Neutral Citation Number: [2022] EWHC 370 (QB)

Case No: BM10074A

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BIRMINGHAM
ON APPEAL FROM THE COUNTY COURT AT BIRMINGHAM
ORDER OF RECORDER BRIGHT QC
DATED 17 APRIL 2021

Birmingham High Court Appeal Centre
33 Bull Street, Birmingham B4 6DS

Date: 23/02/2022

Before :

MR JUSTICE COTTER

- -

Between :

John Hill	**Claimant/Appellant**
- and -	
Ministry of Justice	**Defendant/Respondent**

- -
- -

Adam Samuel, Counsel (instructed by Thompsons) for the **Claimant/Appellant**
Adam Farrer, Counsel (instructed by **Government Legal Department**) for the **Defendant/Respondent**

Hearing dates: 03 February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE COTTER

Mr Justice Cotter:

1. This is an appeal against the order of Recorder Bright QC made on 27th April 2021 dismissing a personal injury claim brought by the Appellant. The order followed the three day hearing of the preliminary issue of liability.

2. Permission was granted by the order of Mr Justice Andrew Baker made on 12th November 2021.

3. The case concerned a spinal injury suffered by the Appellant on 18th March 2015 in the course of his duties as a probationary prison officer at HMYOI Brindsford. The Appellant was instructed to escort two young offenders on his own from an adjudication at the segregation unit back to their cells. When they reached the first cell one of the prisoners ("DB") assaulted the Appellant by deliberately pushing into him so that both prisoners could barricade themselves into the cell. In the course of the assault the Appellant sustained an injury to his back. An MRI scan subsequently revealed a disc protrusion requiring operative treatment, sadly with no lasting benefit. The extent to which constitutional degenerative pathology within the back was exacerbated and/or brought forward remained in issue between the parties.

4. In a careful and comprehensive judgment the Learned Judge found that, whilst DB was a volatile, impulsive, manipulative and troubled young man who could be violent and fell into the worst 25% of prisoners in terms of conduct, the contention that he was a very dangerous prisoner should be rejected and that it was not necessary to automatically deem him as high risk whenever he left his cell. Further that he did not pose any specific, imminent or foreseeable risk to staff beyond that unfortunately experienced by prison officers routinely and unavoidably faced. The assault had not been as serious as the Appellant had described and the objective of the prisoner in pushing the Appellant was to block his access to the cell door so that both prisoners could enter the cell and barricade themselves in rather than to cause any significant harm. The transfer to the cells was a routine task and there was nothing in any security or intelligence report, or which should have been known to the Appellant's senior officer or other officers, including the staff on the segregation unit, that should have prompted the deployment of two officers to undertake the escort. Had two officers undertaken the escort, rather than the Appellant alone, the incident would not have happened.

5. The Appellant argues that the Judge fell into error in his assessment of the foreseeable risk of injury arising from the transfer of DB, wrongly taking into account the fact that the assault was relatively minor (although with very serious consequences for the Appellant) and also in requiring the risk to be high and /or imminent before additional steps needed to be taken to remove or reduce it. Taking into account the foreseeable risk of injury arising from disruptive behaviour on the part of DB, including through having to intervene when he fought with other prisoners, and the ready availability of steps which would have prevented the assault, the Respondent was negligent.

6. The Respondent argues that the Judge made clear and unimpeachable findings of fact. The Judge found that the level and immediacy of risk must be assessed at the relevant and particular point in time. DB's relevant history did not give rise to an immediate and specific risk to prison officers and it was reasonable to require the Appellant, who had been adequately trained, to escort the two prisoners alone. The Appellant was seeking

to place too high a bar in respect of protective measures when faced with "non-specific risk information". The result would effectively prevent a single officer from working alone with prisoners.

Facts

7. Save where otherwise stated I take the following facts from the judgment.

8. The Appellant commenced his employment on 5th January 2015 as a probationary prison officer. He successfully completed his foundation training and was "conscientiously learning the ropes". Although there was an unfortunate lack of on the job training and mentoring, the Claimant was properly supervised.

9. On 18th March 2015 the Appellant escorted two young offenders "DB" and "PG" from the Care and Segregation Unit ("CSU") following an adjudication into DB's conduct.

10. DB was a volatile, impulsive, manipulative and troubled young man who could be violent. He fell into the worst 25% of prisoners in terms of conduct. In the view of Mr Street, the Head of residence at HMYOI Brinsford he was

> "care experienced with a lot of anger and frustration (but) geared to other prisoners"

11. DB had been admitted to HMYOI Werrington in late February 2014 having been sentenced to a Detention and Training Order for common assault. He assaulted the prison librarian by pushing away her arm in March 2014 and engaged in abusive and non-compliant behaviour at times, although he was more settled at other times. On 7th March 2014 an entry was made in DB's NOMIS record that he was "a risk to staff". On 23rd June 2014 he damaged and barricaded his cell and also threatened staff. An alert dated 25th June 2014 was headed

> "risk to staff…threats to assault staff using a weapon".

