ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AS ORDERED IN [174].

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-000881
[2020] NZHC 3401

UNDER	the New Zealand Bill of Rights Act 1990 and the Corrections Act 2004
IN THE MATTER OF	negligence, breach of duty of care, breach of statutory duty and breach of constitutional rights
BETWEEN	A Plaintiff
AND	ATTORNEY-GENERAL Defendant

Hearing: 5 - 7 and 23 October 2020

Appearances: Plaintiff in person
A Powell & L Dittrich for the Defendant
J McHerron as Counsel to Assist

Judgment: 17 December 2020

JUDGMENT OF DOOGUE J

This judgment was delivered by Justice Doogue
on 17 December 2020 at 3.30 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:
Crown Law, Wellington

Introduction

[1] The plaintiff, Mr A, is serving a long term of imprisonment.

[2] Mr A was the victim of three assaults by two prisoners, Mr B and Mr C, between January and June 2017 at Whanganui Prison.

[3] First, Mr A claims in negligence that the Department of Corrections (Corrections) owed him a duty of care to keep him safe from harm from other prisoners, and that Corrections officers breached that duty by allowing him to be harmed by Mr B and Mr C (the courts in New Zealand have had limited opportunity to consider whether a duty of care is owed by prison authorities to a prisoner).

[4] Second, Mr A claims Corrections have breached his right under s 23(5) of the New Zealand Bill of Rights Act 1990 (BORA) to be treated with humanity and with respect for his inherent dignity as a person.

[5] Third, Mr A claims Corrections have breached his right under s 9 of BORA not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[6] Mr A seeks both aggravated and exemplary damages for the negligence claim, and damages for the two BORA claims.

Background

How Corrections as an institution assesses, manages, and attempts to mitigates risks posed by prisoners to other prisoners

[7] Before I examine Mr A's claims in detail, it is important to consider how Corrections as an institution assesses, manages, and attempts to mitigate risks posed by prisoners to other prisoners, and how they attempt to keep prisoners safe while also ensuring that a prisoner's detention is humane and consistent with human rights.

[8] Mr Symonds, the manager of custodial practice for Corrections, said the starting point for Corrections' approach to managing the risk posed by prisoners to one

another is a zero tolerance attitude to violence in prison. He said that at each stage of a prisoner's detention, as well as in Corrections officers' daily interactions with prisoners, Corrections uses a number of tools and measures to identify, assess, de-escalate, and address risk. These include a comprehensive training regime, ongoing assessment and security classification processes, alert systems, and closed-circuit television (CCTV).

[9] This results in Corrections officers identifying and mitigating the risk to prisoners from other prisoners. It is these officers who are trained to build rapport and interact with individual prisoners, and to notice when situations are tense or there may be problems between prisoners. There is a real focus on building relationships as a foundation from which to de-escalate tension, by dispute resolution or separation of prisoners from one another as the particular circumstances so require.

[10] Risk around gang affiliations is managed by Corrections officers being aware of gang relationships and ensuring the number of prisoners in each unit from different gangs is finely balanced. This is factored into prisoner movements and placements within certain units. Balancing gang numbers in units mitigates risk of violent incidents by minimising the power imbalance.

Assessing and mitigating generalised risk

[11] Assessing and addressing risk starts from the moment a prisoner enters the prison system. When a prisoner is received into Corrections' custody they undergo a strip search, collection of biometric data, and are processed according to their warrant(s). A one on one assessment then takes place, and the prisoner is asked questions aimed at identifying stressors and risks that might affect them during their period of detention (for example, gang affiliations). They are also screened in relation to substance dependency, and are assessed for their medical and mental health (in particular for their risk of self-harm or suicide).

[12] The final component of a prisoner's first assessment is the unit induction, where the prisoner is given an outline of how the unit works and how to keep themselves safe. This induction is designed to mitigate risk by getting the new prisoner accustomed to the prison environment, and Corrections officers encourage

prisoners to talk to them if they are feeling threatened, uneasy, or at risk. This unit induction also gives Corrections officers the opportunity to observe the prisoner and identify risks in their management.

[13] Security classifications are another way that risk is identified and mitigated. Security classification effectively identifies the kind of regime a prisoner needs to be managed on, in order to keep others and the community safe. Prisoners can be managed on a low, medium, or high security regime in accordance with their classification. Because classification is based on a prisoner's risk, behaviour, and attitude, it enables the prison to determine where it is best to house prisoners, and whether there are complex issues that require a prisoner to be managed at a higher classification.

[14] The difference between the classifications is the ratio of prisoners to Corrections officers, and how restrictive the regime is. Low security is the least restrictive regime. The ratio of Corrections officers to prisoners is 20 to one. The cells are not locked, so prisoners can move around relatively freely within the unit. Under medium security, prisoners are housed in the same units as low security prisoners, and are managed under the same ratio of prisoners to Corrections officers. High security is the most restrictive regime. The most prisoners in such a unit is 30. Unless the unit is in the yard or the prisoner is unlocked, prisoners are in their cells. Prisoners are in the yard or unlocked 15 at a time, and during unlocked times a minimum of two Corrections officers are present. This means the ratio of prisoners to Corrections officers never exceeds 25 to one.

[15] The first security classification assessment is done when the prisoner arrives, and it is based on the prisoner's risk of violence and escape. Subsequently, during their incarceration, prisoners are assessed using an assessment tool which measures dynamic or changeable factors about a prisoner that have been shown to contribute to a prisoner's risk. A prisoner's security classification can also be reassessed by an "events based review". An events based review can follow a positive or negative event, for example where a prisoner assaults another prisoner, or where a prisoner is progressing well in some form of treatment or rehabilitation. In addition, Corrections

staff continually assess risk throughout a prisoner's detention by observing prisoners and their interactions with others. As Mr Symonds put it:

> Corrections staff continue to assess risk throughout a prisoner's period of detention. Staff are always observing prisoners and interactions on the floor. Corrections Officers look for interactions and body language – whether a prisoner is cheeky, mouthy, staunch and needs to maintain external face. They keep an eye out for gang affiliations and tensions in that regard.

[16] The prison Intel team also assists in de-escalation of risk. Intel monitor phone calls and keep track of prisoners who pose particular risk. Corrections officers are made aware of the prisoners or gangs that require special attention or monitoring at any given time.

