RECENT DEVELOPMENTS

HUMAN RIGHTS

Dangerous prisoners and attacks on fellow prisoners

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Introduction

In a recent decision of the High Court,[1] the Ministry of Justice was found in breach of its common law and European Convention obligations to keep a prisoner reasonably safe, where he had been attacked by another prisoner and had suffered serious injuries because of the attack. This resulted in the prisoner being awarded £85,000 in general damages, including interest, and the court also made a declaration that the prisoner's right to be free from inhuman and degrading treatment, guaranteed under Article 3 of the European Convention on Human Rights 1950, had been breached. Such legal claims are not novel, although many are settled out of court, but they raise a number of legal and moral claims surrounding the question of whether prisons, and the government, should be responsible for such attacks, and in what circumstances, and whether prisoners should, morally, be able to make such claims and receive compensation from the public purse.

This piece details this recent court case, but more broadly, it will revisit the legal issues raised in such claims, including the principles of human rights, public authority accountability and the rule of law employed to justify awards in the face of criticisms from the public against such awards.

The decision in *Newell v Ministry of Justice*

In this case, the claimant prisoner, Newell, brought a claim in common law negligence and under the Human Rights Act 1998 against the defendant, for breach of his Article 3 rights under the European Convention.[2] Newell was a convicted murderer and had been serving a whole life term, and on 27 November 2014 Vinter, another whole-life term prisoner, attacked him whilst they were in the exercise yard at a prison. Because of the attack, Newell suffered significant injuries, including brain damage and the loss of sight in his right eye.

Importantly, Vinter had a history of violent and disruptive behaviour whilst in prison and was recorded by the prison as a high risk of harm to other prisoners in custody.[3] At the prison, there was a system of unlock levels in place: a single unlock was imposed where a prisoner's risk to others was considered too high to enable him to participate in mixed association or mixed activities, and unlock level three meant that three prison officers would be required safely to unlock a prisoner from his cell. A Dynamic Risk Assessment (DRAM) had been carried out on Vinter on 26 November, and it had been recorded

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[1] *Newell v Ministry of Justice* [2021] EWHC 810 (QB)

[2] Article 3 provides that no one shall be subject to torture or to inhuman or degrading treatment or punishment.

[3] This prisoner had been at the heart of another legal dilemma facing prisoners' rights: of whether the imposition of a whole life sentence amounted to inhuman and degrading treatment under Article 3 ECHR: *Vinter v United Kingdom* (2016) 63 EHRR 1. See Steve Foster, 'Whole life sentences and article 3 of the European Convention on Human Rights: time for certainty and a common approach? (2015) 36(2) *Liverpool Law Review* 147.

that he was unsettled because of a delay in his transfer to another prison, and that there was an opportunity for him to assault another prisoner in his association group in the exercise yard.

Newell sought damages and a declaration of the breach of his Article 3 ECHR rights for the alleged failure by the Ministry to prevent him from being harmed by others in custody, specifically Vinter. The substantive issues for the Court were: whether on the facts, the Ministry had kept Newell reasonably safe, and, if not, the causal consequences of that failure; and whether there had been a breach of the operational duty under Article 3 ECHR by the Ministry. However, for the Article 3 claim to proceed, the other issue for the court was whether Newell should be granted an extension of time under s.7(5)(b) of the Human Rights Act 1998 to bring a claim under Article 3 ECHR,[4] as it had been issued after the expiry of the time limit prescribed by the Act. The final issue was the quantum of damages, if Newell's claim was successful.

Giving judgment for the claimant, the court first considered whether that had been a breach of the Ministry's duty of care towards the claimant. In this respect, the court noted that the decision at the 26 November DRAM to allow Vinter to associate with Newell was in breach of the Ministry's duty of care. This was because the risk on 26 November was high, and that the effect of maintaining the three officer unlock meant that Vinter's opportunity to use the violence that he was well known for, would have arisen in the exercise yard when he was with other prisoners in his association group; the prison officers being locked outside the yard. Thus, on 26 November, there was a failure to consider the opportunity that presented to Vinter, and in the court's view, had it been discussed, the conclusion that should have been reached was to take steps to remove Vinter's association with other prisoners. Thus, if Vinter had been placed on a single unlock on 26 November, the attack would not have occurred.[5]

