NOTE: ORDER MADE BY THE HIGH COURT IN [2020] NZHC 3401 PROHIBITING PUBLICATION OF IDENTITIES OF THE APPELLANT, THE OTHER PRISONERS INVOLVED AND ALL FRONT LINE CORRECTIONS OFFICERS REFERRED TO IN THE HIGH COURT JUDGMENT REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA41/2021
[2023] NZCA 166

BETWEEN	A (CA41/2021) Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	13 September 2022
Court:	Gilbert, Goddard and Simon France JJ
Counsel:	D A Ewen for Appellant A M Powell for Respondent
Judgment:	12 May 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Soon after this appeal was heard, Simon France J became terminally ill. Sadly, he passed away while the judgment was reserved. Section 62(4) of the

Senior Courts Act 2016 provides that in circumstances such as these the remaining judges must decide whether the proceeding should be reheard, or whether the judgment should be completed. We have decided that the judgment should be completed rather than requiring the parties to incur the inevitable expense and delay of a rehearing. We consider this is the preferable course particularly given the panel was unanimous having conferred after the hearing that the appeal should be dismissed.

Introduction

[2] The appellant was a serving prisoner at Whanganui Prison when he was assaulted by another prisoner (Mr C) in an exercise yard on 10 June 2017. The assault, which lasted for up to five minutes, involved punches to his head and face. The appellant suffered bruising to the side of his face, a cut lip and redness to the top of his head.

[3] The appellant sued the Attorney-General on behalf of Ara Poutama Aotearoa | Department of Corrections (Corrections) for negligence and for allegedly breaching his rights under the New Zealand Bill of Rights Act 1990 (BORA) — namely, his right not to be subjected to torture or cruel, degrading, or disproportionately severe treatment or punishment (s 9), and his right as a detained person to be treated with humanity and with respect for his inherent dignity (s 23(5)).

[4] Doogue J found that Corrections was negligent in leaving the appellant in the same exercise yard as Mr C without supervision.[1] There had been an earlier incident of violence by Mr C against the appellant on 25 April 2017. Following this assault, Corrections immediately moved the appellant to a separate wing. Mr K, the Corrections officer responsible for placing the appellant in the yard where Mr C was present, understood that the appellant and Mr C had reconciled and played table tennis together in the six-week period following the April assault. Mr K was acting in what he perceived to be the appellant's best interests by offering him the opportunity to go into the yard where a game of squash was being played, a game he knew the appellant particularly enjoyed. Mr K also made enquiry of the appellant before letting him into the yard, but due to miscommunication, this was not sufficient to alert

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1 *A v Attorney-General* [2020] NZHC 3401 [High Court judgment] at [139] and [151].

the appellant to the prospective danger. Mr K thought he had the appellant's informed consent, but the Judge found he should not have relied on the appellant's response without making his own independent assessment.[2] In any case, a Corrections officer should have remained in the yard; monitoring by CCTV from the control room was insufficient.[3]

[5] The Judge was satisfied that Mr K acted in good faith and in the appellant's interests. His error was in his assessment of the risks on the day:

> [140] I find that all of the Corrections officers involved in this matter acted in good faith and in [the appellant's] interests, including Mr K, but that sadly Mr K erred in making a casual assessment of the risks on the day, and in the exercise of his discretion around putting [the appellant] and Mr C together in the yard without supervision. This constitutes a breach of the duty of care owed by Corrections to [the appellant].

[6] Compensatory damages for personal injury, including aggravated damages, are excluded by s 317 of the Accident Compensation Act 2001. While exemplary damages remain available by virtue of s 319, the Judge did not consider such an award was warranted.[4]

[7] The Judge dismissed the BORA claims, concluding that the negligent error fell far short of the requisite threshold to establish these claims:

> [170] This was a one off mistake by a well-intentioned and not indifferent Corrections officer, and the breach of the common law duty falls far short of the requisite threshold to establish a breach of [the appellant's] right to be treated with humanity and with respect for the inherent dignity of the person under s 23(5) of BORA, or his right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment under s 9.

[8] The Judge declined to grant the relief sought. There was no justification for exemplary damages on the negligence claim, and no BORA breach had been made out.[5]

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2 At [139].
3 At [138].
4 At [151].
5 At [151] and [170].