[17] Corrections officers are also required to do a daily assessment of the unit they are working in every morning. The daily assessment is called the Prisoner Tension Assessment Tool (PTAT), and is designed to assess the unit "feel" on any given day. Officers discuss their observations from the previous day, and assign a risk rating to the unit of green, amber, or red. Green is the lowest level, and means that unit officers have not identified any concerns that may impact on the safety of themselves or prisoners. Amber means tensions are rising, and mitigation measures need to be put in place to de-escalate tensions and risk of incidents. Red is the highest risk level.

[18] If a unit escalates to amber a number of measures can be put in place. These may include a change in unlock regimes to manage numbers, undertaking searches of cells, putting more Corrections officers on the floor, reducing numbers in the yards, and notifying the Rapid Response Teams that tensions in the unit are escalating. The Rapid Response Teams are teams that are despatched to respond to incidents. At amber level, they are advised the rating has been heightened, which means they will be more prepared to respond if needed.

[19] CCTV cameras also operate in units to ensure areas are monitored, and a visual record of incidents can be kept if needed for a misconduct charge or criminal prosecution.

[20] The evidence also establishes very clearly that because of the investment that Corrections officers put into building relationships with prisoners, there are prisoners

who, while keen to avoid being seen as "narks", do also work with the officers and give hints about what might be wrong. There is no formal structure of informants, but many prisoners prefer a tension-free environment and often assist officers to work out issues.

[21] Where tensions are rising or an incident has occurred, Corrections officers can place prisoners on "time out" for up to three hours. This gives the prisoner an opportunity to get way from other prisoners, and to calm down. It often relies on prisoners asking for time out. While there is no onus on a prisoner to manage their own safety, it goes without saying that it is in their best interests to do so, and where they do preventive measures can be taken.

[22] Finally, in relation to the assessment and prevention of general risk, Mr Symonds put it this way:

> Finally, assessing risk in the unit is continuously undertaken by staff through the experience they have and relationship they have built up with prisoners. We know our prisoners. Our staff are recruited by targeting characteristics and experience that will make them suited to the work. They are also provided with training. Prison staff spend over 8 hours every day in their units with prisoners. Staff get to know each prisoner, their personality, their circumstances, their Court dates. You know who visits them regularly and know to check in on people when that person doesn't. You ask if they are okay, if something has gone wrong, if they need anything. Staff talk to prisoners. They are always assessing how they are doing and how the situation is developing.

[23] Having heard three days of evidence and over 10 Corrections officers being cross-examined, and having seen the demonstrable rapport Mr A 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.

Assessing and mitigating risk to particular individuals

[24] I have described the various mechanisms that Corrections officers routinely use to assess ongoing risk from other prisoners as part of a prisoner's term of

imprisonment. But sometimes a prisoner will be at more specific risk from particular prisoners, for instance because of how they interact with others.

[25] Corrections encourages prisoners to be open when they fear for their own safety. Corrections officers have a number of responses available to them if they are aware of tension between prisoners. They first try to resolve issues between prisoners at the lowest possible level, by discussing it with the relevant prisoners. If the issue rises to the next level, officers can place prisoners on a misconduct, where an adjudicator considers the evidence and determines an appropriate punishment (for example, loss of privileges, or cell confinement). If the issues are more serious, Corrections officers can record the issue on the Integrated Offender Management System database (IOMS), or raise the issue with the head of the unit. They call this 'placing an alert'. Alerts can include non-association alerts, which warn officers that specific prisoners are not to be unlocked together or to mix.

[26] If a prisoner says they are afraid, they will be isolated and their placement in the unit assessed. If the risk is caused by a personality clash with another prisoner, Corrections officers consider whether relocation to another unit will resolve the problem. Similar consideration is given in circumstances where the prisoner may have offended a gang member.

[27] If a prisoner says they are unsafe, Corrections officers encourage prisoners to consider segregation. Segregation enables Corrections to restrict a prisoner's access to other prisoners, by housing them separately from mainstream prisoners.

[28] Corrections officers are familiar with s 59(1) of the Corrections Act 2004, which provides that a prisoner may request to be placed in segregation for protection. This means Corrections officers, with sign-off from the Prison Manager, can restrict a prisoner's access to other prisoners if it is in their best interests. Mr Symonds advised that where a prisoner opts to be in voluntary segregation, that can be a "gentler" way of serving their sentence. Voluntary segregated prisoners are supposed to mix only with other voluntary segregated prisoners. That does not mean there is no risk, but rather less risk in those units. If Corrections assess that a prisoner is at risk but they

do not want to segregate themselves, Corrections officers attempt to persuade them to do so. When that is unsuccessful, they very sparingly use directed segregation.

Mr A's relevant history of incarceration

[29] Mr A first arrived in prison in August 2014, when he was charged with a number of serious offences. He was sentenced in the High Court at Rotorua in December 2015. He was initially placed in Waikeria Prison, and was later moved to Rimutaka Prison. He was transferred from Rimutaka Prison to Te Waimarie unit (Te Waimarie) of Whanganui Prison in December 2016. When Mr A was first placed in prison he was assessed as being under threat from gang members who were members of his partner's family, and he was placed into directed segregation. At other times (which I will describe below), Mr A was placed under voluntary segregation.

[30] On 2 January 2017, Mr A was transferred from Te Waimarie to Te Moenga unit (Te Moenga) of Whanganui prison. He was assaulted at Te Moenga three days later, on 5 January 2017, by Mr B (the first assault).

[31] On 15 February 2017, Mr A was moved back to Te Waimarie, into East 2 wing, which also housed Mr C. On 25 April 2017, Mr A was assaulted by Mr C (the second assault). As a result, Mr A was then moved to Te Waimarie East 1 wing. On 10 June 2017, Mr A was assaulted by Mr C again (the third assault).

The first assault: 5 January 2017

[32] At the time Mr A was moved to Te Moenga in January 2017, Te Moenga was a multi-purpose unit, housing mainstream prisoners, remand prisoners, and some prisoners on voluntary segregation. Te Moenga was made up of seven units of cells, with each unit housing up to eight prisoners. There were grilles in front of each unit, separating them. The grilles were constructed of steel bars through which a person could fit their arms, and the grilles allowed both physical and verbal interaction between prisoners.

[33] It was Corrections policy at that time to keep the segregated and mainstream prisoners separate from one another at all times. The prisoners shared common

facilities such as exercise yards, laundry, library, and telephones. But they did so at different times of the day and under close supervision of Corrections officers, in order to ensure there was no intermingling of the two groups.