With respect to the claim under Article 3 ECHR, the court first had to consider the issue of extension of time and whether it was proportionate and fair to both parties to allow Newell's Article 3 case to proceed. The court stated that here was no evidence of the steps taken by N until the claim form was issued, but that for some months Newell had been suffering from significant cognitive dysfunction because of his brain injury and in addition was in prison, which provided a justification for some delay. The time limit in s.7(5)(b) of the 1998 Act expired on 27 November 2015, and the claim form was issued eight months later. That delay, in issuing the claim form, was, in the court's view, relatively modest and the defendant had been on notice at around 10 months after expiry of the limitation period following a request for disclosure. The court bore in mind that the memories of the Ministry's witnesses would have faded to some extent, but considered that the documentation available to the defendant had not been materially affected by any such delay. It concluded, therefore, that the cogency of the evidence had not been affected to the extent that there was any significant prejudice to the Ministry's ability to defend the claim. Newell had a good claim under Article 3 ECHR, and the delay in the context of a claim for a declaration and damages was relatively short. The necessary burden had been discharged and the time would be extended to permit his claim to be brought.[6]

Having ruled in favour of the claimant with respect to the delay issue, the court proceeded to deal with the substantive claim under Article 3 ECHR**.** In the court's view, there would be a breach of the positive obligation under Article 3 where the authorities knew or ought to have known at the time, of the existence of a real and immediate risk of a breach of Article 3 of an identified individual or individuals from the acts of a third party, and failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk. In the present case, the risk posed by Vinter was a present and continuing one, was immediate, and became so on 26 November. As a result of the failure to appreciate that, reasonable steps had not been taken, and if they had been, the attack on

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[4] The section provides as follows: (5) Proceedings under subsection (1)(a) must be brought before the end of— (a) the period of one year beginning with the date on which the act complained of took place; or (b) *such longer period as the court or tribunal considers equitable having regard to all the circumstances,…*

[5] At paras 82-83 of judgment).

[6] At paras 91, 94 of the judgment

27 November would have been avoided. The claim of a breach of Article 3 had, thus, been established and the court granted a declaration that that Article had been breached.

Finally, with respect to the quantum of damages, the court felt that the appropriate award was £85,000 for general damages, with approximately £7,400 interest.[7]

Human rights claims of prisoners for attacks by fellow prisoners

Awarding compensation to prisoners for attacks from fellow prisoners is hugely controversial, and a previous article in this journal reported the outrage from the media and politicians in response to a £4,500 damages award given to Levi Bellfield, the convicted murderer of teenager Millie Dowler, for an attack on him by fellow prisoners in 2010.[8] The Ministry of Justice was reported as saying that it was "hugely disappointed" by that decision and Labour MP Ian Austin described the pay out as "a complete and utter disgrace.''[9] In such cases, it is argued that to allow awards to those convicted of serious criminal offences makes a mockery of justice.[10] In particular, the general public response has been that individuals such as Bellfield and Newell, should not be allowed to use the courts to vindicate their rights when by the very nature of his crime they have violated others' rights. In other words, that it is morally wrong, and should be legally impossible, for them to bring such an action.[11] In the Bellafied case, further criticism was directed at the fact that the taxpayer had to pay the compensation and the resultant costs, which were estimated at approximately £10,000.[12]

These concerns and arguments are part of a wider debate about the forfeiture of prisoners' rights: the popular opinion being that prisoners should forgo many of their rights on imprisonment. Nevertheless, the legal position – under both domestic law and under the European Convention on Human Rights – is that prisoners retain their basic rights, subject to them being taken away, expressly or by necessary implication.[13]

Under both domestic and human rights law, prisoners may and do bring actions in private law against the prison authorities.[14] In addition, following the coming into effect of the Human Rights Act 1998, courts, as public bodies under s.6 of the Act, have the duty to apply such private law principles in the light of the European Convention whenever the claimant's Convention rights are engaged.[15]

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[7] At paras 108, 110.

[8] Steve Foster, 'Compensating prisoners for attacks by fellow prisoners' (2014) 2 Coventry Law Journal 18. See 'Why should monsters like Levi Bellfield have human rights when they are not human?' *The Daily Mirror* April 4 2014. Bellfield had been attacked by a fellow prisoner with a makeshift weapon outside one of the prison's bathrooms in 2009 before he went on trial for the murder of the 13-year-old schoolchild. B launched a legal action in negligence claiming that the prison staff should have protected him; arguing that he should not have been placed within the prison's main population because the nature and notoriety of his murders made him a target. Bellfield, a former wheel clamper and bouncer, was already serving a whole life term, imposed in 2008 for the 2003 murder of Marsha McDonnell, 19, and the 2004 murder of Amelie Delagrange, 22, and attempted murder of Kate Sheedy, 18.

