Prisoners and the Law of Tort

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The law of tort offers a range of remedies for wrongs done to prisoners. That is at least the position in theory. The world of *realpolitik* is somewhat different. Prisoners are a stigmatised group. Courts tend not to go the extra mile in translating their entitlements into verdicts against the prison authorities. More generally, there has been a retrenchment in judicial thinking in regard to the tort of negligence over the past decade as a result of the Supreme Court decision in *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 IR 84. To establish a duty of care in any case, plaintiffs now have to show, in addition to proximity of relationship and foreseeability of damge, that it is just and reasonable to impose such a duty.

There are, however, other developments which encourage courts to be somewhat more sympathetic to prisoners' claims. The first is that, unusually, our Constitution is horizontal in its application. It envisages the vindication of constitutional rights, not only against the State, but against any other party, personal or corporate, guilty of breaching the rights in question: *Meskell v Coras Iompair Eireann* [1973] IR 121. Moreover, if a claim for such vindication does not fit into the traditional repertoire of torts or if a particular tort is "basically ineffective" in providing vindication, then the court can make an award of damages (or grant any other appropriate remedy, such as an injunction, for example) in order to ensure that the right is effectively vindicated: *Hanrahan v Merck, Sharp & Dohme (Ireland) Ltd* [1988] ILRM 629.

A striking instance of vindication of a constitutional right outside the traditional framework of torts occurred in *Kearney v Minister for Justice* [1987] ILRM 52. The plaintiff, a prisoner in Mountjoy Prison, discovered that his mail had not been delivered. Awarding him damages, Costello J stated:

> "The governor's evidence satisfies me that the non-delivery of the letters to which the plaintiff and other prisoners were entitled to receive was a result of unauthorised actions taken

> by an officer or officers employed in the prison. These actions constituted a breach of the plaintiff's constitutional right to communicate, for the letters quite clearly should have been delivered to him once their contents were found not be objectionable, within the meaning of rule 63 [of the Rules for the Government of Prisons 1947]. But the governor's evidence also satisfies me that steps were taken to ensure that this unauthorised act would not occur again and that these steps have been effective. Accordingly this is not a case in which I should grant an injunction.
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> The wrong that was committed in this case was an unjustified infringment of a constitutional right, not a tort; and it was committed by a servant of the State and accordingly Ireland can be sued in respect of it: see *Byrne v Ireland* [1972] IR 241. It was suggested, however, that the State could not be vicariously liable because the actions of the prison officers were wrongful and outside the scope of their employment. The State may be liable for the acts of a servant of the State which amounts to an infringment of a constitutionally protected right even though done outside the scope of the State's servant's employment—but I need express no view on that point now. That is because the State is clearly liable for such a wrong when it can be shown that had the wrong been a tort vicarious liability would attach to the State. The wrongful act in this case was obviously connected with the functions for which the prison officer or officers who committed it were employed, and even though the act was not authorised I cannot hold that it was performed outside the scope of his or their employment. The plaintiff is therefore entitled to be awarded damages against the State."

Over the years, courts have been somewhat reluctant to invoke the Constitution when addressing claims that seem to be rooted in tort. Times may be changing. Certainly, Hogan J has shown a distinct willingness to use *Meskell* creatively: witness his decision in *Sullivan v Boylan (No 2)* [2013] IEHC 104,where, rather than resorting to a traditional tort disposition, he preferred to award compensation to a woman who had been seriously intimidated by a debt collector on the basis of the violation of her constitutional right to the protection of her person under Article 40.3.2° and the security of the dwelling under

Article 40.5. Hogan J took this step, "given the basic ineffectiveness (in the *Hanrahan* sense) of the existing common law rules ...". Since the protection of the "person" under Article 40.3.2° is capable of embracing a range of rights expressly identified in the text of the Constitution as well as several unenumerated rights under Article 40.3.1°, the possibility of a generic *Meskell*-based vindication of this generic right is indeed exciting.

Indeed, it may be worth reflecting more deeply on the potential benefit of this decision in the context of prisoners' rights. The "right to person" captures the dignitary dimension: a person's autonomy, bodily integrity, self esteem and privacy, as well as the right not to be picked on or treated as an inferior. Indeed, in this single word, "person", one might argue that all of the constitutional rights, enumerated and unenumerated, are refracted. Certainly they are relevant to the daily experience of prisoners, where a great violation of personal dignity may occur in what is, to the outsider, a banal and trivial context.

It might, as a tangential issue, be worth considering whether a prisoner's cell is a dwelling, for the purposes of Article 40(5). A strong argument can be made that it is. If this is so, any intrusions on it by prison authorities may be regarded as putative breaches of its inviolability though no doubt the very nature and purpose of imprisonment, as well as the pressing associated security and protective concerns, would be likely to constitute justifications for most of such intrusions .

Let us turn to consider some of the torts that have relevance to the prison context, beginning with perhaps the least contentious, occupiers' liability. Before doing so, I should acknowledge the enormous help that Paul Anthony McDermott's great book on Prison Law has been.

Occupiers' Liability

There has been some litigation taken by prisoners who have been injured as a result of the poor state of the premises but the cases are

rare. No doubt this is because a great deal of thought has gone into the design of prisons over the years, or the modification of the design of old prisons, so as to avoid predictable dangers. In contrast to commercial or domestic premises, a prison cell has a limited enough range of aspects to which attention can be given in planning its safe construction and maintenance. Obviously, if a bed collapses under a prisoner on account of its poor quality or a prisoner injures himself or herself on a rusty nail in the cell door, there can be a claim but, of the nature of things, prison cells are designed to be sturdy and there is a monitored regime for the purchase of furniture, so accidents of this type should not happen at all regularly.

Design issues may be presented in particular contexts, such as where a prisoner is able to attempt to take his or her own life from a point of suspension in the cell, but these issues may be addressed by the court, not under the rubric of occupiers' liability, but under a more general assessment of the prison authorities' duty of care to the prisoner.

Occupiers' Liability is now dealt with by legislation, which replaces the old and complex common law on the subject. The Occupiers' Liability Act 1995 sets out specific levels of obligation resting on the occupier to different categories of entrant onto the premises. Of the three categories of entrant prescribed by the Act – visitors, recreational users and trespassers – prisoners are unquestionably visitors, though this is surely not a term that they would use to describe themselves in ordinary speech. The prison authorities accordingly owe prisoners the "common duty of care" prescribed in section 3.