12. Having turned 18 years of age on 11th June 2014, he was transferred to HMYOI Brinsford on 15th July 2014. On 21st July he was placed on report for smashing his television and on 27th July 2014 attempted to assault a prison officer, was restrained and returned to his cell under restraint. On 2nd February 2015 he had pushed an officer in the chest when challenged in the exercise yard. He was aggressive and abusive when appearing before the Governor the next day. On 9th February DB was placed on report for having two home-made weapons (a piece of metal pipe and a sock with two bars of soap in it). On 10th February he told an officer how he hated his social worker and that when he was released, he would kill him. However immediately after that whilst being escorted he did not react to an incident which the recording officer considered showed maturity and was worthy of a positive behaviour entry. There was misconduct again on the 25th February 2015 when he was found to have a broken broom handle down his trousers. On 27th February he was put on notice for fighting with other prisoners. When

seeing his social worker on 4th March he was well behaved and was again the subject of a positive behaviour report.

13. Mr Thompson was at the material time an experienced senior officer (and a union representative at the prison). It was his role to supervise the regime in a unit and to co-ordinate the movement and activities of prisoners and to allocate tasks to staff. He knew DB well, had a good working relationship with him and considered him "troublesome, immature and compulsive" who sometimes "played up". In his view every prisoner is a risk but DB did not pose any specific physical risk to staff. He said that at the time of the assault on the Appellant there had been nothing specific or recent and that he presented "no imminent risk".

14. It was accepted by Mr Street, the Head of Residence at the prison, that when DB left his cell there was a risk that he would fight with other prisoners.

15. This was the Appellant's first solo escort. His recollection was as follows:

> "(15) On 18th March 2015 Marvin Thompson told me to collect two prisoners from the CSU. This is the care and separation unit. I was given no information about the prisoners. I had not been told about their individual characteristics or why they were on the CSU. 1 knew that prisoners went there for adjudications but was not told anything else. I questioned Marvin whether I had to do the task on my own. Marvin simply looked around and gestured and said it's your job, get on with it and then walked off. His tone and body language made it clear that he would not welcome further questions and he seemed quite stressed.
>
> (16) I walked down to the CSU which took, around five minutes. I opened the gates and saw an officer who said 'you've come for them'. He opened a side cell and said to two lads 'off you go'. 1 asked the officer for their names and cell numbers. He gave them very quickly, one was called (DB) and the other was called (PG). I asked for their prison numbers and wrote them down on a notebook because I wanted to make sure that I brought them back to the right cells. I had never met the prisoners before and knew nothing about them.
>
> (17) I was concerned to ensure that I was safely positioned whilst escorting them back to their cells. I let them both walk in front of me and I walked slightly behind. We walked along the corridor. The prisoners seemed to know where they were going. They were laughing and joking. They turned right into another corridor. At no time did I see any other officers who would have been able to assist me if there was a problem. It took a few

> minutes to reach the entrance of Res 1. I opened the gates which involved opening a heavy door. The prisoners waited for me to lock the door. In front of this was another metal gate leading to the staircase to the lower level. They went down the stairs and through another gate. I unlocked and opened the gate. I was carrying a set of keys which were attached by a chain to my belt. We started walking along another corridor.
>
> (18). As we walked along they were laughing and joking and I heard them making some homophobic comments. I didn't take much notice of this and didn't feel especially threatened. I had been most concerned about the part of the journey which involved going downstairs and thought that this was the most dangerous part and felt that once we had cleared the stairs that the worst was over."

16. When they reached cell A1-22 the two prisoners executed what was obviously a preconceived plan to both enter DB's cell and barricade themselves in. In so doing DB pushed the Appellant aside.

17. The Appellant stated:

> "If I had known that (DB) had behaved violently towards members of staff previously I would have insisted on having assistance or would have refused to carry out the task because I was simply too inexperienced and do not believe that I should have been asked to do this on my own."

18. Before the Judge Mr Samuel argued that a foreseeable risk arose from the task of escorting the two prisoners and that as a result the Respondent should have either sent along another more experienced officer along with the Appellant or provided adequate information and instruction about DB which would have promoted the Appellant to request such assistance.

19. As regards the foreseeability of risk Mr Samuel relied upon the following factors:

    a) Adjudications could be a bit of a flash point
    b) The distance to be escorted was quite a way
    c) A person was always liable to perform a task incorrectly the first time they perform it
    d) An officer escorting alone was at an increased risk of injury
    e) There was a significant amount of documentation relating to DB's record of violence and it was known that he would "play up".

20. He submitted that the risk of injury to staff posed by DB each time he left his cell

> "needed to be considered whether that was due to direct assault on members of staff, or due to having to intervene in Control and Restraint operations in circumstances where assaulted, or fought with, other inmates."