The appeal

[9] There is no appeal against the Judge's refusal to award exemplary damages in respect of the negligence claim. Nor is there any cross-appeal against the Judge's finding of negligence. There is also no appeal against the Judge's dismissal of the claim founded on an alleged breach of s 9 of BORA. The appeal is confined to the alleged breach of s 23(5). The appellant accepts the factual findings made by the Judge but argues that these facts are sufficient to substantiate his claim under s 23(5). The appeal therefore turns on a question of law.

[10] The appellant says the appeal requires consideration of the difference, if any, between the circumstances which engage liability at common law and BORA liability under s 23(5). Given the assault was perpetrated by another prisoner, he says the appeal also raises the question of when the state has responsibilities relating to the actions of non-state actors. The appellant says the proper test to apply in assessing whether there has been a breach of s 23(5) of BORA in circumstances such as the present where an assault has been perpetrated by a non-state actor, is as follows: where the third party's acts were known or should have been known to pose a real and immediate risk to safety, the state has an obligation to take all reasonable steps to prevent the risk from eventuating.

[11] If the appeal is allowed, the appellant seeks to have the matter remitted to the High Court to assess the amount of public law compensation so that his normal appeal rights are preserved.

Key facts

[12] In her careful and comprehensive judgment, the Judge reviewed the evidence leading to her factual findings, all of which are accepted. It is not necessary to set these out in full. The following summary will suffice for present purposes.

[13] The appellant was sentenced to a lengthy term of imprisonment in December 2015. He was transferred from Rimutaka Prison to Te Waimarie unit in Whanganui Prison in December 2016.

[14] On 2 January 2017, the appellant was transferred from Te Waimarie unit to Te Moenga unit, a multi-purpose unit used to house mainstream prisoners, remand prisoners, and some prisoners on voluntary segregation. Corrections' policy at the time was to keep segregated and mainstream prisoners separate. Although sharing common facilities such as exercise yards, laundry, library, and telephones, they did so at different times of the day and under close supervision of Corrections officers to ensure there was no intermingling of the two groups.

January assault — Mr B

[15] On 5 January 2017, two Corrections officers (Mr E and Mr G) were making deliveries to prisoners in the unit adjacent to where the appellant was housed. Shortly after they entered this unit, another prisoner, Mr B, took advantage of their entry to escape through the unsecured grille into the main hallway. Mr B immediately assaulted the appellant who was in the hallway using the telephone. The appellant said he was hit approximately four to six times on his head and ribs within four to six seconds. Another Corrections officer quickly intervened and pinned Mr B to the floor while other officers arrived. Mr B then became compliant and was returned to his cell while the appellant was taken to the medical centre to be checked for any injuries. The only injury recorded was a slight graze around his left eye area. Mr B subsequently pleaded guilty to a misconduct complaint brought by Corrections. Following this assault, the appellant submitted a request for voluntary segregation.

[16] The appellant withdrew his request for voluntary segregation on 16 February 2017, and this was duly approved by either the prison director or his delegate:

> Happy to sign off voluntary segregation to mix with the mainstream prisoners. Prisoner familiar with current unit. Knows most of the prisoners on the unit and happy to associate with them.

[17] Around 17 February 2017, the appellant was moved back to Te Waimarie. The Judge observed that at that time, it was a "harmony-type" unit for vulnerable prisoners who agreed to get along with each other and serve out their sentences quietly and peacefully, without conflict or aggression.[6] The unit was divided into two wings:

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6 At [44].

East 1 and East 2. Prisoners in each wing could access the entire wing when their cells were open, but not the other wing. Only prisoners in trusted positions such as those serving as messmen delivering food to other prisoners in their cells were permitted to cross between the wings. Mr C was a messman.

April assault — Mr C

[18] Mr C and the appellant were both initially housed in the East 2 wing. The appellant, who was studying at the time, was bothered by Mr C playing loud music and he repeatedly complained about this. On 25 April 2017, Mr C and another messman, under the supervision of two Corrections officers, were delivering breakfast to their fellow prisoners. When one of the Corrections officers opened the appellant's cell, the appellant approached Mr C and, using abusive language, complained about the stereo noise. Mr C responded by striking a glancing blow to the appellant's head. One of the Corrections officers immediately moved between the two men, ushered the appellant back into his cell and returned Mr C to his cell. Mr C was subsequently charged with misconduct and cautioned about his behaviour.