In *Power v Governor of Cork Prison* [2005] IEHC 253, Herbert J imposed liability where a prisoner slipped on the floor of the toilet. The wash-hand basins in the toilet were in constant use by prisoners to wash their drinking and eating utensils. No towels, paper rolls, napkins or electronic dryers were provided. (Prisoners were, however, issued weekly with a tea towel and hand towel in their cell.) Water would frequently get onto the toilet floor. Herbert J noted that prison officers who had given evidence acknowledged that:

> "... occasionally water would get on the floor of this toilet and the cleaner would be ordered to dry the floor. In cross examination [one] prison officer ... accepted that this

> occurred quite frequently. This is scarcely surprising when one considers the evidence that there are 16 or more cells on this landing of B Wing. On the evidence, the only other place where prisoners could wash their eating and drinking utensils is the "slop-out" area where chamber-pots are emptied and cleaned as this prison has no in-cell sanitation."

Herbert J accepted uncontradicted expert evidence that, without replacing the existing square 12-inch ceramic floor tiles with more appropriate non-slip tiles, the hazard created by the presence of even an almost imperceptible film of water on the floor of a toilet could not be entirely eliminated. Herbert J also accepted that the replacement of the floor could be accomplished easily and at relatively little cost. He went on to state that he accepted the expert evidence that the absence of any form of drying equipment in the toilet:

> "... must inevitably and foreseeably result in the floor becoming wet and therefore dangerous to persons using the toilets ... [W]hile not very hygienic the laying of non-slip mats on the floor of this toilet would go considerably towards preventing prisoners from slipping, even though such mats could themselves present a possible tripping hazard if not very carefully maintained."

Herbert J accepted that there was a warning notice in the toilet containing the words "danger slippery surface". He imposed liability. He considered that there was "no overriding requirement of social utility that these defendants ought to be exempt or excused from the consequences of their breach of duty". He found that there was no contributory negligence on the part of the plaintiff.

> "Even if he was or ought to have been aware of the warning notice that the floor was slippery: even if he knew that as a result of the activities taking place at the wash-hand basins which he admitted hearing while in the W.C. cubicle, the floor outside that cubicle was likely to be wet, there is no evidence that there was something which the plaintiff did or failed to do which amounted to recklessness for his own safety in the particular circumstances. It was not suggested that his footwear was unsuitable or unsafe. It is obvious from the photographs taken and proved in evidence .... that there

> were no handrails and no alternative route which the plaintiff could have held, or taken to avoid the area of the floor on which he slipped. It was not suggested that the plaintiff was running or hurrying unduly or otherwise behaving inappropriately in anyway. I find that there was no duty on the plaintiff to scrutinise the floor with particular care before deciding where to place his feet. I accept the evidence of the plaintiff that when he exited the W.C. cubicle he immediately started to turn to his left and did not cross the floor in the direction of the wash-hand basins. I find that in the circumstances as previously outlined the plaintiff had taken all reasonable precautions for his own safety."

Herbert J's decision is to be welcomed. It recognises the need for prison authorities to provide a safe environment for prisoners who are in their care. The idea that prison authorities can create an unsafe environment and then immunise themselves by a notice requiring the prisoners to take care to avoid the danger thus created is unpalatable. In this context it is worth recalling that, at common law, a distinction was drawn between the old categories of entrant. Towards a licensee the occupier had only a duty to warn of hidden dangers; towards an invitee, however, a warning of an unusual danger would not suffice unless it enabled the invitee, in the light of the receipt of the warning, to accomplish in safety what he or she had entered the premises to do. Section 5(5) of the 1995 Act provides, with regard to *all* visitors, that a warning of a danger is not to be treated as absolving the occupier from liability unless, in all the circumstances, it was enough to enable the visitor, by having regard to the warning, to avoid the injury or damage so caused. The crucial factor with prisons, of course, is that the prisoner has no choice but to be there. The common-law principles of occupiers' liability were based on the idea that, if the entrant did not like the condition of the premises, he or she could always go elsewhere. This explains the old law relating to warnings to licensees. The injustice of the common-law rules in the context of prisoners is obvious from a decision such as *Williams v Ohio Department of Rehabilitation and Correction* 2005 – Ohio – 2669, where the Ohio Court of Appeals denied compensation to a prisoner who slipped on a wet floor because of the obviousness of the danger.

In *Hennessy v Ireland*, High Court , 16 June 1993, Doyle's Personal Injuries Judgments: Trinity & Michaelmas Terms 1996, Geoghegan J

imposed liability on prison authorities where the plaintiff prisoner, who was using crutches, slipped on a wet floor in a toilet which had a blocked urinal. Geoghegan J rejected as "completely unreal" the defendants' suggestion that the plaintiff had been guilty of contributory negligence in resorting to the toilet unassisted rather than using a chamber pot in his cell; he nonetheless reduced the plaintiff's compensation by 25% for contributory negligence in failing to have seen the substantial "amount of wet" on the floor.

I should mention briefly Section 5(2) of the 1995 Act, which deals with modification of the occupier's duty towards entrants. It enables an occupier, by express agreement or notice, to restrict, modify or exclude its duty towards visitors, subject to certain qualifications. The visitor will not be bound unless the restriction, modification or exclusion is reasonable in all the circumstances. Moreover, where the occupier seeks to accomplish the goal by notice rather than by obtaining the visitor's express agreement, the occupier must take reasonable steps to bring the notice to the attention of the visitor. The occupier will be presumed, unless the contrary is shown, to have taken such reasonable steps if the notice is prominently displayed at the normal means of access to the premises.

There is a minimum level of obligation to visitors below which the occupier is not permitted to venture: the occupier may not exclude liability for injuring a visitor or damaging the visitor's property intentionally or to act with reckless disregard for a visitor or the property of a visitor: section 5(3). So the minimum level that the occupier can engineer by agreement or notice is identical to the duty an occupier owes under the legislation to recreational users and trespassers.

Clearly section 5(2) is premised on the acceptance of the judgment that there are some cases where a restriction of liability is unreasonable. I would suggest that the prison context is a clear example. Prisoners' presence on the prison premises is not one where they have any choice. A notice in such coercive circumstances would appear to be about as obvious a case of unreasonableness as there can be.