21. The Judge heard from Mr Street and Mr Thompson on behalf of the Respondent.

22. As the Judge recorded Mr Street stated

> "19. In terms of prisoner movement, Mr Street indicated that escorting prisoners *"is a standard, everyday task for a Prison Officer",* with the maximum safe ratio of prison officers to inmates in a YOI being one officer per 14 inmates, as opposed to the ratio for adult prisons being 1:30. He emphasised that this is of course the maximum number of prisoners that can be escorted by one prison officer, because *"each situation is different and a safe ratio will be determined by the particular context, for example, the purpose of the movement, the distance to be covered, and which prisoners are in the group.""*

23. The Judge reviewed the evidence of Mr Thompson as follows;

> "25. Whilst he did not recall instructing the Claimant to collect the two prisoners from the CSU and to bring them back to the wing, it is the sort of task that he would ask officers to carry out. Whilst the CSU would not normally specify who the prisoners were for escort, to do so was in his view *"a routine task for officers to carry out."* As a result, no specific safety briefing would be given in advance of such a task but, if the CSU staff informed him that one of the prisoners for collection was behaving badly, his standard approach would be to go and speak to that prisoner before they were escorted to ensure that it could be carried out safely. That was not however the case on that day.
>
> 26. Mr Thompson's evidence was that "It is quite normal for one officer on their own to escort more than one prisoner around the Prison. One officer to two prisoners is within what is considered to be a safe ratio. If an officer arrived to pick up two prisoners and had any concerns or was uncertain about their ability to safely carry out the task, I would expect them to take steps to minimise that risk. For example, they are able to ask for assistance from colleagues, or they could take one prisoner through at a time and then return for the other." In addition to

> having a baton, whistle, radio and access to alarms, he indicated that officers "are trained to deal with situations involving non-compliant prisoners, including specific training for control and restraint, and personal protection procedures."
>
> 27. In relation to the Claimant, from working with him he said that *"I never had any reason to think that he was not capable of carrying out an escort for two prisoners within the Prison. The Claimant had completed the Prison Officer Entry Level Training ((POELT) at the college, and he had given no indication that he was uncomfortable carrying out his duties as a Prison Officer. As I recall, he was good at his job, and I had no concerns about his competence."...*

And

> "66. …if there is a significant risk from a prisoner, he would do a briefing and potentially send two prison officers, or could have each prisoner escorted one at a time. However, he said that *"the trouble with our business is that we don't have the luxury of time and things have to be done quickly…"*
>
> 68…He agreed that DB was troublesome and that adjudications could be a flashpoint but maintained that the CSU staff would brief the prison officer if they saw prisoners as a danger and would instruct the officer not to escort them."

24. The Judge found that Mr Thompson, although clearly a long serving and "hard-nosed" prison officer, was entirely reasonable and balanced in his evidence, and rightly careful to avoid the benefit of hindsight, in a manner which made his observations all the more compelling.

25. The Judge found as fact that the Appellant was a conscientious and competent probationary officer. Further that the Appellant had a conversation with SO Thompson about doing the escort alone and was told to get on with it.

26. I turn to the Judge's findings. He found there was no clear evidence upon which he could or should find that the Appellant's training was not adequate or comprehensive. He did not consider that any understandable anxiety on the part of the Appellant was indicative of inadequate training. He also found that the Respondent's risk assessment reflected a suitable and sufficient risk assessment applicable to the movement of prisoners generally. Mr Samuel makes no challenge to these findings.

27. The Judge also found that the Appellant's expectation that he would not work alone without another officer being nearby, if actually present at the time, rather than being misremembered, was unrealistic. Both Mr Street and Mr Thompson were correct in considering that the Appellant and other new prison officers were suitable for escorting duties, even if there would have to be a first time.

28. He rejected the Appellant's contention that DB was a "very dangerous" prisoner and that he presented an imminent and continuing risk whenever he left his cell in 2014, 2015 or 2016, that risk being to prison officers, howsoever caused. He preferred the evidence of both Mr Street and Mr Thompson that whilst DB was volatile, impulsive, manipulative, troubled and could be violent, falling into the worst 25% of prisoners in terms of conduct, he should not automatically be deemed a high risk or posing any specific physical risk to staff. He found that the level and immediacy of any risk must be assessed at a particular point in time, namely March 2015, whilst recognising that previous, serious alerts remained extant from a number of months or even the year before, and that serious incidents arose in subsequent months or years. He found that the entries in February and March 2015 were concerning they generally amounted sometimes to threats, which were not carried out, or the carrying of weapons and fighting with other prisoners, or incidents in relation to a prison officer and the governor which arose in particular circumstances;

> ".. none of which, could or should have given rise to an assessment of immediate and specific risk to prison officers in general and new offices in particular, such that an imminent or foreseeable risk beyond that unfortunately experienced by prison officers routinely and unavoidably, was present"

29. He found there was nothing in the NOMIS records for DB, and no evidence of anything in the wing observation book or intelligence reports which otherwise was or should have been known to Mr Thompson and other prison officers, or indeed the CSU staff, at the time, that could or should have prompted Mr Thompson to instruct or permit the Appellant to take a second officer with him or to escort DB and the other prisoner one at a time. He accepted Mr Thompson's evidence that this was a routine task of which the Appellant was perfectly capable, such that there was no foreseeable risk that the normal manner of solo escorting needed to be modified. He accepted that the Claimant's mode of escorting was "absolutely textbook". He found the decisions taken at the time were reasonable notwithstanding the unfortunate occurrence of the incidents in question.