[9] Milly Dowler's killer Levi Bellfield awarded £4,500 over prison attack' *The Daily Telegraph,* April 4 2014,

[10] Similar outrage was vented in 2010 when Ian Huntley - the person convicted of the 'Soham murders' involving the deaths of two young girls in 2003 - brought an action to sue the government in negligence when he was assaulted by a fellow prisoner. See 'Soham killer Ian Huntley to get 20k pay out for having throat slashed in prison' *The Daily Record*, 23 March 2010

[11] See Steve Foster, 'Compensation for assaults by fellow prisoners and the rule of law' (2010) 174 (41) *Criminal Law and Justice Weekly* 631

[12] 'Durham County Court hears murderer Levi Compensation bid' *Daily Chronicle,* 5 April 2014 It is reported that he will also receive £171 in interest as the payout has been back-dated to 2009; the time of the assault.

[13] See *Golder v United Kingdom* (1975) 1 EHRR 524; *Raymond v Honey* [1980] AC 1.

[14] For a general account see Livingstone and Owen, *Prison Law* (Oxford University Press) 3rd edition, 53-76

[15] Alternatively, the prisoner may bring a direct action against the prison authorities under s.7 of the Human Rights Act for breach of his or her Convention rights. This will be discussed, later.

Prisoner's private law claims in negligence in the domestic courts

In *Ellis v Home Office*,[16] it was established that the Prison Service owed a duty to take reasonable care for the safety of prisoners in their custody. The claimant, a remand prisoner, had been attacked by a convicted prisoner and brought an action against the Home Office. He sought to discover documents relating to the convicted prisoner and his mental capacity, but the prison authorities successfully relied on Crown Privilege (now Public Interest Immunity). Although the court accepted that the claimant was owed a duty of care, it found that there was no breach of that duty on the facts. The case highlights the difficulty of uncovering essential and sensitive information that is in the hands of public authorities, although in the post-Human Rights Act era it appears that the courts will provide greater protection, applying article 6 of the European Convention which guarantees the right to a fair trial and, in particular, the right to equality of arms.[17]

Nevertheless, Ellis established that the prison authorities owe a duty of care towards prisoners in respect of attacks by fellow prisoners. In these cases, the courts must judge whether the prisoner in question was owed such a duty and whether the duty was broken in all the circumstances, although early case law showed that the courts were reluctant to find liability on the facts in the absence of a clear breach of duty. For example in *Palmer v Home Office*,[18] it was held that the Home Office was not liable in a case where the plaintiff had been attacked with a pair of scissors by a prisoner with a very violent criminal and prison record. The scissors had been given to the prisoner when he was allocated tailoring work in the workshop. It was held that although it was foreseeable that the prisoner might attack a fellow prisoner, the prison authorities had a twofold duty; one to ensure the safety of fellow prisoner, and the other to provide all prisoners with a constructive working regime. The prison authorities had to balance the protection of prisoners with their duty to provide other prisoners with suitable employment and that in that respect they were reluctant to interfere with the prison's judgment in this case. This reluctance seemed to be based on the idea that prisoners would inevitably be under threat from fellow prisoners and that in the absence of clear evidence that the assault was foreseeable and avoidable no liability would be established.

On the other hand, the courts have always been more prepared to attach liability in relation to the actions of prison officials where the authorities are in breach of their own procedures. Thus in *Burt v Home Office*,[19] it was held that the prison authorities had been negligent when a vulnerable prisoner was attacked by other prisoners while being escorted from a segregation unit through the general prison. In finding the Home Office liable, the court noted that the officers involved had walked in front of the prisoner, instead, as required in such cases, behind him, and had chosen not to take a more secure route. Indeed, in the present case, the court relied heavily on the prison's procedures and its failure to act on the clear warning signs in not removing Vinter from normal association.