The Duty to Protect Prisoners from Attacks by Other Inmates

The prison authorities may be liable for failure to take due care to protect prisoners in their charge from being injured by other prisoners. This at least is the theory, though Irish courts invoking the need to protect the dignity of prisoners from an oppressively controlling and intensive prison regime of endless inspections, have rejected almost every claim for compensation that has come their way (I leave to Patrick Keane, Senior Counsel, the discussion of O'Neill J's recent decision in *Creighton v Ireland*, the first of which I am aware in which a prisoner has succeeded in a claim of this kind that has gone to judgment. In earlier proceedings, the plaintiff had succeeded at trial but the Supreme Court ordered a retrial: [2010] IESC 50.)

There is a considerable volume of caselaw on this subject, in Ireland and elsewhere. One should not assume from the general lack of success in these claims that there is no prospect of winning. The egregious cases are settled; what comes before the courts is the subsection of claims which the defendants consider are worth fighting all the way.

Before we look at the particular cases, a few observations are in order. The first is perhaps an obvious one: prisons are dangerous places and some prisoners are dangerous people. As was pointed out in the decision of the High Court of Australia in *New South Wales v Bujdoso* [2005] HCA 76, at paragraph 44:

> "It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates. Many of the people in prisons are there precisely because they present

> a danger, often a physical danger, to the community. It is also notorious that without close supervision some of the prisoners would do grave physical injury to other prisoners. "

The second observation is that concern for the dignity and liberty (perhaps an odd word in the context of prisons but true nonetheless) of prisoners is a factor telling against an overly protective regime of searches, scrutiny and control. In *Creighton v Ireland* [2010] IESC 50, Fennelly J stated:

> "Prisons may, as an inevitable consequence of the character of persons detained, be dangerous places. Prisoners are entitled to expect that authorities would take reasonable care to protect them from attack by fellow prisoners. What is reasonable, will as always, depend on the circumstances. As the cases recognise, prison authorities may have to tread a delicate line between the achievement of the objective of protecting the safety of prisoners and the risks of adopting unduly repressive and inhumane measures. They must balance the protective function and possible demand for instructive searches against the need to permit prisoners an appropriate degree of freedom of movement and human dignity."

The third, and final, observation is that each case will depend on its very particular circumstances. Among the questions the courts ask are the following:

> Was the victim of the attack a likely target? Had he or she informed the authorities of any particular danger from a particular individual or individual or was he or she a likely target for other reasons (such as the nature of the offence with which he or she has been charged or of which he or she has been convicted)?
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> What weapon was used? Is it one that ought not to have been in a prison or one the use of which the authorities could have done nothing realistically to prevent?

> What was the supervision regime? Was it adequate to prevent attacks of this kind? Was it carried out on the day in question?
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> Was the design of the prison premises such as to expose prisoners to the risk of attacks? Against the background of the particular design, was the organisation of activities in the prison such as to expose prisoners to such risk?
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> Was the response of the prison officers to the attack, once it had commenced, adequate? Should the risk of a slow response have been anticipated by better organisation of the prisoners' activities?

Let us now consider the caselaw.

In *Muldoon v Ireland* [1988] ILRM 367, the plaintiff, who was serving a prison sentence in Arbour Hill, was suddenly attacked from behind by another prisoner during a recreation period in the prison recreation yard.

The other prisoner later admitted to having used a blade, though this had not been recovered by the authorities at the scene of the assault. At the time the incident occurred there were around 40 or 50 prisoners in the yard, with several supervisors –10 or 12, according to the plaintiff; 17, according to the evidence of the Chief Officer. No search of any prisoner had apparently taken place before the recreation period that day. It appeared that prisoners were searched initially when committed into custody and that searches, of their person and their cells, were made on a very regular basis. Moreover, before and after they went to the workshops, an inventory was made of all implements, supplemented by a rub-down search of all prisoners when they were leaving the workshop.

The plaintiff sued Ireland and the Attorney General, claiming that the prison authorities had been guilty of negligence. Hamilton P withdrew the case from the jury. He considered that no case had been made out based on the lack of staff on duty in the yard to exercise proper supervision. In view of the sudden, unprovoked nature of the attack, the incident could not have been prevented even if there were 50 officers in the yard. Nor could it be said that the prison authorities had been

wanting in care in permitting a prisoner to reach the recreation yard with a sharp instrument such as a blade. Reasonable care did not dictate that every prisoner should be searched every time he moved from one area of the prison to another. In spite of the regime of searches prevailing in the prison, an incident such as arose in the present case could always happen. More frequent searches would without doubt be regarded by the prisoners as excessive, and arguably would amount to harassment of them.

In *Kavanagh v Governor of Arbour Hill Prison* High Court, 22 April 1993, on somewhat similar facts, Morris P reached the same conclusion, acquitting the prison authorities of negligence.

Boyd v Ireland, High Court 13 May 1993 concerned an attack on the prisoner by co-prisoners in the exercise yard of Portlaoise prison. The deputy governor of the prison testified that it was not the practice to search prisoners from the block where these prisoners were housed as they were going into the exercise yard, as by and large they were well behaved. In the previous 15 years, there had been no incidents in the yard.

As to supervision of the yard, Budd J noted that the deputy governor had explained that, "after an incident on 30 December 1974", prison officers and gardaí "had been in the exercise yard but that this had caused constant confrontation between the staff, the prisoners and the garda". Eventually the staff had been placed outside a chain-link fence surrounding the yard. There was no need for prison officers to be in the yard and it was also understandable for security reasons. Budd J dismissed the plaintiff 's case. In his view, there had been no failure to provide adequate searches of the prisoners or to supervise them adequately.

In *Byrne v Ireland*, High Court 31 July 1996, Doyle's Personal Injuries Judgments:Trinity & Michaelmas Terms 1996, Moriarty J dismissed a claim where the plaintiff had been cut on the face by another prisoner who came into his open cell to carry out the attack. The plaintiff had the previous day discovered a syringe embedded in his mattress. Thinking that reporting this night cause trouble, he had thrown it into a bin. Another, unidentified, prisoner had made a threatening remark in

response. The identity of the assailant was never resolved but Moriarty J's judgment proceeded on the basis that the assault and the plaintiff's earlier action with the syringe were connected.

In relieving the prison authorities of liability in negligence, Moriarty J emphasised that the syringe had been so well hidden that its presence would not have obvious on "an entirely perfunctory examination of the cell and contents"; it was "well nigh impossible" to prevent such an unprovoked assault on a model prisoner where the plaintiff had made no mention of either his finding of the syringe or his receipt of the threat from the other prisoner; the need to have an acceptable penal regime precluded "inordinately rigorous searches" every time a prisoner moved from one section of the prison to another.