30. In terms of causation he found that had the Appellant been accompanied by a second officer and on balance of probabilities the incident would not have happened. However, he stated

> "Conversely, however, I find that there is insufficient evidence to conclude on the balance of probabilities, that DB would have

> been dissuaded from his plan to barricade himself in his cell had the claimant resorted to "one by one" escorting, which contention I consider to be in the realms of speculation."

31. The Judge considered the various accounts of the assault given by the Appellant over time and found that there was "a development" in them. He found that the incident was neither as forceful or as violent as latterly described, rather consisted of DB turning and pushing into the Appellant from a standing position (or walking) and not running approach and pushing him back against him in order to block him causing the Appellant's back to come into contact with the wall causing some injury, due to his twisted position. However the Appellant was not slammed against the wall as he had latterly described. The Judge stated

> "those findings are in my view relevant to the issues of both the nature of the risk presented by DB and the level and foreseeability of it."

32. I shall consider this particular finding in detail in due course as Mr Samuel submits that it represents a flawed approach to the analysis of foreseeability.

33. Finally, the Judge noted that the authorities supported the view that resourcing considerations as well as levels of risk were relevant to the duty of care. He stated

> "..in this case I have largely reached my conclusions on my assessment of risk, rather than the absence of resources, but do accept the Defendant's general submission that the claimant seeks to set the bar far too high in terms of the measures that he contends for in order to balance the level of risk to prison officers as inevitably present, against available staffing resources."

Grounds of Appeal

34. There were initially three grounds. It was argued that the Judge erred by

    (a) having regard the "actual circumstances" of the assault in assessing whether some injury to the Appellant was foreseeable;

    (b) applying an incorrect and unduly onerous test of "imminence/immediacy" of harm in assessing whether any injury to the Appellant was foreseeable. All that was required was a "real risk"; a foreseeable risk of injury;

    (c) failing to find that the Respondent should have taken precautions which its own witnesses agreed could have been taken with relative ease.

35. Before considering the grounds in detail it is necessary to consider what a claimant must prove in respect of the foreseeability of injury in personal injury cases.

36. There is a duty on an employer to take reasonable care to protect his employees against a reasonably foreseeable risk of injury in the workplace. Reasonable foreseeability of injury is not a fixed point on the scale of probability. The test is objective, but takes account of all relevant circumstances, including characteristics of the defendant in determining what is foreseeable. It is not necessary that the precise manner in which an accident happens should be foreseeable, so long as an accident of that general kind can be foreseen: see **Overseas Tankship v Mort Dock and Engineering Co** [1961] AC 388; **Hughes v Lord Advocate** [1963] AC 837; **Doughty v Turner Manufacturing Co Ltd** [1964] 1 QB 518 and **Jolley v Sutton London Borough Council** [2000] 1 WLR 1082 at 1089–1091.

37. As stated by Lord Steyn in **Jolley** *(*at 1090 D–E. referring to Fleming, the Law of Torts, 9th Ed [1998] assessment of the issue requires an intense focus on the circumstances of the individual case.

38. Some occupations carry with them what has been described as an "unavoidable" level of risk. The Learned Recorder used this term. In my view it can be an oversimplification and often not strictly accurate. A better analysis for many occupations would be that the risks in question cannot not be wholly eradicated save by measures which would be either impracticable and/or unacceptable to the public generally and /or unlawful (or in breach of a duty owed to relevant individuals such as pupils, patients or prisoners) and/or or too costly to be met by public funding. As directly applicable to the present case systems of inmate management in operation in prisons in other countries, e.g. America, may avoid what are considered "unavoidable" risks within custodial environments in this country. However, the methods used would be considered, for a range of reasons, unreasonable and/or unacceptable in this Country. The problem with use of the term unavoidable is that it fails to recognise that changes, for example to public attitude or through invention or progress, may alter the question of what is reasonable such that different steps should be taken to address a risk of injury.