[34] Mr A said that he was moved to Te Moenga due to muster pressures. He said that he did not want to move, but agreed because he felt under pressure by Corrections (by Mr D, a Senior Corrections officer, in particular) to do so. Corrections said Mr A requested voluntary segregation pursuant to s 59(1)(a) of the Corrections Act. Mr A said his request for voluntary segregation was made at the suggestion of Mr D. Mr D disputed this, but his recollection of this was somewhat equivocal. Regardless, the point is not material. I mention it only because it was of considerable importance to Mr A. I consider Mr A is more likely than not correct in his recollection of events on this point.

[35] Mr A was placed in unit 4, and Mr B was in unit 3. Mr A said that the day he was moved to Te Moenga he met Mr B for the first time, and that Mr B questioned him immediately in an aggressive manner. He also said that between 2 January and 5 January 2017, Mr B would come up to the grille between their two units whenever he could and call out to Mr A, swear at him, gesture towards him, and threaten him.

[36] Mr A said that between 2 and 5 January he complained to two Corrections officers (Mr E and Mr F) about Mr B's behaviour. Mr E had no recollection of any such complaints, and Mr F could not be located to be produced as a witness. There is no written record of any such complaints having been made by Mr A.

[37] On 5 January 2017 two Corrections officers (Mr E and Mr G) were making deliveries to prisoners in unit 3 (where Mr B was housed). In accordance with their standard policy, they had opened the grille and entered the unit together. In the normal course of events, and according to Corrections procedure, the grille should then have been locked behind them.

[38] The evidence is uncertain as to whether the grille that separated unit 3 from the main hallway was at that time opened and closed manually by a key, or electronically from the guardroom in the main hallway. Mr E recollected that the grille was opened

and closed manually, and Mr G recollected it was opened from the guardroom. This inconsistency is explicable for two reasons. First, the evidence was that the systems for opening and closing the grille were changed about that time, because a prisoner had got stuck in the grille somehow. Second, the effluxion of time between the assault that day and the hearing had affected all witnesses' recollection of events.

[39] Nothing material emerges from any of that uncertainty, however, because it is not disputed that shortly after Mr G and Mr E entered the unit, Mr B took advantage of their entry to escape through the unsecured grille into the main hallway. The escape happened so fast that it is entirely possible that whatever method then applied for the securing of the grille, it would still have been undertaken by Mr G or a Corrections officer in the guardroom in the normal course of events and in accordance with Corrections policies.

[40] Mr B immediately assaulted Mr A, who was in the hallway using the telephone. Mr A said that he was hit by Mr B on the head and in the ribs approximately four to six times within four to six seconds.

[41] Mr H, another Corrections officer, was sitting at his desk in his office nearby. Mr H was able to see the assault, and he was able to intervene very quickly. He separated Mr A and Mr B, and restrained Mr B by pinning him to the floor. Other officers arrived to assist including those who had been doing the deliveries to Mr B's unit. Mr B was immediately compliant with the officers, and was returned to his cell unaided. Mr A was escorted to the medical centre to check any injuries he may have sustained. The only injury to Mr A that was recorded was a slight graze around the left eye area.

[42] Following the incident, a misconduct complaint against Mr B was instituted by Corrections officers, and on 25 January 2017 Mr B pleaded guilty to assaulting Mr A.

[43] Also immediately following the assault, Mr A submitted another request for voluntary segregation. His reasons for submitting the request were that he did not want to "associate with violent or gang affiliated peoples because I fear for my

personal safety". On 16 February 2017, Mr A withdrew his request for voluntary segregation and the Prison director or his delegate approved the withdrawal saying:

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

The second assault: 25 April 2017

[44] In or around 17 February 2017, Mr A was moved back to Te Waimarie. At that time, Te Waimarie was a "harmony-type" unit for vulnerable prisoners, where prisoners agreed to get along with each other and serve out their sentences quietly and peacefully, without conflict or aggression. Te Waimarie housed a mix of mainstream prisoners, remand prisoners, and some prisoners on voluntary segregation. It included prisoners with security classifications ranging from low to high-medium security.

[45] The unit was divided into two wings, East 1 and East 2. Each wing consisted of units of cells. Prisoners within each wing could access the entire wing when their cells were open (meaning they had access to the other units within their wing), but could not access the other wing. Each wing contained prisoners of the same category. Prisoners of different categories could cross over to the other wing only if they were in trusted positions – for example serving as a messman, whose job it is to prepare the food trolley and deliver food to the other prisoners in their cells. Mr C and Mr A were both initially housed in East 2. Mr C was in cell 30, and Mr A was in cell 45.

[46] Prior to the second assault by Mr C on Mr A, Mr A had encountered issues with Mr C. These issues were primarily because Mr A was bothered by Mr C playing his stereo at loud volume. Mr A was spending significant periods of time in his cell studying, and Mr C's stereo noise provided an unwelcome intrusion into Mr A's concentration on his studies. Mr A said he had complained to Corrections officers numerous times about Mr C's stereo noise (as had other prisoners). Mr A also said he had told officers that he felt threatened by Mr C. While I accept that Mr A complained about the stereo noise, I do not accept that he complained about feeling threatened; there is no record of Mr A making those complaints to Mr F, or any other Corrections officer. Had he done so, it would have been recorded in IOMS and acted upon.

[47] On 25 April 2017, Corrections records show that Mr C, in his capacity as a messman, was delivering breakfast to his fellow prisoners along with a fellow messman whose identity was not established on the evidence available to me. Mr I, a Corrections officer, and at least one other Corrections officer were supervising Mr C, and were present and observed the second assault.

[48] Mr I's recollection was that he opened Mr A's cell, and Mr A then approached Mr C using abusive language about Mr C's stereo noise. Mr C struck a glancing blow to Mr A's head. Mr I moved between the two men, ushered Mr A back into his cell, and then returned Mr C to his cell.

[49] Mr A's recollection about this assault was that a larger number of Corrections officers were present, and that they did little to intervene early on in the altercation. He also denied being verbally abusive towards Mr B. He said whilst he may have raised his voice, he did not use any invective.

[50] I find Mr A's evidence unreliable in respect of this incident. His recollections changed between his statement of claim, his amended statement of claim, and his viva voce evidence. The inconsistencies emerged starkly when Mr A was subject to cross-examination. By contrast, Mr I's evidence was clear and consistent. I prefer and accept Mr I's account as to what occurred during this altercation.

[51] Mr C was subsequently charged with misconduct, and was cautioned about his behaviour.

[52] Mr A was subsequently moved out of East 2 into East 1, away from Mr C. Mr A explained he did not request to be returned into voluntary segregation at this stage, as he believed Mr C would not be able to access him in East 1.