In *Bolger v Governor of Mountjoy Prison* [1997] IEHC 172, the plaintiff, a remand prisoner, was attacked by another prisoner who threw a bucket of scalding water over him when they were in the recreational hall. O'Donovan J rejected the claim on the basis that the aggressor had not displayed such a dangerous propensity as to warrant his segregation from other prisoners and his exclusion from access to buckets of hot water. A balance had to be struck between precautions that were acceptable and those that were excessive.

The aggressor had a history of violence when in custodial institutions, including, six years previously, an incident in which he had thrown boiling water, but O'Donovan J concluded that it had to be taken into account that he had been aged 16 at the time of the incident, which had not recurred until the assault of which the plaintiff complained.

O'Donovan J observed that to segregate the aggressor would have been tantamount to subjecting him to solitary confinement.

In the Supreme Court decision of *Bates v Minister for Justice* [1998] 2 IR 81, the plaintiff, a prisoner in Limerick Prison, was the victim of a horrific attack by another prisoner, who threw a jug of hot water containing sugar in his face, as well as striking him with a heavy object and cutting him with a knife or blade. The basis of the plaintiff's case in negligence was that hot water should not have been made available

to prisoners in the way that the prison authorities had permitted. Johnson J rejected the claim and the Supreme Court affirmed.

The area where the incident took place housed seven or eight high-security prisoners in separate cells. It was supervised by five prison officers. The system in place was that breakfast food was brought to a room in the area; the prisoners were released from their cells, collected the food and returned to their cells where they ate it. To that extent, as Murphy J noted, breakfast was a form of self-service. The prisoners made their own tea. Since 1987, there as an electrically operated boiler in the area, which maintained the water at a permanent temperature during the breakfast period. The prisoners filled teapots or jugs from the boiler. They then usually took the water to their own cell or, at their choice, to a fellow inmate's cell. In the instant case, the assailant was seen by the prison officers to go to the plaintiff 's cell with his hot water. This was not regarded as unusual or undesirable by the prison authorities or by the prisoners who gave evidence.

The essence of the plaintiff 's case was that, in contrast to the cases where unsuccessful actions for negligence against the prison authorities involved the use of weapons unlawfully taken into the prison, in the instant case the weapon – the jug of hot water – had actually been provided by the prison authorities. The plaintiff 's criticism was not that the general level of supervision was inadequate, but that, having regard to the known propensity of some of the inmates to violence and the obvious danger to prisoners and wardens from the throwing of hot water or tea, the availability of these missiles should have been more carefully supervised. The authorities, his counsel contended, should not have permitted one prisoner to enter the cell of another carrying a container full of hot water.

Murphy J rejected this argument on the basis that its logic was that one prisoner could not be permitted to have such a container anywhere in the presence of another inmate or indeed a prison officer, as it would be impossible to prevent an assault with the hot liquid although it might be possible to prevent the incident from escalating. Moreover, there would be little difficulty in identifying the culprit and imposing sanctions.

Murphy was not impressed by other systems for providing tea which had been canvassed. Transporting large urns of tea that had already been brewed in the kitchen – an option that had been tried before 1987 and which was resurrected after the assault – "involved some dangers and difficulties in the transportation of the tea but more particularly the addition of milk to the urns was resented by some prisoners who preferred to have their tea without milk." Requiring the inmates to drink their tea in a single room together would merely transfer the problem from the cells to that room. Service of the hot water to each inmate in his cell "might afford a solution but would involve a major change in the management of the prison and perhaps a risk to security." Furthermore, if the tea or hot water was to be served by other prisoners, these prisoners would have the potential for causing injury.

There was, in Murphy J's view, no obvious way for serving tea of a reasonable quality and temperature to prisoners whereby their safety could be ensured without causing an excessive hardship on the prisoners or an excessive burden on the prison authorities:

> "No doubt prison management is a constant battle between the need to preserve security and safety on the one hand and on the other hand, the obligation to recognise the constitutional rights of the prisoners and their dignity as human beings. Procedures for the provision of food and hot drink and the means by and the location in which it will be provided will require to be reviewed from time to time but it would seem unfortunate if the requirements of safety precluded access to tea or necessitated further restrictions on communal eating and social intercourse between the inmates. It is a difficult balance to achieve but it is in that context that the duty of care owed by the defendants to the plaintiff must be tested."

Ultimately, cases of this nature had to depend on what should have been anticipated by the prison authorities. The wardens had been unaware of any antagonism by his assailant to the plaintiff. Neither ought they have known of any objection by the plaintiff or other prisoners to any other inmate visiting them in their cells. There was obviously a danger that boiling water could be thrown but "there was no evidence to suggest that there was any particular risk to inmates from such conduct; only to wardens."

It is interesting to compare *Bates v Minister for Justice* with *Connaughton v Minister for Justice* [2012] IEHC 203, an employers' liability case, where a prison officer in Mountjoy Women's Prison slipped on tea that had fallen on the floor from the landing above, having been accidentally spilled from a tray by a prisoner. Mr Tennyson, the expert witness called on behalf of the plaintiff, gave evidence to the effect that prisoners should not have been allowed bring teapots on trays back to their cells having regard to the confined width of the walkways on the upper level and should have been given small kettles in their cells. Irvine J, acquitting the prison authorities of negligence, observed:

> "I reject Mr. Tennyson's evidence that I should consider the defendants as negligent in failing to provide, as an alternative and safer system, a kettle in the room of each cell. The fact that small kettles may be given to inmates in other prisons does not mean that it was negligent on the part of the defendants not to have implemented a similar system in Mountjoy Women's Prison. Clearly, the provision of kettles in cells provides an alternative range of risks which has to be balanced having regard to the specific characteristics of an individual prison and its inmates. I can well imagine a scenario in which a prison officer could be assaulted with boiling water by a prisoner and I might find Mr. Tennyson advising the court that it was foreseeable that providing access to boiling water in this way increased the risk of prison officers being subjected to such an assault. Further, a whole range of alternative risks are generated in a canteen situation."

In *Breen v Ireland* High Court 24 March 2004, Smyth J was not receptive to the argument that overcrowding in breach of the Prison Regulations should generate civil liability on the part of the prison authorities for an unprovoked assault by one prisoner on another. Smyth J took the view that the requirements set out in the regulations were directory rather than mandatory but he was in any event satisfied that the evidence had not established a causal connection between any such breach and the attack on the plaintiff.