39. The common law principles applicable to occupations which are inherently dangerous and carry with them a background or base level of risk, are the same as those applicable in any other type of occupation. In **King v Sussex Ambulance NHS Trust** [2002] EWCA Civ. 953 Hale LJ (as she then was) stated:

> "21. The starting point is that an ambulance service owes the same duty of care towards its employees as does any other employer. There is no special rule in English law qualifying the obligations of others towards fire fighters, or presumably police

officers, ambulance technicians and others whose occupations in the public service are inherently dangerous: see *Ogwo v Taylor [1988] AC 431*. Such public servants accept the risks which are inherent in their work, but not the risks which the exercise of reasonable care on the part of those who owe them a duty of care could avoid. An employer owes his employees a duty to take reasonable care to provide safe equipment and a safe system of work, which includes assessing the tasks to be undertaken, training in how to perform those tasks as safely as possible, and supervision in performing them.

22. What then is reasonable care in this context? The classic statement of the standard by which an employer is to be judged is that of *Swanwick J in Stokes v Guest Keen and Nettlefold (Nuts and Bolts) Ltd [1968] 1 WLR 1776, 1783*:

"the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know … where there is developing knowledge, he must keep reasonably abreast of it and not be slow to apply it … He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions which can be taken to meet it and the expense and inconvenience they involve.""

However, there is a further dimension which is particularly applicable to the statutory services. As Denning LJ put it in *Watt v Hertfordshire County Council [1954] 1 WLR 835, 838*:

"It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk … I quite agree that fire engines, ambulances and doctors' cars should not shoot past the traffic lights when they show a red light. That is because the risk is too great to warrant the incurring of the danger. It is always a question of balancing the risk against the end."

23. The problem in a case such as this is that the ambulance service owe a duty of care to the members of the public who have called for their help: see *Kent v Griffiths [2001] QB 36*. This can result in liability for failing to attend to a patient within a reasonable time. The service do not have the option available to a commercial enterprise of refusing to take the job. If a removal firm cannot remove furniture from a house without exposing its

> employees to unacceptable risk then it can and should refuse to do the job. The ambulance service cannot and should not do that. But that does not mean that they can expose their employees to unacceptable risk. They have the same duty to be efficient and up to date and careful of their employees' safety as anyone else. It does mean that what is reasonable may have to be judged in the light of the service's duties to the public and the resources available to it to perform those duties: as Colman J put it in *Walker v Northumberland County Council [1995] ICR 702, 712*:"
>
> The practicability of remedial measures must clearly take into account the resources and facilities at the disposal of the person or body owing the duty of care … and the purpose of the activity which has given rise to the risk of injury."

40. The prison system in this county has evolved to reflect an overall balance between the need for control of the risk posed by the prison population and what are considered reasonable and acceptable conditions of incarceration. The result of this balance is that prison officers are a category of public servant who may have to deal, day in and day out and face to face, with a sub-category of the public which contains a significant proportion of violent and unpredictable individuals. As a generic category, young offenders are more volatile, unpredictable, aggressive and disruptive than adult prisoners due to a lack of maturity. This is reflected by a lower overall base ratio of officers to inmate of 1:14 as opposed to 1:30 for the adult population. However as the Judge noted Mr Street stated

> "In all normal situations however with prison officers or even non-prison staff and instructors responsible for a working group of e.g. 10 prisoners, and in numerous tasks, two officers would not be allocated to a single prisoner."

41. The present case concerned the necessary movement of young adult prisoners. Escorting inmates from the CSU to their cells was described as a routine task. As a result of the general systems in the prison estate operation (as opposed to those operated in some other countries) such movement carries with it a baseline risk of violence and disruptive behaviour which varies with the individual or individuals concerned. As Lord Justice Stuart-Smith observed in **Hartshorn-v-Home Office** [1999] Lexis Citation 4262

> "In any prison there is some risk that prisoners will be violent to each other. If they are determined to attack other inmates they are usually cunning enough to do so at a time when someone's back is turned, or there is no immediate supervision. Unless there is a known propensity to violence by the aggressor, known animosity to the victim or particular vulnerability of the victim, such attacks cannot be prevented, because it is impossible to segregate such people or supervise them all the time."

42. The duty to take reasonable care requires the baseline risk to be addressed within a safe system of work, which includes assessing prisoners, any tasks to be undertaken, training staff how to perform those tasks as safely as possible, and supervision in performing them. As regards assessment of a particular activity the assessment is one as to whether, in the light of the extent of the risk posed by a prisoner or prisoners, the need for and purpose of the activity and the resources available to deal with it, the risk posed is such that additional or alternative measures should be taken.

43. A failure to maintain and a operate a safe system of risk reduction will be negligent. In **Lloyd v Ministry of Justice** [2007] EWHC 2475 (QB) His Honour Judge Foster QC held that a prison officer who was violently attacked by a prisoner would have taken further precautions if he had been alerted about the prisoner's history of violence and assaults on other officers. None of the officers had known anything about the prisoner's violent disposition. Nor had any relevant enquiries been made about him. The Defendant had, in the circumstances, failed to provide him with a safe system of work by failing to inform the senior officer or the prison officers, including the claimant of the prisoner's history of violence and assaults on prison officers and thereby exposed him to a foreseeable and unnecessary risk of injury.