[53] Mr A gave evidence that he made requests to Mr I, Mr D, and Mr J (another Corrections officer), for a non-association alert to be issued against Mr C. None was issued. Mr A did not cross-examine Mr I on this issue. Mr D could not explain why there was no alert issued, and he said that it should have been as it was standard practice after an incident of this nature. Mr J could not remember a conversation with

Mr A about a non-association alert being issued, but explained that all officers would have been alerted to the fact of the assault and would have known to keep the two prisoners apart. He explained this information would have been imparted in the daily morning PTAT briefing all Corrections officers have.

The third assault: 10 June 2017

[54] On 10 June 2017, Mr K, a Corrections officer, approached Mr A in the day room in East 1 and asked Mr A if he wanted to go to the yards for some exercise. He knew Mr A enjoyed sports, and he was aware that a squash game was underway in yard 2A in East 2 (the yard). Mr A said he would like to join the game, and Mr K and another Corrections officer, Ms L, then escorted Mr A to the yard.

[55] I pause here to say that Mr A alleged Mr K was part of a conspiracy with Mr C and his Black Power gang affiliates to lure Mr A into the yard so that he could be beaten up there. There is no evidence of such a conspiracy, and I reject the allegation outright.

[56] When they approached the yard, Mr K noticed Mr C was in the yard. Before letting Mr A in, Mr K said he checked with Mr A 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 Mr A that Mr C was present, and sought Mr A's confirmation that he still wanted to enter the yard. Mr A disputed this – although he also cannot remember the exact wording, he denied that he was aware Mr C was in the yard. At most, Mr A conceded that Mr K said something along the lines of "is this going to be ok?" As Mr A did not understand this was a reference to Mr C's presence in the yard, he simply replied "yes".

[57] When Mr A entered the yard, he saw Mr C sitting on a bench with other prisoners, including two or three of his Black Power gang affiliates. Mr A said he was shocked, and he wondered how Corrections officers could have left him in that vulnerable situation. He said he tried to avoid any confrontation with Mr C, by immersing himself in focussed interaction with the prisoners playing squash. Mr A was cross-examined as to why he did not ask to leave the yard once he had spotted

Mr C. He replied that he had not spotted Mr C until after Mr K and Ms L had gone and the door to the yard was locked. He said:

> In fact, even if I spotted him and the guards were there, I wouldn't be able to say that I want to go away, because in prison environment that would be looked as being scared of someone or being some issues, or being a nark, and the moment I did that, that would be perceived by prisoners that he is a nark or he's scared of somebody in here, and there would usually be bullying issues later on I would have to face because of that.

[58] After the squash game ended, Mr A walked up to the bench and sat down while taking his jersey off. He 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. Mr A 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 member of Black Power who was standing by his side. That prisoner asked Mr C if he needed any help in overpowering Mr A. Mr C declined the offer and handed his glasses over to him.

[59] At this point Mr A threw another punch at Mr C, which missed. Mr C managed to grab Mr A's neck, and he pinned Mr A to the bench with his body weight. Mr C then started punching Mr A to the face and head area with his free hand. Mr C punched Mr A in a number of short bursts, before grabbing a chess board and hitting Mr A with that.

[60] Mr A recollected that while he was being hit by Mr C with the chess board, Mr C said to the other prisoners in the yard that he should kill Mr A and that to do so would not bother him because it would simply be "adding Mr A to the list". At this stage Corrections officers arrived and intervened to rescue Mr A.

[61] Mr A initially asserted that the assault lasted between 15 to 20 minutes. He later accepted that it may have been between eight to 15 minutes. He also conceded that, given he was the victim of the assault, his sense of time may have been affected, and the assault may not have lasted as long as he thought. Corrections officers, including Mr I, Mr J, Mr M, and Mr N, observed CCTV footage of the assault. They estimated the assault lasted between 30 to 40 seconds, and four to five minutes. The most common assessment was four to five minutes, which is in itself a significant time.

[62] I consider it more likely than not that the assault did not last any longer than five minutes, but that Mr A's perception is that it lasted longer and was more furious than observed by others because he was the victim. That is quite natural, and I do not consider he has actively attempted to mislead the court about this aspect of the matter.

[63] When the Corrections officers were alerted to the assault and Mr C realised that, he let Mr A go, and Mr A ran to the middle of the yard. Mr A said that when the Corrections officers were entering the yard he spit blood on the ground, because his mouth was bleeding. Mr I and Mr J refuted that Mr A was bleeding.

[64] Immediately after the assault, Mr A was seen by a nurse and photographs were taken of his injuries. The medical observations record that Mr A had a sore head, but no headaches or vision loss. He had obvious 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.

[65] Following the third assault, a non-association alert was placed on Mr C, not to associate with Mr A. Mr M said he referred the matter to the Police. Mr A disputed this, but I am satisfied on Mr M's evidence that he did complain to the Police.

Submissions

Plaintiff's case

[66] Put simply, Mr A's case is that the Prison Director received information that two prisoners, Mr B and Mr C, posed a conspicuous risk to Mr A, and that Corrections officers did nothing to keep him safe from harm at the hands of Mr B and Mr C, thereby breaching their duty of care and his rights under ss 9 and 23(5) of BORA.

Defendant's case

[67] The Attorney-General accepted at the outset of the case that prisoner-on-prisoner violence should never be casually dismissed as an unavoidable consequence of being sent to prison.

[68] Mr Powell, counsel for the Attorney-General, did not concede a duty is owed to Mr A, but said if a duty were to be recognised that it would only arise in circumstances where the Prison Director or Unit Manager receives information of a conspicuous risk to a particular prisoner from another prisoner or group of prisoners.

[69] Mr Powell submitted that there was no information that a prisoner or group of prisoners posed a conspicuous risk to Mr A, and therefore if any such duty of care is established it has not been breached in Mr A's case.

[70] As far as the claims of breach of ss 9 and 23(5) of BORA are concerned, Mr Powell submitted that the very high threshold in s 9 could not be met in the absence of at least acquiescence in, and probably encouragement of, such violence. He submitted the lesser standard of humanity required by s 23(5) would not be breached in the absence of indifference to the safety of prisoners.

[71] Finally, Mr Powell submitted that the facts in this case demonstrate that Corrections officers were concerned for Mr A's safety, and facilitated his various requests for segregation and monitored his relationships with other prisoners. Further, Mr Powell submitted that when the Corrections officers did become aware of the incidents, they responded appropriately.