The failure by the assaulted prisoner to have effectively alerted the prison authorities of his apprehension of attack from an identifiable prospective assailant led to the rejection of claims in *Howe v Governor of Mountjoy Prison* [2006] IEHC 394, *Breen v Governor of Wheatfield Prison* [2008] IEHC 123 and *Sage v Minister for Justice* [2011] IEHC 84.

In *Howe v Governor of Mountjoy Prison* [2006] IEHC 394, the plaintiff was attacked in July 1998 by another prisoner, Philip Byrne, where there was a history of conflict between them but the prison authorities had not been made aware of it. In the recent past, when both had been in the same cell in the Bridewell Garda Station, Philip Byrne had alleged that he had been stabbed by the Plaintiff. This was investigated by An Garda Síochána and a prosecution ensued. In 1997 Depositions were taken and the matter came on for trial in the Circuit Criminal Court in May of 1998. During this trial Philip Byrne failed to identify the plaintiff as the person who stabbed him and as a result the plaintiff was acquitted.

Holding that the prison authorities were not guilty of negligence, O'Neill J stated:

> "I am .... satisfied that neither the warrants committing both of them to prison or any warrants or production orders by which they were taken to court did not and could not disclose the conflict which existed between them.
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> I am also satisfied that the prison authorities could not have known of this conflict in the absence of being given any complaint or any information about it from either Philip Byrne or the plaintiff and it could not be said that the defendant had a duty to initiate an enquiry into every prisoner to find out if such conflicts existed.
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> In my view the enquiry which is made when prisoners are admitted to prison, together with the receptivity of the prison authorities to complaints by prisoners and the well known policy of separating prisoners in these situations are as much as could be expected from the prison authorities in the

> discharge of their duty to take reasonable steps to safeguard prisoners at risk of violence in circumstance such as existed in this case.
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> The attack on the plaintiff was, I am satisfied, wholly unexpected. I am also satisfied that two prison officers were on duty at the door into the exercise yard and having regard to the speed and the unexpected nature of the attack could have done nothing to prevent it.
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> If the plaintiff had fears of an attack from Philip Byrne he should have alerted the prison authorities to this but he did not.
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> In these circumstances the prison authorities cannot in my view be said to have been negligent in any way in failing to prevent this attack."

The case does raise the question whether the State has a duty of care to ensure that information of this type is conveyed from one arm of the State to another rather than leaving it entirely to the prisoner to alert the prison authorities of the danger.

In *Breen v Governor of Wheatfield Prison* [2008] IEHC 123, the plaintiff was injured when attacked by another inmate who poured boiling water over him. The motive related to an alleged attack that the plaintiff had earlier made on the aggressor's cousin. The plaintiff claimed that he had communicated his apprehension of a possible attack by the aggressor to a range of prison personnel, including the Governor. Gilligan J rejected this on the evidence.

The incident happened when the plaintiff was in the recreation area. The assailant had been granted permission to clean his cell and had been authorised to fetch a bucket, mop and boiling water from the boiler beside the recreation area. (Gilligan J noted that "the reason for this is that prisoners prefer hot water because the floor dries quicker.... ") The assailant then poured the water over the plaintiff, injuring him severely.

Once the plaintiff's assertion of prior knowledge on the part of the prison authorities was rejected, his claim was doomed to fail. On the wider question of the reasonableness of giving prisoners such easy access to boiling water, Gilligan J's observations were supportive of the practice rather than questioning it.

In *Casey v Governor of Midlands Prison* [2009] IEHC 466, Irvine J, reflecting the approach of several earlier Irish decisions, rejected the contention that a more intensive regime of searches of prisoners was required of the authorities: the need to preserve the dignity of prisoners was the countervailing consideration. Irvine J set out the central principles of law as follows:

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

In *Sage v Minister for Justice* [2011] IEHC 84, the plaintiff was assaulted with a chair leg, reinforced with batteries, a day after he had been transferred from Mountjoy Prison to Fort Mitchell Prison. At Mountjoy, he had expressed concern that he might be the victim of an attack from a named prisoner or his associates. There was no facility for protective custody at Fort Mitchell. The assistant chief officer gave evidence that, if prisoners on admission expressed concern that they might be at risk of assault from another prisoner, the practice was to place them temporarily in one of the single cells in the prison and keep them separated from other inmates until they could be transferred to another prison. This would probably happen within 24 hours but had not arisen in the instant case as the plaintiff had not expressed any concerns.

Irvine J rejected the plaintiff's evidence that he had thought he would be in protective custody whilst serving his sentence in Fort Mitchell:

> " If he had expected this I believe he would have raised it at interview on his arrival or immediately after he was taken to A wing, where it must have been immediately clear to him that he was to be detained as a regular inmate on that wing and not in protective custody. Further, the plaintiff spent his first night in Fort Mitchell in a cell with four other lads and thereafter participated in the daytime routine for A wing prisoners without complaint, albeit for the brief period prior to his assault. If he believed that he needed to be in protective custody, or that he had expected to have been admitted to Fort Mitchell on that basis, surely he would at least have brought this fact to the Governor's attention on the second morning of his stay in the prison?"

The manner in which the pleadings had been drafted, including the absence of a number of assertions made during the hearing, suggested to Irvine J that the plaintiff had been satisfied that he would be safe once he was transferred to a prison where the prisoner he feared was not an inmate, particularly where the prison to which he was transferred was one which did not house high profile prisoners.

Irvine J was satisfied that the defendants were not in breach of their duty of care to the plaintiff. They had " clearly heeded the concerns expressed by the plaintiff when in Mountjoy and acted upon them immediately by putting him in protective custody there until he could be moved to another prison." Irvine J accepted the evidence of the assistant chief officer at Fort Mitchell that both prison governors would have considered the safety of the plaintiff against the backdrop of the concerns expressed by him whilst in Mountjoy and that it was reasonable for them to assume that, in moving him away from Mountjoy to a prison that had no high profile prisoners, he would be reasonably safe. The plaintiff had called no evidence to establish that the practice adopted by the prison authorities in Fort Mitchell, having regard to the complaints made by the plaintiff in Mountjoy Prison, was to fall short of the standard of care to which the plaintiff was entitled. No evidence had been led to suggest that the fears outlined by the plaintiff regarding the other inmate and his associates whilst in Mountjoy mandated those in authority in Fort Mitchell to carry out enquiries as to whether there were any prisoners in the prison who were his known associates. Even if there had been such evidence the plaintiff could not succeed by reason of the uncontradicted evidence of the assistant chief officer that the men who perpetrated the assault upon the plaintiff were not at that time known to be associates of the inmate whom the plaintiff feared.

