according to the pursuer's account. He received extensive head injuries as a result.

[7] The prison officer, Mr Murray, had been unaware of the previous threat. He had gone into the office at the material time in order to answer the phone. He had noticed a movement of prisoners towards LR through the internal window. He went into the gym and saw Mr Porter standing with a barbell above his head. He shouted at Mr Porter, who stepped back and put the bar down. Mr Murray took hold of the pursuer and pulled him into the office, but the damage had already been done. The Lord Ordinary found as fact that the attack upon the pursuer was in implementation of the earlier threat made by Mr Porter to him.

[8] The Lord Ordinary heard evidence from two skilled witnesses, one on behalf of each party. Both spoke about the "Kaizer hypothesis"; this being that the pursuer had (as ultimately found by the Lord Ordinary) informed Mr Lumsden of the earlier threat. Both witnesses said that the threat should have been reported by Mr Lumsden. The Lord

Ordinary accepted that too. The question before the Lord Ordinary then came to be what the consequence of such a report would (or perhaps "ought to") have been. Was it more likely than not that the attack would not have taken place?

[9] Mr Murray explained the system whereby he would go to the residential area (hall) of the prison and escort those allocated for the particular gym session. Where there had been an altercation between prisoners, involving threats or bullying in the gym, an intelligence report would be made. A prisoner on an anti-bullying report could be excluded from the gym. Those under restriction should not have been in the gym, but if they were circulating with others in the hall they would be. Any issues ought to have been addressed before the prisoners were allocated to the gym. Prisoners were managed first and foremost in the halls. Mr Murray would not expect two prisoners involved in a bullying incident in the gym to be in the gym together later. The intelligence reports went every morning to the senior managers who would decide what further action was needed. Such action could involve managing two prisoners separately.

[10] Mr Murray said that when he first saw Mr Porter, after emerging from the office, he was "glazed over". When Mr Murray had shouted, Mr Porter seemed to refocus and dropped the barbell. Even with his presence in the weights room, the incident may still have happened but he didn't know. It was "very difficult".

[11] The pursuer's expert, namely John McCaig, spoke highly of the organisation and staff at Craiginches. Although he had limited experience of the prison, he had worked with members of the management team. He was referred to a written anti-bullying strategy, which was aimed at such behaviour and reducing its incidence. He had not been involved in implementing such a strategy, but a version would have been applicable in Craiginches at the time of the attack. It stated that it was important to identify both bullies and victims and

to make the staff aware of this with a view to ensuring that no harm ensued. Intervention was critical. Where a prisoner was put on anti-bully measures, he could be relocated or have his movements restricted. Steps could be taken to ensure that the bully and the victim were not in the same place together. They could be "kept separate". The risk would always be there, but the prison's role was to minimise it.

[12] If a report of the threat episode had been made and an investigation was planned, the two individuals would have been separated. The investigation could have resulted in no action, if there was no case to answer, or a decision might be made to ensure that the two prisoners would not attend the gym at the same time. A report of the incident would have ensured that the staff, including Mr Murray, would have been aware of the incident. A reasonable decision would have been not to take the two to the gym together. If they were together, the presence of a prison officer "on the floor" would have had the same effect as a police officer on the beat in a local community. It would have acted as a deterrent. If Mr Murray had picked up "early rumblings" he could have intervened quickly and effectively. If Mr Murray had been given information about the threat, his "antenna would have been heightened".

[13] Awareness of the intelligence would make it less likely that there would be an unsupervised opportunity to attack. If Mr Murray had not been distracted by the phone and left the room, the assault would not have happened. If a report had been made, it is likely that the pursuer and Mr Porter would not have been in the gym at the same time. Prisoners were less likely to become involved in assaults when staff were providing an effective level of supervision. Most prisoner-on-prisoner assaults occurred out of sight of the prison staff. The presence of a prison officer being seen to be closely observing had an effect on prisoners' behaviour. Very rarely would an assault take place in view of a member of staff.

The attack on the pursuer would have been "much less likely" if Mr Murray had been seen to be closely observing the prisoners.

The Lord Ordinary's analysis

[14] The Lord Ordinary noted (para [43]) that Mr McCaig's view was that "on the balance of probabilities it was more likely that the assault would not have happened in these circumstances". He continued immediately by stating (para [44]) that he accepted the evidence of Mr McCaig "on this matter". He formed the impression that Mr Murray was a very competent and conscientious prison officer who, had he been aware of the threat, would not have left the room unsupervised by going into the office to answer the phone. Mr Murray's authority and presence would have prevented what was an "opportunistic" assault from taking place. On the balance of probabilities, had Mr Lumsden reported the threat, the attempted murder would not have taken place (para [45]). The Lord Ordinary so held, even although he accepted the evidence of the defenders' expert, Philip Wheatley, that there was insufficient basis for formally segregating Mr Porter in terms of the Prison Rules.