First cause of action: the tort of negligence

[72] In order to succeed in his first cause of action in negligence, Mr A must establish that:[1]

(a) Corrections owed a duty of care to him;

(b) Corrections breached that duty;

(c) in breaching its duty, Corrections caused the damage he suffered;

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[1] Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 151.

(d) the damage he suffered was a sufficiently proximate consequence of that breach (in other words, it was not too remote); and

(e) exemplary damages are warranted.

Did Corrections owe a duty of care to Mr A?

[73] Before turning to the substantive question of whether Corrections owes the duty of care which Mr A argues for, I first consider the general principles relating to the formulation of a duty of care in negligence.

[74] The most helpful starting point is the Supreme Court's decision in *North Shore City Council v The Attorney General* (*The Grange*).[2] The Court reviewed the authorities on negligence, and provided guidance on how courts should approach the task. In particular, the Court said that the courts generally approach claims about allegedly tortious omissions with more caution than they do claims relating to positive acts taken by a defendant.[3] The Court retained the three essential and familiar elements of the duty formulation; foreseeability, proximity and the application of policy considerations. It is now firmly established that this is a mere methodology to answer the fundamental question whether it would be fair and reasonable to impose a legal duty of care to prevent the harm complained of.

[75] Like private individuals and bodies, public authorities generally have no duty of care to prevent the occurrence of harm, because the common law does not generally impose liability for pure omissions.[4] However, there are many examples of a duty being founded on an assumption of responsibility for another person, where a person may come under a duty to act to prevent harm because they have taken on the responsibility for the welfare of another.[5]

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2 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*].
3 At [167], citing *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1060; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [80].
4 *Attorney-General v Strathboss Kiwifruit Ltd* [2020] NZCA 98 at [199].
5 Todd, above n 1, at 197.

[76] The fact that the harm that was caused to Mr A was caused by third parties (Mr B and Mr C) does not mean that the Attorney-General does not owe a duty of care. As the Court of Appeal said in *Attorney-General v Strathboss Kiwifruit Ltd*:[6]

> …the courts have routinely recognised duties for failing to prevent harm caused by third parties. In *Dorset Yacht* the primary source of risk was the borstal trainees (not the Home Office employees). In *Couch (No 1)* it was Mr Bell (not the parole officer). In the building inspection cases the primary sources of risk were the building, the environment and the builder (not the inspector). The respondents emphasise that in none of these familiar examples did the existence of an external source of risk not within the defendant's control mean that the defendant could not owe duty of care.

[77] When applying *The Grange* methodology, the Court of Appeal in *Strathboss* made some helpful preliminary comments about the duty of care:[7]

> [192] The role of the concept of a duty of care in the law of negligence is to delineate the circumstances in which a careless act or omission which causes damage will be actionable. A duty of care will exist where the relationship between an actor A and a party B who sustains a loss is such that the law imposes upon A a duty to take care to avoid or prevent such loss.
>
> [193] While negligence claims are habitually analysed compartmentally, the critical question is a composite one, whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind the claimant claims to have suffered. Hence it is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harm. Furthermore, while it is conventional to examine the duty of care question without reference to breach, as the majority in *Couch v Attorney-General (Couch (No 1))* observed sometimes the nature of the breach can be relevant to the scope of the duty.

Case law on the existence of a duty of care owed to prisoners

[78] Due to the statutory bar on claims for compensatory damages in respect of personal injury, and the high threshold for exemplary damages, New Zealand case law is relatively sparse on the duty of care arising when a person is detained in the custody of another.

[79] In 1965, Tompkins J in *Morgan v Attorney-General* found prison authorities have "a duty to exercise reasonable care for the safety of prisoners."[8] The case

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6 *Attorney-General v Strathboss Kiwifruit Ltd*, above n 4, at [230] (footnotes omitted).
7 *Attorney-General v Strathboss Kiwifruit Ltd*, above n 4 (footnotes omitted).
8 *Morgan v Attorney-General* [1965] NZLR 134 (SC) at 137.

involved a prisoner who had suffered a workplace injury while cutting firewood after being issued inadequate boots. Tompkins J considered international authorities, including the United Kingdom case of *Ellis v Home Office*, where a prisoner was injured by another prisoner and the Court held:[9]

> The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, and that includes those who are within against their wish or will, of whom the plaintiff was one. If it is proved that supervision is lacking, and that accused persons have access to instruments, and that an incident occurs of a kind such as might be anticipated, I think it might well be said that those who are responsible for the good government of the prison have failed to take reasonable care for the safety of those under their care.

[80] Tompkins J also considered the Australian case of *Howard v Jarvis*, where the Court recognised a duty of care was owed by prison authorities to prisoners:[10]

> We feel no doubt that the learned Judges of the Supreme Court of Tasmania were right in holding that [the prison officer] was subject at common law to a duty to exercise reasonable care for the safety of [the prisoner] during his detention in custody. . . . In arresting and detaining [the prisoner] he was no doubt acting lawfully and properly and in the due execution of his duty, but he was depriving [the prisoner] of his liberty, and he was assuming control for the time being of his person, and it necessarily followed, in our opinion, that he came under a duty to exercise reasonable care for the safety of his prisoner during the detention.

[81] Tompkins J concluded the prison authorities owed a duty to the prisoner in the case before him:

> I think, applying the above cases, that the Superintendent and each of his subordinate prison officers owed a duty to the plaintiff to take reasonable care for his safety during his detention. This duty, however, did not go so far as to put them under a duty to provide safe equipment or a safe system of work. Their duty is limited, so far as the employment of the prisoner is concerned, to using reasonable care not to allot the prisoner to work, and not to give him orders, which they could reasonably foresee would cause harm to him. They are not under a duty to warn the plaintiff of dangers in his work.