As to the assertion that it had been negligent of the defendants not to place the plaintiff in protective custody following his transfer to Fort Mitchell, Irvine J accepted the defendants' evidence that it was reasonable, on the facts known to them, for the prison authorities to believe that, once he was removed from the precincts of Mountjoy, he would be reasonably safe in Fort Mitchell, unless alerted by the plaintiff of some specific concern or the subsequent occurrence of some

adverse event that might demonstrate a potential risk to his safety. The assault happened on the plaintiff's second day at the prison.

As in the case of *Howe v Governor of Mountjoy Prison* [2006] IEHC 394, a question may arise as to whether the State should have some overarching duty to integrate its information as to dangers to prisoners. Even if the receiving prison cannot be expected to be aware of dangers of which it has been alerted, should not the sending prison have a proactive duty to provide the information rather than letting everything depend on what the prospective victim has, or has not, told the authorities in the receiving prison?

Preventing Self-Harm and Suicide

Prison authorities are under a duty to take reasonable care to prevent those in their custody from hurting themselves, whether through their own carelessness or intentionally, or from taking their own lives. A similar duty attaches to members of An Garda Siochana.

Cases of careless self-harm are relatively straightforward. A person in custody who is in such a condition as to be a danger to himself or herself requires special care from the authorities where that condition ought to be apparent to them. Intoxication from alcohol or drugs is perhaps the most obvious example.

In *McKevitt v Ireland* [1987] ILRM 541, the members of the Supreme Court were agreed that gardaí owed a duty to an intoxicated plaintiff in their custody in a cell at a Garda station to take all reasonable steps to ensure that he would not injure himself accidentally or deliberately. Thus, they were obliged to carry out a proper search to ensure that he was not carrying any boxes of matches and to respond to any intimation that he would start a fire in his cell. It is understandable, perhaps, that the duty of care owed by the Gardaí to persons taken into custody would be more demanding (especially where the arrested person is

intoxicated) than that owed by a publican generally to his customers. In taking the person into custody the Gardaí assume responsibility for his or her safety until the person is properly processed in accordance with the law. The Supreme Court ordered a re-trial of the issue of liability because the trial judge had left the negligence issue to the jury as one question rather than two. The case might be regard as a less than coercive precedent on the duty issue in view of the fact that there was "no dispute" between the parties as to the duty owed by the gardaí to persons in their custody.

In *Byrne v Ireland*, Circuit Court, 28 January 1985, Irish Times, 29 January 1985, a year before *McKevitt*, Judge Martin had dealt with the same duty issue, in regard to somewhat different facts. A 39-year-old woman, Mrs Phillips, was arrested by the gardaí for being drunk and disorderly and placed in a cell in a Garda station. That evening she died when a fire broke out in her cell. The gardaí had checked Mrs Phillips in her cell at regular intervals. The last time was at 7.15pm, when the sergeant said she was shouting and muttering; 15 minutes later, he noticed smoke coming from the door of the cell block. He and other gardaí tried unsuccessfully to rescue Mrs Phillips. (Judge Martin commended their bravery.) A matchbox was later found in the cell and, Judge Martin held, Mrs Phillips probably also had had cigarettes. Judge Martin found the gardaí negligent in having failed adequately to search Mrs Phillips before placing her in a cell. He attributed this failure to "reasons of delicacy". Garda regulations made it clear that women were to be searched by a female searcher. Martin J observed that, if a telephone call had been made to a station nearby for a female garda to search Mrs Phillips, "the regrettable fatality would not have occurred".

Issues of causation, remoteness of damage and contributory negligence can combine in this context to create a somewhat complex challenge for the courts. In *St George v Home Office* [2009] 1 WLR 1670, where the plaintiff, addicted to alcohol and drugs for many years, was sentenced to prison and was injured when he fell, in an epileptic seizure, from the top bunk which he had been allocated in spite of the prison staff 's knowledge of his dangerous condition, the English Court of Appeal overturned the trial judge's reduction of 15% in his compensation on account of his contributory negligence attributable to his having become so addicted. In the view of the Court of Appeal, that

fault was "too remote in time, place and circumstance" to regard it as being integrated in the event that occurred in the prison cell: it was "no more than part of the history which had led to his being a person whose physical and psychological conditions were as they were" when he was admitted to prison.

Dyson LJ regarded as a close analogy the case of a plaintiff who seeks medical treatment for a condition from which he is suffering as a result of his or her own fault and sustains injury as a result of negligent treatment:

> "Examples of such a condition are lung cancer caused by smoking or cirrhosis of the liver caused by excessive consumption of alcohol. Mr Kent accepts that in such cases it would be wrong to reduce a successful claimant's damages under the 1945 Act, although it is his fault that he is suffering from the medical condition for which he is being treated and, but for that condition, he would not have required medical treatment in the first place. One of the reasons why I consider [counsel] is right to make this concession is that the claimant's fault in smoking or consuming excessive alcohol over a period of time is not a potent cause of the injury suffered as a result of the negligent medical treatment. The fault is not sufficiently closely connected with the defendant's negligence. Rather, the fault is part of the claimant's history which has led to his being a man who is suffering from a particular medical condition."

The issue of suicide in prison raises somewhat more complex questions of law. Courts formerly used to distinguish between cases where a person took his or her own life when under some degree of mental illness or impairment, on the one hand, and cases where the decision was not so affected. In respect of the former, the negligent facilitation of the act of suicide could generate liability but, where the act was not affected by mental illness, the courts considered it inappropriate to impose liability. The principle , *volenti non fit injuria*, was considered to apply. Thus, in *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283, where a man with clinical depression took his own life in prison in circumstances where the

police had not warned the prison authorities of the danger, the English Court of Appeal rejected the *volenti* defence. Lloyd LJ observed:

> "Where a man of sound mind injures himself in an unsuccessful suicide attempt, it is difficult to see why he should not be met by a plea of volenti non fit injuria. He has not only courted the risk of injury by another; he has inflicted the injury himself... So I would be inclined to hold that where a man of sound mind commits suicide, his estate would be unable to maintain an action against the hospital or prison authorities, as the case might be. *Volenti non fit injuria* would provide them with a complete defence. There should be no distinction between a successful attempt and an unsuccessful attempt at suicide....
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> But in the present case Mr. Kirkham was not of sound mind. True, he was sane in the legal sense. His suicide was a deliberate and conscious act. But Dr. Sayed, whose evidence the judge accepted, said that Mr. Kirkham was suffering from clinical depression. His judgment was impaired. If it had been a case of murder, he would have had a defence of diminished responsibility due to disease of the mind.... Having regard to his mental state, he cannot, by his act, be said to have waived or abandoned any claim arising out of his suicide. So I would reject the defence of *volenti non fit injuria*."