44. In **Cook v Bradford Community Health NHS** [2002] EWCA Civ 1616, the Claimant, who was an employee in a psychiatric hospital was injured by a dangerous patient. The patient in that case was in a "seclusion suite", and a decision was taken by two health care assistants to allow a patient to come out of seclusion whilst the Claimant was still standing in the observation area. Lord Justice Schiemann stated (at paragraph 17);

> "The present situation as the judge held was one where her [Miss Cook's] presence was arguably necessary before the patient left the seclusion room but was not necessary afterwards, and the health authority who has the difficult task of looking after these patients should not expose their employees, however well-trained, to needless risks. There is no avoiding exposing employees to risks. Manifestly the closer your dealings are with a patient, the greater the risk. If your function is merely to bring coffee on this particular occasion, there is absolutely no need for you to be close to the patient. So the judge held. It seems that she had effectively fulfilled or could have fulfilled her function (one does not know the detailed finding on that) but for my part I see nothing wrong in the approach which has been adopted by the recorder."

45. In **Buck v Nottinghamshire Healthcare NHS Trust** [2006] EWCA Civ 1576 the Claimants were injured when attacked by an "exceptional patient" even by the standards of high security hospitals and who posed an "exceptional risk". Lord Justice Waller stated

> "In my view, in concluding that there should have been a rigorous risk assessment as the Tilt Directions contemplated, and in taking the view that following such an assessment the appellants should have had a policy contemplating the

> confinement of Miss Agar in her room at night, the judge was imposing the appropriate standard of care on the appellants in relation to their employees. In holding that there was not a rigorous assessment, which would have contemplated confining Miss Agar to her room at night and in finding that if there had been she would have been confined in her room at night, the judge's decision cannot be criticised."

46. I turn to the specific grounds of appeal.

47. Ground one was that the Recorder erred in law in having regard to the "actual circumstances" of the assault in assessing whether some injury to the Appellant was foreseeable. In the grounds Mr Samuel submitted the nature of the assault could never be relevant to its foreseeability. The Judge had wrongly focused on the exact form of the assault and considered whether it was foreseeable in that form.

48. As I have already set out the Judge considered exactly what happened at the door of the cell and found that the Appellant had not been slammed against a wall rather pushed away from the door and then blocked so as to enable both prisoners to enter the cell. He found that the two prisoners had formed a plan to barricade themselves and that only the presence of another officer would have prevented them trying to carry it through. He stated that his findings (that the assault was less serious than the Appellant had recollected) were relevant to the nature of the risk presented by DB and the level of foreseeability of it.

49. Mr Farrer pointed out that the Judge had only been invited to make findings as to the form of the assault given the disagreement between the medical experts as to the extent of injury caused by it. He conceded that he struggled somewhat to understand what the Recorder meant by his comment.

50. As I indicated during submissions my view is that it is likely that what the Judge meant was that his finding that the assault was limited to a push and a block to enable his fellow prisoner entry to the cell, as opposed to one intended to cause significant injury to the Appellant, was relevant to the issue of foreseeability of any form of disruptive behaviour (and not specifically what did take place). Mr Samuel had relied heavily in presenting the Appellant's case upon the references to there being a risk that DB would fight with other prisoners every time he left his cell. Fighting meant intervention by officers and the consequential risk of injury during restraint. DB had been in the segregation unit with other prisoner and was to be escorted back with him. It appears that all other prisoners were in their cells whilst DB and PG were being returned to their cells. Taking a generally elevated risk that DB would fight with other prisoners at any time when out of his cell then his conduct on the CSU and the interaction between the two inmates would be important in terms of the foreseeability of some form of trouble between then which would necessitate the Appellant having to intervene and thereby, on Mr Samuel's analysis be put at risk of injury. As Mr Thompson indicated in his evidence he would rely on information or briefings from the CSU staff if they saw a prisoner as a danger (bearing in mind that adjudications could be a flashpoint). The Judge found as a fact that there was nothing known to the CSU staff that could, or should, have prompted the deployment of a second officer. It seems to me likely that in arriving at that finding the Judge found what actually happened as relevant to the assessment of risk as, far from being at risk of fighting, the two prisoners had hatched

a plan together which they then executed. This would be consistent with the Appellant's description of them laughing and joking together. Accordingly there was nothing to put the staff on notice that DB was likely to engage in violent behaviour directed against the other prisoner.

51. Further, the fact that DB did not intend to cause significant injury to the Appellant was relevant to whether there was anything to alert the staff to a heightened risk i.e. beyond the ever present degree of risk which he posed, that he might assault staff. Put simply if DB was in a jovial and compliant mood with the staff this would not cause any concern that there was an increased risk that he might engage in disruptive behaviour of any form during the escort.