[19] Following this assault, the appellant was moved into the East 1 wing, away from Mr C. The appellant was content with this arrangement and did not request to be returned to voluntary segregation at this time. A non-association alert ought to have been issued on the Integrated Offender Management System database in accordance with standard practice following an incident of this nature. The purpose of such an alert is to warn officers that specific prisoners are not to be unlocked together or mixed. A non-association alert was not issued in this instance, apparently through oversight. The Judge considered that although this was unfortunate, it was inconsequential because Mr K was aware of the earlier assault and was alive to the risk.[7] All Corrections officers would have been advised of the incident at the daily morning briefing and would have known that the two prisoners should be kept apart.

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7 At [53] and [139].

June assault — Mr C

[20] Having set out this background, the Judge explained how it came about that the appellant ended up being in the East 2 exercise yard on 10 June 2017 at the same time as Mr C:

> [54] On 10 June 2017, Mr K, a Corrections officer, approached [the appellant] in the day room in East 1 and asked [him] if he wanted to go to the yards for some exercise. He knew [the appellant] enjoyed sports, and he was aware that a squash game was underway in yard 2A in East 2 (the yard). [The appellant] said he would like to join the game, and Mr K and another Corrections officer, Ms L, then escorted [the appellant] to the yard.
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> …
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> [56] When they approached the yard, Mr K noticed Mr C was in the yard. Before letting [the appellant] in, Mr K said he checked with [him] that he was comfortable entering the yard. There is some dispute about the exact wording of this exchange. Mr K could not recall exactly, but he thought he had communicated to [the appellant] that Mr C was present, and sought [the appellant's] confirmation that he still wanted to enter the yard. [The appellant] disputed this – although he also cannot remember the exact wording, he denied that he was aware Mr C was in the yard. At most, [the appellant] conceded that Mr K said something along the lines of "is this going to be ok?" As [the appellant] did not understand this was a reference to Mr C's presence in the yard, he simply replied "yes".

[21] The appellant said he was shocked to see Mr C in the yard, sitting on a bench with other prisoners. However, the appellant said it was too late to leave because the Corrections officers had already gone and the door to the yard was locked. The appellant said he tried to avoid any confrontation with Mr C by immersing himself with the prisoners playing squash. After the squash game ended, the appellant walked up to the bench and sat down. While he was taking his jersey off, Mr C struck him on his head. The Judge described the altercation as follows:

> [58] … [The appellant] felt a blow to his head from behind or from the side. He turned around and stepped back. He saw Mr C was throwing punches towards his face. At first he successfully blocked Mr C's blows while stepping backward. Mr C pursued him. [The appellant] punched Mr C on his face and the blow landed on Mr C's glasses. Mr C took off his glasses and gave them to another [gang member] who was standing by his side. That prisoner asked Mr C if he needed any help in overpowering [the appellant]. Mr C declined the offer and handed his glasses over to him.
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> [59] At this point [the appellant] threw another punch at Mr C, which missed. Mr C managed to grab [the appellant's] neck, and he pinned [him] to the bench with his body weight. Mr C then started punching [the appellant] [in] the face and head area with his free hand. Mr C punched [the appellant]

> in a number of short bursts, before grabbing a chess board and hitting [the appellant] with that.

[22] The Judge found that the assault would have lasted up to five minutes.[8] As soon as Mr C realised that Corrections officers had been alerted to the assault, he let the appellant go. Immediately after the assault the appellant was seen by a nurse and photographs were taken of his injuries. The appellant had a sore head, but no headaches or vision loss. As noted, the appellant had bruising to the side of his face, a cut on his lip, and redness on the top of his head (but no bleeding). He was given ibuprofen for pain relief and an ice pack for the swelling.

[23] Following this incident, a non-association alert was placed on Mr C, not to associate with the appellant. One of the Corrections officers also referred the matter to the Police.

High Court judgment

[24] We note at the outset two important general findings made by the Judge about risk mitigation and management at the prison at the relevant time.

[25] First, the Judge found that Whanganui Prison had "excellent" policies and practices in place to keep prisoners safe from one another, noting that significant numbers of them have violent predispositions.[9]

[26] Secondly, the Judge was clearly impressed by the protective culture at the prison:

> [23] Having heard three days of evidence and over 10 Corrections officers being cross-examined, and having seen the demonstrable rapport [the appellant] had with almost all those officers who had had relationships with him, I am satisfied that Corrections have implemented de-escalation of potential risk of prisoner-on-prisoner violence at Whanganui Prison, not only as a matter of policy[,] but also as a culture that is deeply rooted in the practices as described.