In *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, the House of Lords developed the law so as to enable a claim for negligence to be successful where an arrested person (Mr Lynch) took his own life in a police station cell in circunstances where he had not a mental illness. The negligence of the police lay in maintaining the cell door in a defective condition that enabled Mr Lynch to find a point from which to hang himself. Their Lordships were willing to build on the Commissioner's concession of a breach of duty of care so as not to allow the claim by Mr Lynch's family to be defeated by the defences of *volenti non fit injuria*, *novus actus interveniens* or contributory negligence.

Crucial to the analysis was the determination of the nature of the duty of care in the circumstances. Lord Hoffmann stated:

> "There is no doubt that the Commissioner was right to concede that he owed a duty of care to the deceased while he remained in police custody. The deceased had been identified as a suicide risk, having on two previous occasions attempted to strangle himself with a belt after being placed in a cell. It was the Commissioner's duty to take reasonable care not to provide him with the opportunity of committing suicide by making use of defects in his cell door. The risk was not that he would injure himself accidentally if given that opportunity, but that he would do so deliberately. That is the nature of an act of suicide by a person who is of sound mind. It is a deliberate act of self-destruction by a person who intends to end his own life. So I think that the Commissioner's duty can most accurately be described as a duty to take reasonable care to prevent the deceased, while in police custody, from taking his own life deliberately.
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> It is unusual for a person to be under a duty to take reasonable care to prevent another person doing something to his loss, injury or damage deliberately. On the whole people are entitled to act as they please, even if this will inevitably lead to their own death or injury. As a general rule the common law duty of care is directed towards the prevention of accidents or of injury caused by negligence. The person to whom the duty is owed is, of course, under a corresponding duty to take reasonable care for his own safety. If he is in breach of that duty, his damages may be reduced on the ground of his contributory negligence. But if he injures himself by intentionally doing deliberately the very thing which the defendant is under a duty to prevent him doing negligently, he may find that he is unable to recover any damages. He may be found to have assumed the risk of injury, on the principle of *volenti non fit injuria*. Or it may be held that the chain of causation was broken by his deliberate act, in which case his claim will be defeated on the principle of novus *actus interveniens.* Or it may simply be that his loss, injury and damage will be held to have been caused wholly by his own fault, with the result that there will be no room even for a reduced award on the ground of contributory negligence.

But the duty of care may sometimes extend to preventing people injuring themselves deliberately. The person to whom the duty is owed may be unaware of the risks to which he will expose himself by his deliberate act. Or he may be too young to appreciate them.... Or he may be of unsound mind, with the result that he is at risk of doing something to himself which no rational person would do as he would appreciate that to do this would inevitably lead to injury. Or the risk that the person may commit an act of deliberate self-harm may be the result of something which the defendant has done or is doing to him.

That is the situation which may arise where a person who is of sound mind is deprived of his liberty and put in prison or detained in custody by the police. The duty of those who are entrusted with his custody is to take reasonable care for his safety while he remains in their hands. If it is known that he may engage in self-mutilation or suicide while he is in their custody, their duty is to take reasonable care to prevent him from engaging in these acts so that he remain free from harm until he is set at liberty. This duty is owed to the prisoner if there is that risk, irrespective of whether he is mentally disordered or of sound mind. It arises simply from the fact that he is being detained by them in custody and is known to be at risk of engaging in self-mutilation or of committing suicide. If the prisoner, while of sound mind, destroys himself despite all reasonable precautions to prevent him doing so, there is no liability: see *Pallister v. Waikato Hospital Board* [1975] 2 N.Z.L.R. 725, where the board was held not to have been negligent; *Pretty on Top v. City of Hardin*, (1979) 597 P.2d 58, where there was no evidence that the cause of the prisoner's suicide was anything other than his own intentional act; *Sudderth v. White* (1981) Ky. App. 621 S.W. 2d 33. But it is hard to see why liability should not follow if the prisoner was a known suicide risk and precautions which could have been taken to prevent a deliberate act of suicide were not taken by the police.

The Commissioner does not seek to withdraw this concession on the ground that Mr. Lynch has been found to have been of sound mind. For my part, I think that the Commissioner is right not to make this distinction. The difference between being of sound and unsound mind, while appealing to lawyers who like clear-cut rules, seems to me inadequate to deal with the complexities of human psychology in the context of the stresses caused by

imprisonment. The duty, as I have said, is a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives."

Accepting that the defendants owed, and breached, a duty of care, the next question was whether the conduct of the deceased, in taking his life, constituted a novus actus interveniens. Lord Jauncey answered it as follows:

" In *Clerk & Lindsell on Torts,* 17th ed. (1995), p. 54, para.2-24 it states:

'if a particular consequence of the defendant's wrongdoing is attributable to some independent act or event which supersedes the effect of the tortuous conduct, the defendant's responsibilities may not extend to the consequences of the supervening act or event.'

It goes on to state that the *novus actus interveniens* 'must constitute an event of such impact that it rightly obliterates the wrongdoing of the defendant.' The reference to an independent act superseding the effect of the tortious conduct must, in my view, relate to an act which was outwith the contemplated scope of events to which the duty of care was directed. Where such a duty is specifically directed at the prevention of the occurrence of a certain event I cannot see how it can be said that the occurrence of that event amounts to an independent act breaking the chain of causation from the breach of duty, even although it may be unusual for one person to come under a duty to prevent another person deliberately inflicting harm on himself. It is the very thing at which the duty was directed: see *Stansbie* v. *Troman* [1948] 2 K.B. 48, Tucker L.J. at pp. 51-52. In *Kirkham* v. *Chief Constable of the Greater Manchester Police* [1990] 2 Q.B 283, 295c Farquharson L.J. rejected the defence of *volenti non fit injuria* as 'inappropriate where the act of the deceased relied on is the very act which the duty cast upon the defendant required him to prevent.' These observations are equally apposite to the defence of novus actus

> interveniens in the present case. In *Pallister* v. *Waikato Hospital Board* [1975] 2 N.Z.L.R. 725 Woodhouse J. in a dissenting judgment, at p. 742, put the matter most succinctly: 'The concept of a *novus actus interveniens* does not embrace foreseeable acts in respect of which the duty of care has specifically arisen.'"