[82] Ellis J cited *Morgan* more recently, in the 2017 case *S v Attorney-General*, in the context of BORA claims relating to involuntary placement in psychiatric

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9 *Ellis v Home Office* [1953] 2 All ER 149 at 154.
10 *Howard v Jarvis* (1958) 98 C.L.R. 177 at 183.

institutions.[11] Although there was no claim in negligence before her, Ellis J found the common law duty relevant to the claim under s 23(5) of BORA:

> [235] The respondents suggested that a common law duty of care may also inform the content of s 23(5). Historically, and in cognate jurisdictions, such a duty has been held to follow from the particular vulnerability of those in custody and the assumption of control by the detaining authority.[12] Many of those who are detained will have a limited ability (either as a result of their detention or as a result of the circumstances which led to it or both) to protect themselves. Such a duty has been held to require that, in certain circumstances, the detaining authorities should act in a positive way to keep a detainee safe. The steps required by such a duty not only go further than mere compliance with the applicable minimum standards of detention but further than requiring the adequate supervision of inmates to prevent their coming to harm. It includes the avoidance of all acts or omissions which the person having custody could "reasonably foresee would be likely to harm the person for whom he is responsible", including self-harm.[13]

[83] I also note that the existence of a common law duty of care has been relied on recently in interlocutory contexts. In *Taylor v Attorney-General* in 2010, Allan J relied on *Morgan*, when refusing to strike out a claim based on breach of a duty of care in connection with a prisoner's prison conditions.[14] He held "it is clear that there are cases in which the superintendent or manager of a prison may owe a duty of care to a prisoner at common law."[15] In 2017, Wylie J in *Littleton v Serco New Zealand Ltd* declined an application for security for costs against a prisoner who had brought a negligence claim after being assaulted by fellow prisoners.[16] In finding the prisoner was a "genuine plaintiff" whose access to justice would be curtailed by an order for security for costs, Wylie J stated:[17]

> On the authorities cited by [counsel for the prisoner], it is arguable [the prison authority] was under a duty to take reasonable care to ensure the safety of [the prisoner], and to ensure that he was not harmed by the unlawful acts of others. The authorities suggest that a lack of proper supervision of prisoners can constitute a breach of the duty of care owed by a prison authority.[18]

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11 *S v Attorney-General* [2017] NZHC 2629.

12 See for example *Ellis v Home Office*, above n 9.

13 *Kirkham v Chief Constable of Greater Manchester* [1990] 2 QB 283 at 294. The existence of such a duty, and any bearing it might have on the content of s 23(5), is relevant in the present case particularly in the context of the allegations made by Mr S that he was sexually abused by another patient in late 1999 and early 2000. Although his negligence claim relating to those events was abandoned, there remains an issue about whether, in not taking steps to prevent this from occurring, there was a breach of his s 23(5) right.

14 *Taylor v Attorney-General* HC Auckland CIV-2010-404-6985, 11 November 2011.

15 At [64].

16 *Littleton v Serco New Zealand Ltd* [2017] NZHC 1579.

17 At [20].

18 *Ellis v Home Office*, above n 9.

[84] Mr McHerron, counsel to assist, also provided a comprehensive and very helpful summary of the case law in Australia, Canada, and the United Kingdom (all jurisdictions with whom New Zealand often draws comparisons in tort cases). The courts in these three countries all recognise a duty of care owed by prison authorities to exercise reasonable care for the safety of prisoners in their custody, including to protect them from other prisoners. The duty arises because of the special relationship between the prison authorities and prisoners, with the latter having surrendered their liberty to the former. There are of course limits to the extent of the duty of care. As prisoners are adults, the duty owned by authorities is not as high as that owed by, for example, school teachers to their pupils.[19]

[85] The courts have repeatedly recognised the difficult task authorities have in managing prison environments, and have demonstrated a marked reluctance to impose rigid constraints on prison authorities' discretion to permit prisoners known or believed to be dangerous to mix freely with other prisoners, and even to have access to potentially lethal weapons.[20] Furthermore, courts generally accept that prisoners cannot be constantly segregated or supervised, and the sudden and seemingly unprovoked nature of prisoner-on-prisoner assaults makes them very difficult for authorities to predict or prevent.[21]

Is a common law duty of care in negligence precluded by the statutory framework governing prison authorities?

[86] If a public authority has assumed a responsibility to protect a claimant from harm, then the public authority can come under a common law duty to do so unless the imposition of such a duty would be inconsistent with the relevant legislation.[22] There is extensive authority recognising common law negligence claims against public

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19 R P Balkin and J L R Davis *Law of Torts* (4th ed, LexisNexis, Chatswood, 2009) at 208.

20 Tim Owen and Alison MacDonald (eds) *Livingstone, Owen, and MacDonald on Prison Law* (5th ed, Oxford University Press, Oxford, 2015) at [2.70].

21 Malcom Johnson *A Practical Guide to Prison Injury Claims* (Law Brief Publishing, Somerset, 2019) at 44.

22 *Attorney-General v Strathboss Kiwifruit Ltd*, above n 4, at [199]-[200], citing *N v Poole Borough Council* [2019] UKSC 25, [2019] 2 WLR 1478; and *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [34], citing Stelios Tofaris and Sandy Steel "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128 at 128 (footnote omitted).

bodies acting under statute.[23] It is not a prerequisite to the recognition of a duty of care that the statute itself must contain an indicator of the existence of a duty.[24] Indeed the converse is true: the correct standard is whether, against the background of a statutory duty or power, the statute excludes a private law remedy.[25]

[87] The Corrections Act and the Corrections Regulations 2005 comprehensively prescribe the duties of the statutory officers involved, from the Minister and the Chief Executive down to the Corrections officers on the front line. They set out the imperatives that guide the operations of prisons.

[88] The starting point is s 5 of the Corrections Act, which sets out the purpose of the Corrections system:

> **5 Purpose of the corrections system**
>
> (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—
>
> (a) ensuring that the community-based sentences, sentences of home detention, and custodial sentences and related orders that are imposed by the courts and the New Zealand Parole Board are administered in a safe, secure, humane, and effective manner; and
>
> (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners; and
>
> (c) assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions; and
>
> (d) providing information to the courts and the New Zealand Parole Board to assist them in decision-making.
>
> (2) Subsection (1) does not affect the application or operation of any other Act.

[89] Section 6 sets out the guiding principles, and particularly relevant is s 6(1)(g):

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23 *Attorney-General v Strathboss Kiwifruit Ltd*, above n 4, at [271], citing *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 730–731; and *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [41].

24 *Attorney-General v Strathboss Kiwifruit Ltd*, above n 4, at [207].

25 At [208], citing *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [3].

> **6 Principles guiding corrections system**
>
> (1) The principles that guide the operation of the corrections system are that—
>
> …
>
> (g) sentences and orders must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and persons under control or supervision:

[90] Sections 8(1)(b), 12(b), and 14 deal with the functions of the Chief Executive of the Department of Corrections, prison managers, and prison officers, and these sections expressly include "ensuring the safe custody and welfare of prisoners." The "safe custody" of prisoners is an express consideration in making rules for the prison,[26] and in respect of management plans for individual prisoners.[27]

[91] There are no express indications in the Corrections Act or the Corrections Regulations that Parliament intended to exclude a duty of care owed by Corrections officers to prisoners, or that the imposition of such a duty would be inconsistent with the legislation. The statutory framework could not be said to be inconsistent with a duty on the Corrections officers to take care when a danger is posed to a prisoner by one or more other prisoners.