[15] Having made a clear finding on causation, the Lord Ordinary addressed the issue of negligence. He concluded (para [63]):

> "Mr Porter made a specific threat to smash the pursuer's face in. The pursuer informed Mr Lumsden of the threat. Mr Lumsden should have reported the threat, but he failed to do so. Mr Lumsden did not take reasonable care to prevent the implementation of the threat by reporting it. It was reasonably foreseeable that the pursuer was likely to sustain damage to his person if such reasonable care was not taken. Had Mr Lumsden reported the threat, on the balance of probabilities the attempted murder would not have taken place."

He accordingly found that the defenders had failed in their duty of care to the pursuer and that they were liable to make reparation.

Submissions

Defenders

[16] The defenders submitted that the only case of negligence ultimately advanced had been that Mr Lumsden ought to have reported the earlier threat. The Lord Ordinary had accepted that case and his finding in that regard was not challenged. However, the defenders maintained that the Lord Ordinary ought not to have held that, had Mr Lumsden reported the incident, the attempted murder would have been avoided. The onus was on the pursuer to establish causation. It was not enough for the pursuer to prove a material diminution in risk (*McGinnes* v *Endeva Service* 2006 SLT 638 at para [25] citing *inter alia Porter* v *Strathclyde Regional Council* 1991 SLT 446 and *Collins* v *First Quench Retailing* 2003 SLT 1220). The pursuer still had to show that the reduction was such that it was more likely than not that the attack would not have taken place.

[17] It had not been demonstrated that, if a report had been made, it would have been negligent not to segregate Mr Porter or to take some other step to ensure that he and the pursuer were kept apart. Various possible measures, which might have followed the reporting of the threat, were canvassed. The Lord Ordinary accepted that none of these would have resulted in Mr Porter being segregated. It was implicit that the Lord Ordinary did not find it proved that any of the measures would have resulted in the pursuer and Mr Porter not being in the gym together.

[18] It was unclear what the Lord Ordinary had meant by saying that he accepted the evidence of Mr McCaig "on this matter". Although the Lord Ordinary was entitled to accept the evidence of an expert on matters within the scope of the expert's speciality, he was not entitled to devolve responsibility for making findings in fact to an expert. Whether the failure to report the threat would have prevented the assault was a question for the Lord

Ordinary, and not for an expert, to answer (*AW* v *Greater Glasgow Health Board* [2017] CSIH 58 at para [137]). In any event, Mr McCaig's evidence was conditional on Mr Murray not going to the office to answer the phone and his being made aware of the previous incident. It depended upon Mr Murray picking up "early rumblings". The general tenor of Mr Murray's testimony was that he was "on the floor" for most or all of the time, except when answering the phone. The Lord Ordinary made no finding of any early rumblings. Although Mr Murray purported to be aware of the systems operated in Craiginches and the management team there, he had little experience of either.

[19] The Lord Ordinary's reasoning on causation, including the extent of his reliance on the expert evidence, was inadequate and unsatisfactory (see *Macleod's Legal Representatives* v *Highland Health Board* 2016 SC 647 at para 100). There was no finding that, if the threat had been reported, then Mr Murray would have been made aware of it. Mr Murray had not said that he would have organised matters any differently; in particular that he would not have gone to answer the phone. There was no evidential basis to hold otherwise. Many threats were made in prisons by persons with violent records. Yet they did not carry out these threats, nor were they separated from the general prison population. Mr Porter had no record of violence in prison.

Pursuer

[20] The Lord Ordinary's findings in relation to causation were properly that: (1) in the period before the attack, Mr Murray would have been made aware of the threat, as reported; (2) the effect of Mr Murray being aware of the threat would have been that he would have used heightened vigilance and close supervision of the prisoners; (3) such vigilance and supervision would have had a deterrent effect on Mr Porter; (4) it would have allowed

Mr Murray to identify any precursors to an assault, such any "early rumblings" and intervening; (5) it would have reduced the opportunity for Mr Porter to implement his threat; and (6) it would on the balance of probabilities have prevented the attack. These findings were inextricably linked to the benefit, which the Lord Ordinary had enjoyed, of hearing the evidence of Mr Murray, the pursuer and LR. The resultant findings of fact should not be interfered with (*AW* v *Greater Glasgow Health Board* (*supra*) at paras [38] to [59]).

[21] The finding that Mr Murray would have been aware of the threat had a sufficient evidential basis. Mr McCaig had spoken to the efficiency of the systems employed in the prison to mitigate the risks of bullying. The Lord Ordinary was entitled to use this evidence to find that Mr Murray would have been aware of the threat. He had not handed over his decision-making to an expert. Any assistance, which was derived by the Lord Ordinary from Mr McCaig's evidence, was properly in respect of: (a) violence reduction policies, reporting of bullying and other incidents as they operated, in his experience, within Craiginches; and (b) the prevention of violence within the prison estate generally and the effects of heightened vigilance and supervision by officers upon the violence of prisoners.