As evidenced from cases such as *Palmer*, above, a major obstacle for prisoners in negligence actions is the judicial recognition of the fact that prisoners are inherently dangerous places and that the standard of care expected from the defendant authorities has to be judged, and reduced, accordingly.[20] Further, the courts have recognised that the prison authorities may balance their duty of care to ensure prisoner safety with other duties such as the rehabilitation and training of potentially dangerous fellow prisoners. Thus, in *Thomas v Home Office,*[21] a youth offender institute had not been negligent in adopting a policy of supplying razors to inmates. The claimant had been the subject of an unprovoked attack and had suffered severe injuries and at first instance it was held that the authorities were liable in negligence, even though the claimant had given no information on the identity of the assailant. However, the Court

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[16] [1953] 2 QB 135.
[17] *Rowe and others v Fryers and others* [2003] EWHC Civ 655
[18] *The Guardian*, 31 March 1988.
[19] Unreported, decision of Norwich County Court 27 June 1995
[20] There is, of course, a strong argument for imposing a *greater* and *stricter* liability on the prison authorities for that reason.
[21] [2001] EWCA CIV 331 CA

of Appeal held that that neither the policy nor its adoption in this particular case provided evidence of the Home Office's negligence. In the Court's view, prison governors, particularly those in charge of Young Offender Institutions, have to make balancing judgments between tight security and a regime aimed at rehabilitation in which inmates are given the power to act responsibly.[22] The decision, therefore, adopts the approach taken in cases such as Palmer, and leaves to the authorities a very wide discretion as to how they protect inmates from clearly foreseeable attacks. [23]

In the present case however, the court specifically took into account the dangerousness of the other prisoner in finding liability. Vinter was a notoriously dangerous prisoner and Newell needed special protection against him, and this was not a case where the claimant prisoner was in general danger from other prisoners in the dangerous environment of a prison. Indeed, this allowed the claimant to avoid the other obstacle in these cases, that the authorities must be able to foresee the attack to a required degree. In Orange v Chief Constable of West Yorkshire Police,[24] the Court of Appeal stressed that prison or police authorities would not be responsible for harm occasioned to their charges simply because they had failed to follow the required procedures. Thus, to be liable in negligence the authorities would have to owe the prisoner an initial duty of care, and would not be responsible merely because the prisoner suffered damage because of their negligent act or omission. In Orange, the Court of Appeal dismissed a claim in negligence when a detainee had committed suicide after the prison authorities had broken their lock-in procedures. This was because the suicide was still not foreseeable, and that decision was consistent with the case law of the European Convention under article 2 of the European Convention, which requires a real and immediate risk to life. In the present case, however, Vinter was a clear and immediate risk, and the authorities would have known of this specific risk.

Attacks on prisoners and the European Convention on Human Rights

In addition to bringing a civil action against the authorities, a prisoner can also use Articles 2 (right to life) and 3 (prohibition of inhuman and degrading treatment and punishment) of the European Convention as an alternative action, or to augment the civil action. Thus, ECHR rights can both be used to protect an inmate's right to life and physical integrity, not only from the acts of public officials, but also the actions of fellow inmates. This is because prison authorities owe a positive duty under articles 2 and 3 to ensure that they take reasonable measures to safeguard every inmate's right to life.[25]

As well as bringing claims before the European Court, prisoners may be able to use the Human Rights Act 1998 to bring proceedings in respect of neglect on behalf of the authorities a number of ways; both evident in the present case. First, s.6 of the Act makes it an offence for a public authority to violate Convention rights, and s.7 of the Act allows the victim of such a violation to bring proceedings against such authorities. If such neglect, therefore, engages the prisoner's Convention rights – most notably under articles 2 and 3 of the Convention (the right to life and freedom from inhuman and degrading treatment) – then that prisoner may bring a direct action under the Act and seek, inter alia, compensation under s.8 of the Act, which allows the courts to award 'just satisfaction.'[26] Secondly, a prisoner may use the Act when he brings a private action, and as the term 'public authority' used in s.6 of the Act includes a court, there will be duty on the courts to ensure that an individual's Convention rights are not violated.[27] Thus, the courts have a duty to develop and apply the common law in a manner that is

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[22] Ibid, at para 25
[23] See also *Stenning v Home Office* [2002] EWCA Civ 793
[24] [2001] 3 WLR 736
[25] Under the principles laid down in *Osman v United Kingdom* (1998) 29 EHRR 245.
[26] This principle is borrowed from Article 41 of the European Convention on Human Rights, which allows the European Court to award such remedy when it finds a violation of the Convention.
[27] For debate on the horizontal effect of the Human Rights Act, see Hunt, 'The 'Horizontal' Effect of the Human Rights Act' [1998] PL 423, and Wade, 'Horizons of Horizontality' (2000) 116 LQR 217. For a discussion on the effect of the Act on tort law, see Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48, and Wright, *Tort Law and Human Rights* (Hart 2001).

consistent with the European Convention,[28] and in actions in negligence, the courts must have regard to the Convention and its case law in determining whether the prison authorities had broken their duty of care, and in determining the extent of any remedy.