Conclusion

[92] I adopt the starting point that *Morgan* is authority for the proposition that a prison authority owes a duty to its prisoners, to take reasonable care to keep them safe.[28] Although this has only been recognised in limited circumstances so far, I see no reason not to extend the duty to include harm caused by assaults by other prisoners, where the harm caused is reasonably foreseeable. I do not consider a duty at common law to be excluded by the statutory framework.

[93] I therefore conclude that there is a common law duty of care owed by Corrections to its prisoners to protect them from harm at the hands of other prisoners.

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26 Corrections Act 2004, s 33.
27 Section 51.
28 *Morgan v Attorney-General,* above n 8.

However, given the concentration of violent offenders in New Zealand's prisoners, as discussed at [110] below, this duty only arises in circumstances where there is a conspicuous and specific risk to a particular prisoner. Consistent with the other jurisdictions discussed above, this duty is not to guarantee the safety of prisoners, but to take reasonable care for their safety – including taking reasonable steps to mitigate known risks.

Did Corrections breach its duty?

The law

[94] Turning first to the New Zealand authority, Tompkins J found that there was potentially sufficient evidence to establish a breach in *Morgan*.[29] He considered prison standards for prisoner safety were relevant:

> While the issue of smooth-soled boots instead of boots with nails may seem to be a precaution trifling in itself, I think the circumstances here show that it was a precaution regarding which the prison authorities themselves thought it necessary to have a special instruction, so I do not think it can be considered to be trifling here. I do not think it is applying too high a standard of care for a jury to hold that the prison authorities should have carried out that instruction.

[95] However, Tompkins J also noted that the international cases "show that it is necessary to guard against too high a standard of care being applied to the duty of prison authorities to prisoners".[30] In particular, he held:[31]

> Plaintiff's counsel submitted that the prison authorities should have instructed the plaintiff to stand at some different place than uphill from the log being split. This seems to me to be placing too high a standard of care altogether upon them. I do not think there is any evidence to show that the failure to give instructions had any causative effect upon the accident. The men were both adults and had been engaged together on the job for a fortnight.

[96] I also consider the guidance from Australia, Canada and the United Kingdom is helpful in establishing whether Corrections breached its duty in the present case. The mere fact that a prisoner has suffered an injury at the hands of another prisoner will not of itself give rise to liability. The duty of care recognised in other jurisdictions

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29 At 142.
30 At 142, citing *Howard v Jarvis*, above n 10.
31 At 143.

is not to guarantee the safety of prisoners, but to take reasonable care for their safety.[32] The law recognises that authorities cannot guard against every possible contingency, and prison staff have discretion to act in various circumstances within the prison environment. It is only where that discretion is exercised carelessly or unreasonably, that it will result in a breach of the duty of care.[33] The obligation to exercise reasonable care only extends to known or foreseeable risks. Foreseeability has been held to mean that "there must be a reasonable prospect that the event will occur."[34]

[97] In *Hartshorn v Home Office*,[35] the Court upheld a finding that prison authorities had breached their duty towards the plaintiff after he was assaulted by other prisoners. In coming to this decision, the Court acknowledged the difficult conditions prison authorities must contend with:

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

[98] Consistent with this reasoning in *Hartshorn*, cases involving assaults by other prisoners generally involve the presence of specific indicators of violence in relation to the relevant prisoners, sometimes called "pre-indicators" of violence. Pre-indicators of violence are events or circumstances that make the possibility of violence more likely.[36] Examples of pre-indicators include animosities among prisoners which make them incompatible (for example, opposing gang affiliations, or prior incidents between prisoners); or general behaviour observed within the prison, such as threats, loud verbal disagreements, aggressive behaviour, previous physical contact, suspicion of being an informant, and allegations of theft.[37] The Canadian courts have held that, where there are pre-indicators of violence, a court should consider what steps were taken to ensure the safety of the prisoner at risk; and the level

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32 *New South Wales v Bujdoso* [2005] HCA 76 at [51].
33 *Abbott v Canada* (1993) 64 F.T.R. 81 (T.D.) at 117-118.
34 *Subbiah v Canada* (2013) FC 1194 at [93].
35 *Hartshorn v Home Office* [1999] CLY 4012, 21 July 1999 (CA).
36 *Carr v Canada* [2008] FC 1416 at [16].
37 At [16]; *Adams v Canada (Attorney-General)* 2015 ABQB 527 at [35].

and adequacy of supervision given all the circumstances of the prison, the prisoners, and the pre-indicators of violence.[38]

[99] I now consider a selection of cases from Canada and the United Kingdom where courts have held prison authorities breached their duty of care, in relation to assaults on prisoners by other prisoners. In *McLellan v Canada (Attorney-General)*, the plaintiff was assaulted by another prisoner, which resulted in very serious injuries.[39] The Court found the prison had breached its duty, noting there were specific pre-indicators of violence which a prison officer knew of, but did not act on. When viewed together, in a cumulative manner, these pre-indicators created a foreseeable risk of danger to the plaintiff, and imposed a duty on the officer to act to prevent the danger (in particular, by alerting his superiors so they could correlate the information and respond accordingly).[40] The pre-indicators included: the two prisoners did not get along; the plaintiff disrespected the attacker, who was an older prisoner; the plaintiff called the attacker a "rat", after the attacker accused him of theft; and, just prior to the assault, the attacker indicated to the officer that he believed the plaintiff had stolen from him.[41]

[100] In *Kaizer v Scottish Ministers*, the plaintiff was the victim of attempted murder by another prisoner.[42] A week prior to the assault on the plaintiff, the attacker had made a specific threat to the plaintiff. The plaintiff immediately informed a prison officer of the threat, however, the officer failed to report the threat. A week later, the attacker assaulted the plaintiff in the prison gym, while the sole officer on duty was out of the room. The Court held that the prior knowledge of the threat gave reason to regard the attacker as posing a particular risk of violence to the plaintiff, finding that:

> [The prison officer] did not take reasonable care to prevent the implementation of the threat by reporting it. It was reasonably foreseeable that the [plaintiff] was likely to sustain damage to his person if such reasonable care was not taken. Had [the prison officer] reported the threat, on the balance of probabilities, the attempted murder would not have taken place.