[22] Mr McCaig had spoken to the importance of information sharing. If the incident had been reported, there would have been an investigation by the senior management team. During that, the pursuer and Mr Porter would have been separated, although not segregated. There was a deterrent effect of a prison officer being seen to keep close supervision on prisoners. Assaults were less likely when staff were providing such a level of supervision. The Lord Ordinary's statement, that he accepted Mr McCaig's evidence "on this matter", was not unclear. It related to the assistance which he had derived from this evidence in addressing the question of whether it was more likely than not that the attack

would not have taken place. The Lord Ordinary had accepted the evidence about the deterrent effect of the presence of a prison officer and that it would be much less likely that an assault would have taken place if close observation had taken place.

[23] It was implicit from his Opinion that the Lord Ordinary found that, but for Mr Lumsden's failure to report, Mr Murray would have been aware of the threat. The Lord Ordinary had an evidential basis for such a finding. The defenders' expert, namely Philip Wheatley, had said that he would have expected the prison service to have responded to a report by alerting all staff about the threat and to be on the lookout for any signs of further problems. There was clear evidence of structured reporting procedures, involving interaction between staff members, hall managers and senior management on a daily basis. There was an alternative basis for finding that the assault would not have taken place, namely that the pursuer and Mr Porter would have been separated pending investigation of the threat.

[24] It was implicit in the Lord Ordinary's Opinion, given the competence and conscientiousness of Mr Murray, that he would not have left the room had he known about the threat. The proposition that prisoners were less likely to be involved in assaults, when the staff were providing an effective level of supervision, was fundamentally unchallenged. Mr Murray's primary position was that, had he been aware of the threat made by Mr Porter, he would not have taken both prisoners to the gym.

Decision

[25] The Lord Ordinary has found, and the defenders now accept, that Mr Lumsden's failure to report the threat to the pursuer in the gym constituted negligence. That finding and acceptance carry with them an inference that the absence of a report amounted to a

failure to take reasonable care for the pursuer's safety; ie that he was thereby exposed to the risk of injury. The Lord Ordinary said this in terms (para [63] *supra*). The issue of causation is thus sharply raised. The defenders' position, stripped to its essentials, is that, notwithstanding the fact that a prisoner in their custody was exposed to the risk of injury as a result of the failure to report a threat of serious violence with racist overtones, nothing effective would have been done about this by the prison authorities and thus the attack would have happened in any event. The court is unable to accept this unattractive proposition.

[26] Where negligence is established, as it is here, and thus the existence of a risk of injury is demonstrated in the context of a prison setting, in which the prison authorities control the movements of all those involved, the court is entitled to make the reasonable assumption that the prison authorities will not only do something about that risk, but that the something will reduce the risk to such a level that it will, in all probability far less on a mere balance, not occur. If that is so, causation must be taken to be established in the absence of some extraordinary factor which made the incident otherwise inevitable despite the taking of reasonable precautions. This in itself is sufficient reason to refuse the reclaiming motion.

[27] There was, in any event, a sufficient evidential basis for the Lord Ordinary's findings. It is correct to say that the question of causation was one of fact for the Lord Ordinary to resolve for himself. A judge ought not to delegate this task to an expert witness, even if that witness has, without objection, been allowed to express a view on the matter (*AW* v *Greater Glasgow Health Board* [2017] CSIH 58, LJC (Dorrian) delivering the Opinion of the Court, at para [137]). The importance, and indeed the competency, of the evidence of the skilled witnesses was not in relation to whether the attack would or would not have happened in the circumstances. It was to illuminate the court's understanding of matters

outwith its knowledge, notably the systems of prison management and prisoner monitoring and to provide some insight into the reactions of prisoners to different supervisory regimes. Although the Lord Ordinary did say, perhaps somewhat loosely, that he accepted the evidence of Mr McCaig "on this matter", referring to his testimony that it was much less likely that the assault would have happened if close supervision had been in place, the court reads that as meaning no more than that he agreed with Mr McCaig's analysis.

[28] There was evidence from Mr McCaig that, if a report of the threat had been made, it would have gone to senior management for a determination on what to do. There was evidence (if indeed it was required) that it was important to disseminate information about a threat of violence to those officers likely to be in a position to do something positive about such a threat. The officers in question would have been primarily those in the relevant hall. It is not surprising that Mr Murray did not say that he would have been told of the report or explain what he might have done differently, since he would have expected action to be taken in the hall rather than any problem being transferred to the gym. The Lord Ordinary did not consider that possibility because he held that, if the pursuer and Mr Porter had been allocated to the same gym session, the intelligence ought to have reached Mr Murray. In that event he held that, given his conscientious nature, Mr Murray would have acted upon it by not leaving the room and maintaining such authority and presence as would have prevented the attack. The Lord Ordinary was entitled to reach that conclusion even if Mr Murray was unable to say what he would have done differently.

[29] For all these reasons, the reclaiming motion is refused. The court will adhere to the Lord Ordinary's interlocutor of 22 August 2017 and remit the cause to him to proceed as accords.