[27] While finding that the Corrections officers involved were well-intentioned, the Judge considered they nevertheless breached their duty of care in

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8 At [62].
9 At [137].

the circumstances by leaving the appellant in the yard with Mr C without supervision, contrary to standard policy and practice.[10]

[28] The Judge considered that by the time of the June assault, Corrections should have been aware of the tension between the appellant and Mr C and needed to be "vigilant" about any future contact between them. Corrections plainly recognised this by immediately relocating the appellant to the East 1 wing after the April assault.[11]

[29] The customary practice following an assault of this nature would be for a Corrections officer to explore the dynamic between the two prisoners, speak to them to ascertain the prospect of reconciliation, and complete an evaluation of any future risk. There was some evidence of this process being followed — a senior Corrections officer was "pretty sure" such a meeting took place — but the evidence about this was "scant" due to the passage of time (more than three years) and the lack of any independent record.[12] The Judge noted there was disagreement about the necessity for a non-association alert in the particular circumstances.[13] None of the Corrections officers could recollect any notification from the prison "Intel team" who assist in de-escalation of risk by monitoring phone calls and keeping track of prisoners who pose particular risk.[14] There was also evidence that the appellant and Mr C had been permitted to spend time in each other's company in the day room to play table tennis on at least one occasion between the April and June assaults. Mr K formed the impression that there would not be any ongoing issues between the two. The Judge accepted that no increased tension was detected in the unit on 10 June, the day Mr C assaulted the appellant in the yard.[15]

[30] The Judge accepted that Mr K exercised some care about the appellant being exposed to Mr C, being alert to the earlier issue between them. He thought he obtained

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10 At [139]–[140].
11 At [127].
12 At [128] and [129].
13 At [131].
14 At [16] and [132].
15 At [134].

the appellant's consent to being placed in the yard with Mr C, but this was not the case due to miscommunication:

> [135] I accept that Mr K was alert to the earlier issue between Mr C and [the appellant], and he did exercise some care about [the appellant] being exposed to Mr C. He was solicitous of [the appellant's] feelings on the matter before placing [him] into the yard with Mr C. From his perspective, he did ask [the appellant] if he was alright entering the yard with Mr C, but it is clear that there was miscommunication between Mr K and [the appellant]. I find in those circumstances that [the appellant] did not give informed consent to being in the yard with Mr C.

[31] However, the Judge held that even if Mr K thought the appellant had consented to go into the yard knowing Mr C was there, he had a duty to satisfy himself that the appellant would be safe. In any case, in terms of Corrections' policy, a Corrections officer should have been present because there were prisoners of different classes in the yard.[16]

Submissions

[32] Mr Ewen, for the appellant, submits that the defining characteristic of the obligation in s 23(5) of BORA is that it is positive and protective in nature, recognising the special vulnerability of detainees. The state is obliged not merely to refrain from infringing the obligation, but to take positive steps to ensure it is met. Mr Ewen submits that Corrections knew, or ought to have known, that Mr C posed a real and immediate risk to the appellant's safety and was therefore under an obligation to take all reasonable steps to prevent that risk from materialising.

[33] In formulating this test, Mr Ewen draws particularly on decisions of the European Court of Human Rights in right to life cases such as *Osman v United Kingdom*.[17] This line of authority establishes that the fundamental right to life protected under art 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) (given effect in New Zealand by s 8 of BORA) requires state authorities to do all that could be reasonably expected of

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16 At [136].

17 *Osman v United Kingdom* (1998) 29 EHRR 245 (ECHR); and *Keenan v United Kingdom* (2001) 33 EHRR 38 (ECHR). *Osman* was applied in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225; and both *Osman* and *Keenan* were applied in *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] 1 AC 681.

them in the circumstances to avoid a real and immediate risk to life from the criminal acts of a third party of which they are, or ought to have been, aware.[18] He submits that same test should be applied in s 23(5) cases.

[34] Mr Ewen says that although the conduct that breached s 23(5) of BORA was that of Mr C who delivered the beating, Corrections is liable because it knew, or ought to have known, that Mr C posed a real and immediate risk to the appellant's safety. Corrections was therefore required to take all reasonable steps to avert the risk and failed to do so because it did not issue a non-association alert following the April assault and no Corrections officer was present in the yard to supervise at the time of the June assault. Mr Ewen submits that a finding that s 23(5) was breached should inevitably have followed. It is irrelevant that this was a "one-off" inadvertent incident and there was no reckless indifference to the risk. The emphasis must be on the "treatment", not the reasons for it.