This duty is not absolute and even in the post-Human Rights Act era the domestic courts have taken a guarded approach, bestowing on the authorities a reasonably wide margin of discretion in assessing the actual risk to the prisoner. Thus, in *R (Bloggs) v Secretary of State for the Home Department*,[29] the Court of Appeal found that the Prison Service's decision to remove the prisoner from a protected witness unit and return him to mainstream prison system was not in violation of the prisoner's right to respect for life under article 2 of the European Convention. In the Court's view, there had been a substantial reduction of risk to the prisoner's life once the authorities had decided not to prosecute the person who posed the threat to the prisoner.

Nevertheless, under article 2, prison authorities are responsible for protecting the prisoner from threats to his life from the actions of others, such as fellow prisoners[30] and a clear violation of this duty was found in *Edwards v United Kingdom*,[31] a case with some similarities to the present one. In this case, the applicant's son had been killed by his cellmate who had a history of violent outburts and assaults, and who had been diagnosed as schizophrenic. The emergency buzzer in the cell was malfunctioning and by the time officers heard a disturbance and went to investigate, the applicant's son had been stamped and kicked to death by his cellmate. In finding a violation, the European Court found that the cellmate posed a real and serious risk to the applicant's son and that the prison authorities had not been properly informed of the cellmate's medical history and perceived dangerousness. The cellmate should not have been placed in the cell in the first place and the inadequate screening process disclosed a breach of the State's obligation to protect the life of the applicants' son.[32]

In the present case, therefore, the prison authorities clearly saw the risk to the claimant prisoner. They were aware of the specific dangerousness of Vinter, and his specific risk to all prisoners, including Newell, should he remain in normal association. This knowledge, and failure to act accordingly resulted in a breach of the common law and the prison's duty under Articles 2 and 3 ECHR, and the compensation award reflects this; the domestic courts having to reflect the European Court's approach to just satisfaction in such cases.

Conclusions

Prisoners are especially vulnerable to the neglect of prison authorities, and in particular to dangers such as attacks from fellow inmates. As in many other legal areas, the Human Rights Act 1998 increases the potential for legal actions brought by prisoners in respect of negligent mistreatment received whilst in detention. The domestic courts and the Strasbourg Court have adopted a cautious approach with respect to claims brought by prisoners alleging a breach of the authority's duty of care, being careful not to impose an impossible burden on state agents to protect the lives and physical integrity of those in detention. In cases involving attacks by fellow prisoners, the courts accept that prisons are inherently dangerous places, although in the present case the dangerousness of the attacker, combined with a clear and specific risk will attract liability.

Whether the likes of Newell should receive compensation for attacks by fellow prisoners is obviously an emotive one. It is tempting to suggest that such prisoners deserve all they get and that they should

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[28] For example, in an action for assault brought by a prisoner against the prison authorities, or against the officer in person, the courts could have regard to Article 3 of the European Convention in deciding whether the force used on the prisoner was lawful or reasonable so as to found an action in assault. See *McCotter and Russell v Home Office*, *Daily Telegraph*, 13 March 2001.

[29] *The Times* July 4 2003.

[30] See *X v FRG* (1985) 7 EHRR 152 and *Rebai v France* 88-B DR 72.

[31] (2002) 35 EHRR 19

[32] At para 64. The Court also found a breach of the State's obligation under article 2 to hold a proper inquiry into a potentially unlawful death.

be denied the protection of the law and the right to claim compensation (from the public purse) when they have been attacked by fellow prisoners. The inescapable fact is, however, that the courts must and need to rule on these cases. Allowing prisoners to sue in such cases, is essential in upholding basic legal and human rights which are available to all, including prisoners. It is also basic to fundamental notions of justice; based both on common law principles and the content of human rights treaties such as the European Convention on Human Rights, now enshrined in our domestic law by the Human Rights Act 1998. Further, the ability to bring such actions provides the opportunity to call public authorities to account in the performance of their public and legal duties. It is without question that the state and all public authorities owe a duty of care towards everyone, including, and perhaps, especially, those in their custody.

As we have seen, the law does not accept that prisoners can sue in every case where they have been attacked: the attack needs to be foreseeable and the law, including international; law, does not impose a disproportionate and unreasonable duty on the state. Newell is, therefore an exceptional case, albeit in the context of a commonplace event in prisons.