52. During submissions, Mr Samuel correctly conceded that the nature of the assault could have some limited relevance to the issue of foreseeability. I see nothing wrong with the Judge's approach and in my view there is no basis for arguing that he fell into error as argued under Ground one.

53. Under Ground 2 Mr Samuel argued that the Judge applied an incorrect and unduly onerous test of "imminence/immediacy" of harm in assessing whether any injury to the Claimant was foreseeable and in so doing set the bar too high.

54. The Judge referred, within the list of what he stated the issues to be determined were, to the question of whether the previous conduct of DB created an

> "exceptional, immediate and foreseeable risk of violence to prison officers."

He referred in his judgment to it not being necessary that DB

> "should automatically be deemed high risk".

Also he found that, whilst DB's record was generally "concerning", the level and immediacy of risk must be assessed at the relevant point in time and that there was nothing in DB's history and presentation on the 18th March 2015 which could, or should, have given rise to an assessment of immediate and specific risk to prison officers in general and new officers in particular such that an imminent or foreseeable risk, beyond that unfortunately experienced by prison officers routinely and unavoidably, was present.

55. The application of a threshold that the risk be exceptional and/or high before steps were necessary would have been an error. What the Appellant needed to establish was a risk, sufficiently above the baseline/constant risk posed by many young offenders and addressed by the "usual" systems in operation, to require additional steps/measures; here using two officers rather than one or escorting the prisoners one at a time. It was the Judge's finding that such a risk was not present and DB presented no imminent or foreseeable risk of injury howsoever caused he did not fall into error.

56. The idea of the assessment of the immediate future came from SO Thompson who gave evidence that at the time of the assault there had been nothing specific or recent to give

rise to any concern that he presented an imminent risk. This was an assessment taking into account that DB was in the top 25% more disruptive inmates, but not axiomatically a "high" risk whenever he was out of his cell. It was SO Thompson's view, which the Judge accepted, that the assessment of the foreseeability of violence to other inmates or staff had to be taken in the context of what was happening at the time in question i.e. at the relevant and particular point in time. The risk of assault to other inmates and or staff may be significantly reduced and so not be imminent if a prisoner appears happy and is clearly laughing and joking with a fellow inmate as DB had been before the assault. As his positive behaviour entries revealed DB was quite capable of good conduct.

57. For the avoidance of doubt I do not accept Mr Samuel's submission that Judge fell into error by not applying, without more, the test in relation to foreseeability of injury set out by Lady Justice Hale (as she then was) in **Koonjul v Thames Link Health Care Services Limited** [2000] EWCA Civ 320 before additional/alternative steps were necessary. That case concerned regulation 4 of the Manual Handling Operations Regulations 1992 which sets out that it is the duty for an employer

> "so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured."

Counsel for the Claimant argued that as set out in other cases the risk of injury need not be significant and no more than a foreseeable possibility; it need not be a probability. Hale LJ stated

> "I am quite prepared to accept those statements as to the level of risk which is required to bring the case within the obligations of regulation 4; that there must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability"

As Mr Farrer observed the Court was concerned with a specific statutory duty and not common law negligence. It is also important to note that Hale LJ also added

> "It also seems to me clear to be that the question of what does involve a risk of injury must be context-based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved."

In the present case the Judge found there was a "routine" and "unavoidable" baseline risk of injury caused by the violent/disruptive behaviour of young offenders which was constantly faced by prisoner officers. This was a "real" risk which was addressed by the general systems in operation including the reduced staff/inmate ratio. What this case concerned was whether moving DB and PG together was a risk, sufficiently above the constant baseline risk, to require additional steps/measures. The Judge correctly addressed this issue.

58. Ground 3 is that the Judge erred in law, or a mixed issue of fact and law, by failing to find that given the existence of the generally heightened risk posed by DB, the Respondent should have taken precautions which its own witnesses agreed could have been taken with relative ease. Mr Samuel argued the Recorder failed to recognise that having found that DB represented an increased risk over the average prisoner, being in the most violent/disprutive 25% of prisoners and liable to fight with other inmates every time he left his cell, additional steps to reduce the risk he posed should have been considered and, given such steps were easy to implement, taken.

59. Mr Farrer argued that Mr Samuel was again focussing on an increased risk consistently posed by a large number of inmates, or DB in other circumstances, rather than the risk posed by DB at the material time, which is what the Judge correctly considered. He stated that if what Mr Samuels submitted was correct it would mean all the of 25% most disruptive inmates required an increased ratio whenever outside their cells. This would have unsustainable resourcing implications and/or mean that they would spend much more time locked in their cells. Rather what was required were dynamic and situation specific assessments of the risks posed by any prisoners with a history of violence or disruption within prison, given the activity/situation in question. In the present case DB was assessed as not posing an imminent risk of disruption during the escort so no additional steps were reasonably necessary.