[35] Mr Powell, for the respondent, submits that the appellant's argument impermissibly conflates the separate legal concepts of negligence law and human rights law. Human rights obligations impose positive protective duties on state actors to meet minimum standards of behaviour whereas the primary function of negligence law is to apportion risk. Common law duties must be treated separately to human rights obligations, and negligence and human rights law should develop separately to reflect the different functions they serve.

[36] Mr Powell observes that s 23(5) of BORA is aimed at protecting detained persons from conduct which lacks humanity, demeans the person or is clearly excessive in the circumstances. While in some cases a common law cause of action and an action for breach of BORA will coincide, this will be because the circumstances establishing the tortious breach will demonstrate an additional element of egregiousness such as the intentional use of excessive force by a state actor against a prisoner (such as, for example, in *Archbold v Attorney-General*) or gross negligence

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[18] *Osman v United Kingdom*, above n 17, at [116]; *Keenan v United Kingdom*, above n 17, at [90]; and Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

sufficient to cause outrage among right-thinking members of society (such as, for example, in *Morgan v Attorney-General*).[19]

[37] Mr Powell submits that the appellant's reliance on the test developed by the European Court of Human Rights in the context of art 2 (and art 3) of the European Convention (equivalent to ss 8 and 9 of BORA respectively) is misplaced. He says there is a marked difference between these provisions, and it would be inappropriate to apply the same test to both. He observes that no authorities have been identified where the same test has been applied in relation to a right equivalent to s 23(5).

[38] Mr Powell contends that in the present case, Corrections made decisions in the best interests of the appellant and Mr C and sought practical solutions to respect the needs of both and to de-escalate the conflict between them. He argues that the appellant's treatment was consistent with the humane detention of both prisoners.

Our assessment

[39] Section 23(5) of BORA gives effect to the almost identically worded art 10(1) of the International Covenant on Civil and Political Rights (ICCPR)[20] and provides:

> **23 Rights of persons arrested or detained**
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> …
>
> (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

[40] The words "with respect for the inherent dignity of the person", were added when art 10(1) of the ICCPR was drafted to meet a concern that the word "humanity" would not bear the same meaning when translated into different languages.[21] The concepts of humanity and respect for the inherent dignity of the person are intended to be the same and no distinction is drawn between them.[22] According to

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19 *Archbold v Attorney-General* [2003] NZAR 563 (HC); and *Morgan v Attorney-General* [1965] NZLR 134 (SC).

20 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

21 William A Schabas *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd revised ed, NP Engel, Kehl (Germany), 2019) at 273–274.

22 *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569 at [75].

Ronald Dworkin, human dignity is the "vague but powerful idea" that all individuals should be treated as full members of the human community; no one should be treated as less than human.[23] Prisoners are entitled to be treated with the same dignity as anyone else, subject to the limitations that are unavoidable in prison.[24]

[41] As Cooke J observed in *Pere v Attorney-General*, the right has particular significance where it arises in circumstances where the state has arrogated to itself the right to detain a person and limit their personal autonomy.[25] For example, prisoners may have limited ability to protect themselves by choosing not to associate with other prisoners, many of whom may have violent propensities. The right may be infringed where a prisoner is the victim of prisoner-on-prisoner violence in circumstances where the state's failure to protect against this type of harm is sufficiently egregious as to be properly viewed as inhuman treatment.

[42] Inhuman treatment must attain a minimum level of severity to breach the protected right. The assessment of this minimum depends on all the circumstances including the nature and context of the treatment, its duration, any physical and mental effects and, where relevant, the status of the victim including their sex, health and age.[26] In *Taunoa v Attorney-General* (*Taunoa*), Blanchard J quoted with approval a statement of the European Court of Human Rights in *Kudla v Poland* as capturing "the flavour" of the obligation in s 23(5) to treat prisoners and other detainees with humanity:[27]

> … the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured …

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23 Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (MA), 1978) at 198.

24 United Nations Human Rights Committee *CCPR General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)* UN Doc HRI/GEN/1/Rev.9 (Vol. I) (7 April 1992) at [3]; and *State v Makwanyane* [1995] 1 LRC 269 (SACC) at 330, citing *Whittaker v Roos and Bateman* 1912 AD 92 at 122–123.

25 *Pere v Attorney-General* [2022] NZHC 1069, [2022] 2 NZLR 725 at [34].

26 *Brough v Australia* UN Doc CCPR/C/86/D/1184/2003 (17 March 2006) at [9.2]; and see also Schabas, above n 21, at 276.

27 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [156], citing *Kudla v Poland* (2000) 11 ECHR 197 (Grand Chamber) at [94].