It may be useful at this point to record Lord Hobhouse of Woodborough's impressive analysis, in his dissenting speech, of the potential difficulties of imposing liability in the face of a voluntary act of suicide. He posited two hypothetical situations:

> "Suppose that the detainee is a political agitator whose primary motivation is to further a political cause. Such persons are liable to see self-destruction, in circumstances which they hope will attract as much publicity and media attention as possible, as an appropriate means of advancing their political cause. Can such a person, having taken advantage of a careless oversight by the police and carried out his purpose, vicariously bring an action against the police and recover damages from them? Or suppose a detainee who and whose family are in serious financial difficulties and who .... says to himself 'the best way for me to help those I love is to commit suicide' and then carries out that purpose by taking advantage of the careless oversight.... [H]e might even leave a suicide note for his wife telling her this. In cases such as these it would be surprising if the courts were to say that, notwithstanding the determinative, rational and deliberate choice of the deceased, that choice had not become the only legally relevant cause of the death. It would also in my judgment be contrary to principle. It certainly would be contrary to principle to resort to the fiction of saying that he was guilty of 100 per cent. contributory negligence: if the responsibility for his death was his alone, the principled answer is to say that the sole legal cause was his own voluntary choice. Yet, if such a case were hereafter to come before a court, that court.... would be bound to award the plaintiff damages."
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> Lord Hobhouse gave these examples "to illustrate the need to identify a dividing line unless one is to say that even in such cases the deliberate voluntary choice of the deceased, the quasi-plaintiff, can never break the chain of causation.... [I]t is a basic

> rule of English law that a plaintiff cannot complain of the consequences of *his own* fully voluntary conduct - his own 'free, deliberate and informed' act: see Hart and Honoré, Causation in the Law, p. 136."

Pointing to the fact that suicide is within the range of conduct lawfully open to a person on the basis of the principle of personal autonomy, Lord Hobhouse focused on the finding of the trial judge that Mr Lynch had made a rational decision to take his own life, unaffected by mental illness. Lord Hobhouse commented:

> " Lord Bingham of Cornhill C.J. [in the Court of Appeal] was clearly surprised by the findings which the trial judge had made. I can understand his reaction. It might be thought that any person locked up in a cell was almost certainly being subjected to abnormal stresses which would be liable to cause him to act in an irrational fashion and do things which he would not normally contemplate; he may suffer impulses which he would not normally suffer. He may be in all other respects a normal person. He may not be mentally ill or otherwise suffering from any disturbance of the mind. It is the general experience of those concerned with prison administration and the custody of persons in police stations that the risk of suicide or self-harm exists among those confined whether they be suffering from some frank mental condition or appear to be relatively undisturbed. Your Lordships have been referred to reports and statistics which support this and the risk is clearly recognised in the instructions and recommendations issued by the police authorities and the Home Department. The risk of suicide is a concern of those responsible for holding persons in custody and within their contemplation. But it was the trial judge who heard the evidence, including expert evidence, and made the findings, being fully aware of their significance, and his findings have not been challenged."

On the question of the contributory negligence of the deceased, the majority in the House of Lords favoured a 50% reduction of the award of damages. Lord Hoffmann acknowledged that a 100 % reduction might seem appropriate in view of the fact that the deceased had been the author of the act that had resulted in his death, but added:

> "[W]hatever views one may have about suicide in general, a 100 per cent. apportionment of responsibility to Mr. Lynch gives no weight at all to the policy of the law in imposing a duty of care upon the police. It is another different way of saying that the police should not have owed Mr. Lynch a duty of care. The law of torts is not just a matter of simple morality but contains many strands of policy, not all of them consistent with each other, which reflect the complexity of life. An apportionment of responsibility 'as the court thinks just and equitable' will sometimes require a balancing of different goals.... The apportionment must recognise that a purpose of the duty accepted by the Commissioner in this case is to demonstrate publicly that the police do have a responsibility for taking reasonable care to prevent prisoners from committing suicide. On the other hand, respect must be paid to the finding of fact that Mr. Lynch was 'of sound mind.'..... I therefore think it would be wrong to attribute no responsibility to Mr. Lynch and compensate the plaintiff as if the police had simply killed him. In these circumstances, I think that the right answer is ....to apportion responsibility equally."

Employers' Liability and Breach of Statutory Duty

You might not have thought it likely that prisoners would be regarded by the courts as the employees of their gaolers yet there is some litigation which proceeds broadly, or perhaps analogically, on that basis. The concept of employers' liability has fuzzy edges. Those who are in a relationship similar to that of employment will be taken within the scope of the principles of employers' liability, to the benefit of the weaker party. Thus, in *Quigley v Ireland* DPIJ: Hilary and Easter Terms 1992, p 111 (HC) , an inmate of Loughan House, who had been told to paint a ceiling and started the task by climbing onto table as no step ladder had been provided, succeed in his claim for damages against the State (although the award was reduced by 50 per cent, as the plaintiff should have asked for ladder). Contrast *Hanrahan v Minister for Justice* DPIJ: Trinity and Michaelmas Terms 1993, p 92 (HC).

Section 6(1) of the Safety, Health and Welfare at Work Act 2005 provides that the relevant statutory provisions apply to prisons and places of detention unless their application is incompatible with safe custody, good order and security. The phrase "relevant statutory provisions" means existing enactments and the Act and any instrument made under the Act for the time being in force: section 2(1). Of course, much of the 2005 Act is concerned with the employer's duties to employees and employees are defined in section 2(1) in a way that does not include prisoners. However, section 12 of the Act imposes an important duty on an employer extending beyond employees. It provides:

> **"**Every employer shall manage and conduct his or her undertaking in such a way as to ensure, so far as is reasonably practicable, that in the course of the work being carried on, individuals at the place of work (not being his or her employees) are not exposed to risks to their safety, health or welfare."

Clearly, prisoners may claim the benefit of this provision, moderated only by the qualification mentioned in section 6(1).

Concluding Observations

There is much more to the possibilities for tort litigation involving prisoners. Section 3 of the European Convention of Human Rights Act 2003 opens up the whole of Convention jurisprudence on the right to life, the prohibition on inhuman treatment, the right to liberty, privacy and freedom of expression. Prisoners have already succeeded in several claims in this context at a European level. The Constitution also offers far more in such contexts as administrative justice and protection of the rights to health and education. Not all of the claims have been

successful to date but the prospects for the future are promising, if the claims are advanced by diligent and committed advocates.