60. Mr Farrer also submitted that the issue of whether, in light of the presence of risk posed by a particular inmate, reasonable and acceptable steps were taken is highly fact specific and here the Recorder made detailed findings which should be respected by an appellate court.

61. Mr Samuel relied upon the identification of a risk of violence which was "not a serious risk" as requiring steps to address it in **Hartshorn-v-Home Office** [1999] 1 WLUK 584; a case which concerned an attack by two prisoners on the Claimant prisoner. Lord Justice Stuart-Smith held

> "There was in effect no supervision to see that the rule designed to minimise the risk, albeit not a serious one, was obeyed. The defendants were not required to ensure that the rule was obeyed but they ought, in my view, to have taken reasonable care to see that it was. This involved at least the presence in the hall area of a prison officer whose duty it was, among other things, to keep an eye out for breaches of the rule. This the defendants failed to do."

However he went on to make it clear

> "It is important to appreciate that this case depends on its own particular facts. In any prison there is some risk that prisoners will be violent to each other. ……The peculiarity of this case is that the defendants had a rule which was at least in part designed to guard against the risk of prisoners attacking each other but no attempt was made to see that it was obeyed at a time when those responsible knew that it was most likely to be breached."

62. In the present case the Judge found the assault was part of a preconceived plan by the two inmates to barricade themselves in a cell and that as a result (and this is why the Recorder found the nature of the assault relevant to the foreseeability of risk) there would have been no warning signs of likely issues between the prisoners (and they would not be likely come into contact with any other prisoner on the way back to their cells); so the risk posed of fighting with other prisoners was not elevated at the material time. This addressed the main element of what Mr Samuel argued was the admitted elevated risk posed by DB. Further, there was also nothing to alert staff to DB being in a bad temper or state of unhappiness with staff (despite the fact that there had been an adjudication) as he was laughing and joking. DB could behave himself and could not be considered as someone who was a high risk whenever outside his cell.

63. Although I can see force in Mr Samuel's submissions it is my view that the assessment of the adequacy of the steps taken by the Respondent to address both the background (ever present) and the specific risks at the material time i.e. the risk created by escorting DB and PG together (which was otherwise a routine task), was, and remains, highly fact specific. Ultimately, I am not satisfied that the Judge fell into error in his careful assessment of the level of risk posed and the necessary steps to address that risk. As Mr Farrer conceded some inmates will present such a consistent and serious risk of disruption and injury that a proper risk assessment would always require the particular steps to be taken (see e.g. **Buck -v- Nottinghamshire Healthcare NHS Trust**). This could include the need for two or even three officers present whenever an inmate is unlocked. However, as the Judge found, and was entitled to find, that DB was not such a prisoner.

64. The risk of injury posed by the movement of the two prisoners would have been reduced by the use of two officers or by single prisoner escort. The Judge found that on the facts of this case these steps were not reasonably necessary. He was entitled to reach this finding.

65. For the reasons which I have set out none of three grounds succeeds. However, it is necessary to address an additional ground of appeal in relation to causation.

66. If DB had presented such a risk of violent or disruptive behaviour that steps needed to be taken to reduce or minimise that risk, there were two options. Either another officer could have been deployed to accompany the Appellant or he could have taken the prisoners back to their cells one by one. I raised with Mr Samuel the fact that the Judge made no finding as to which option would have been chosen by Mr Thompson and/or the Appellant further that on the Judge's findings one would have avoided the incident and one would not. He found that the presence of two officers would have been sufficient of a deterrence to the prisoner that the assault would not have occurred. However, he also found that a one to one ratio would not have prevented it.

67. I also indicated during submissions that I was troubled by the finding that one on one escorting would not have prevented the incident. The Judge stated that it would not have dissuaded DB

> "from his plan to barricade himself in his cell".

68. The problem with this analysis is that the preconceived plan that the Judge found was in existence was for *both* DB and his fellow prisoner to barricade themselves in the cell. The reason that DB needed to push the Appellant was so that the other prisoner could enter DB cell, which he was not supposed to do as DB was in a single cell. DB could have barricaded himself in his cell any time he wanted. Accordingly, if DB had been escorted alone the plan would have been thwarted and there would have been no reason to push the Appellant out of the way.

69. Appreciating the difficulty with causation the Judge's findings presented, and also recognising that, if correct, my observations would solve the problem, as either of the options would have prevented the incident, Mr Samuel made an application to amend his grounds to add a challenge to this finding.

70. Not surprisingly Mr Farrer objected to the amendment on the basis that it was far too late. Having regard to the overriding objective, the full circumstances of the appeal, the lack of real prejudice as Mr Farrar was able to respond to this limited and discrete argument and also that it arose during submissions and as the appeal developed, I would have allowed the amendment. I would also have allowed the ground. In my view the Judge's finding contradicts his earlier findings in relation to the preconceived plan and did not have a logical basis. Accordingly, had breach of duty been established, the Appellant would also have established causation.

71. For the reasons which I have set out, the appeal fails.