[43] The positive duty imposed on the state under s 23(5) to meet the minimum standard required for treatment of detainees is to be assessed objectively.[28] In *Taunoa*, Blanchard J noted the types of factors that have been found, frequently in combination, to be sufficient to meet the required level of severity to render conditions of detention inhumane — lack of hygiene or natural light, overcrowding, inadequate sanitary facilities, deprivation of food while detained in solitary confinement, lack of beds or bedding, inadequate medical care and lack of recreation or exercise.[29] As this Court observed in *B v Waitemata District Health Board*, cases in which s 23(5) has been successfully invoked have included failures to provide these basic human necessities, or where there has been "brutish and unnecessary use of police force".[30]

[44] Treatment sufficient to constitute a breach of s 23(5) is of a lesser order than conduct proscribed by s 9 of BORA (equivalent to art 3 of the European Convention):

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[45] Blanchard J observed in *Taunoa* that ss 9 and 23(5) involve differing degrees of reprehensibility, s 9 being concerned with "conduct on the part of the state and its officials which is to be utterly condemned as outrageous and unacceptable in any circumstances", whereas s 23(5) "proscribes conduct which is unacceptable in our society but of a lesser order, not rising to a level deserving to be called outrageous".[31] In particular, s 23(5) is concerned with conduct by state actors:[32]

> … which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so.

[46] A breach of s 9 will be "utterly condemned as outrageous and unacceptable in any circumstances". According to Tipping J, it will usually involve an intention on the part of state actors to cause harm (for example, cruelty or brutality by prison

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28 See *Pere v Attorney-General*, above n 25, at [39]–[40].
29 *Taunoa v Attorney*-General, above n 27, at [157].
30 *B v Waitemata District Health Board*, above n 22, at [76], citing *Archbold v Attorney-General*, above n 19.
31 *Taunoa v Attorney-General*, above n 27, at [170].
32 At [177].

guards), or at least reckless indifference to the causing of harm.[33] A breach of s 9 will also usually, although not necessarily, involve significant physical or mental suffering.[34] Conduct by state actors that breaches s 9 in a prison setting would equally amount to a breach of s 23(5). However, conduct of a lower order of reprehensibility, short of requiring condemnation as "outrageous", could also qualify as a breach of s 23(5). We consider that reckless indifference to harm may well be sufficient, such as where state actors deliberately turn a blind eye to the likelihood of prisoner-on-prisoner violence and take no action to safeguard the prisoner from harm.

[47] We were not referred to any authority to support the approach urged by Mr Ewen concerning a breach of a right equivalent to that protected by s 23(5). His formulation of the test — that state actors are required to take all reasonable steps to protect against a real and immediate risk to safety that was either known or ought to have been known to them — would render Corrections liable under s 23(5) for simple negligence. There would be no need to establish the requisite degree of reprehensibility identified in *Taunoa*. In the context of prisoner-on-prisoner violence, where the alleged breach on the part of state actors is the product of negligence but does not involve wilful wrongdoing or something akin to that, we consider that only an egregious departure from acceptable standards of care amounting to gross negligence could found a breach of s 23(5). Such conduct would be reprehensible and unacceptable in our society. While not rising to the level where it would be condemned as utterly outrageous in all circumstances, it would nevertheless be sufficiently reprehensible as to be marked and punished by an award of exemplary damages.

[48] As we noted at the outset, the appeal turns on a question of law. Having rejected the legal test proposed by the appellant, the appeal must fail. The Judge's factual findings are not challenged. Mr K genuinely believed there was no risk in allowing the appellant into the yard. This was based on his observations of both prisoners and his honest belief that they had had a reconciliation meeting and had played table tennis together on at least one occasion since the April assault. He also thought he had made the necessary enquiry of the appellant to confirm that he was comfortable being placed in the yard with Mr C.

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33 At [295].
34 At [295].

[49] There is no room for a finding of gross negligence in this case given there is no challenge to the Judge's finding that exemplary damages were not justified in all the circumstances. We agree with the Judge's assessment that this was a "one off mistake by a well-intentioned and not indifferent Corrections officer".[35] There was no element of egregiousness or reprehensibility. It is plain on the Judge's findings that Mr K and the other Corrections officers involved were sensitive to the appellant's needs, honestly believed his safety was not at risk, and treated him throughout thoughtfully, and with humanity and respect for his inherent dignity.

Result

[50] The appeal is dismissed

[51] There is no order for costs.

Solicitors:
Ord Legal, Wellington for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

[35] High Court judgment, above n 1, at [170].