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38 *McLellan v Canada (Attorney-General)* 2005 ABQB 486 at [39].
39 *McLellan v Canada (Attorney-General)*, above n 38.
40 At [55].
41 At [56].
42 *Kaizer v Scottish Ministers* [2017] CSOH 110 at [63].

[101] In *Walters v Ontario,* the plaintiff and his attacker were in rival gangs.[43] The plaintiff was severely assaulted, and suffered serious injuries. The Court mostly rejected the prison authority's submission that, given the plaintiff himself did not foresee the risk and request protective custody, it could not have foreseen the risk either and there was therefore no breach (instead, this was mostly relevant to the issue of contributory negligence on the part of the plaintiff).[44] Although there were no specific pre-indicators of violence between the two prisoners, the Court nonetheless found the prison authority breached its duty. This was primarily due to the fact that the two prisoners were known to be from rival gangs, and the attacker had a long history of violent offending, both inside and outside of prison.[45]

[102] I turn now to consider examples where prisoners have been assaulted by other prisoners, but the courts have not found the prison authority to be negligent. In *Subbiah v Canada*, the plaintiff was attacked after details of his offending were published, by two prisoners who managed to block open a door so that it could not be locked.[46] He was stabbed six times, and Corrections officers responded to the assault within one minute. The Court found no negligence, noting there were no pre-indicators that an assault was pending, the plaintiff had not complained he was in danger, and there were no prior threats from either of the attackers.[47]

[103] In *Timm v Canada*, the plaintiff fell from a truck while part of a working party, after allegedly being struck by another prisoner.[48] The Court noted that while the attacker's criminal history included violent offending, his conduct in the prison was not such that the prison authorities would have had any reason to believe that he had "extraordinarily violent propensities over and above those of ordinary" prisoners, and that he might therefore attack the plaintiff.[49] The Court found there was no reason to segregate the attacker, or subject him to "constant rigorous observation or special

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43 *Walters v Ontario* 2015 ONSC 4855.
44 At [41].
45 At [82].
46 *Subbiah v Canada*, above n 34.
47 At [90]-[97].
48 *Timm v Canada* [1965] 1 Ex CR 174.
49 At [19].

precautions", and it was reasonable that he should be included in a working party under routine conditions and supervision.[50]

[104] In *Ellis v Home Office*, the plaintiff was injured by another prisoner, after cell doors were left open to allow prisoners to empty their slops without adequate supervision.[51] Usually there would be two prison officers on duty, and only nine cells open at one time; in that instance, there was only one officer on duty, and he opened 36 cells at one time. The Court found there was no breach, primarily because there was no evidence the attacker was any more or less dangerous than an ordinary prisoner.

[105] In *Palmer v Home Office*, the plaintiff sustained injuries in an assault by a fellow prisoner who had obtained scissors while working in the prison tailor's workshop.[52] The attacker had been convicted of three murders (in addition to other serious violent offences), and was subject to the highest security classification. A psychiatrist had characterised the attacker as "an extremely unusual psychopathic multiple murderer".[53] He had previously had a confrontation with another prisoner with a pair of scissors, and the day before the assault he had been found with blades in his possession. There were no pre-indicators of violence specific to the plaintiff. The Court did not characterise the decision to permit the attacker to work in the tailor's shop as negligent. The Court concluded that it was "impossible" to disagree with the prison authority's assessment that the attacker, though plainly a dangerous man, was not a particular risk such as to warrant his exclusion from the tailor's workshop. The Court noted:[54]

> Those in charge of prisoners have a difficult task. Clearly, except in extreme cases, of which obviously there are some, those responsible for prisons cannot keep prisoners permanently locked up or segregated from other prisoners. In addition it is necessary, or certainly desirable wherever possible, to provide suitable employment for individual prisoners.

[106] In *Smylie v Governor of HMP Magilligan*, the plaintiff was assaulted in his cell by another prisoner.[55] In dismissing the plaintiff's claim, the Court found that there

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50 At [19].
51 *Ellis v Home Office*, above n 9.
52 *Palmer v The Home Office* CA (Civ) Plaint No 86 15800, 25 March 1988.
53 At 7.
54 At 14.
55 *Smylie v Governor of HMP Magilligan* [213] NIQB 141.

were no known issues between the plaintiff and the attacker, and the assault had all the hallmarks of a spontaneous attack.[56] In coming to this decision, the Court stated:[57]

> Those in charge of prisons and prisoners have a difficult task. They have to maintain a secure location in which to incarcerate prisoners who do not wish to be there, many of whom may be violent or have violent tendencies and at the same time provide a regime which engages the time and interest of the prisoners and contributes to their rehabilitation. This is no easy task involving as it does fine judgments balancing different difficult issues all within a secure regime.

[107] Case law also suggests that when confronted with arguments asserting inadequate supervision or deficient security measures, courts may factor into their assessments the economic constraints that prison authorities must contend with. The nature of this balancing exercise was laid out in *Cekan v Haines*:[58]

> The suggestion that reasonable care required constant monitoring of prisoners … must be measured against a number of competing considerations including:
>
> 1. The need to respect the legitimate privacy and other rights of prisoners.
>
> 2. The economic costs involved in modifying the cell arrangements or inspection practices to permit a more intensive surveillance than occurred.
>
> 3. The marginal utility of introducing such modifications having regard to:
>
>   (a) The prospect that they would have prevented the kind of injury that the appellant suffered; and
>
>   …
>
> 4. The evidence of the practices of other custodial authorities.

[108] There is no simple formula for the economics of providing reasonable care. Courts take economic costs into account in determining what natural justice requires of public authorities. Similarly, courts must consider the costs of modifications said to have been necessary to attain standards of reasonable care to avoid liability in negligence.

[109] I emphasise again that the duty does not require Corrections to guarantee the safety of prisoners, but only to take reasonable care for their safety. The mere fact that

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56 At [15].
57 At [16].
58 *Cekan v Haines* (1990) 21 NSWLR 296 (SCA) at 304.

a prisoner has suffered injury will not of itself give rise to liability – it must be shown that Corrections has been careless in some way, in order to establish a breach of the duty. These authorities reinforce that Corrections is only required to exercise reasonable care to prevent harm caused by foreseeable risk. In the context of assaults by other prisoners, Corrections will only be found to have breached its duty if the attacker is known to be extremely dangerous and is not adequately supervised; or, more commonly, where Corrections knows there are pre-indicators of violence specific to the attacker and the victim (especially where the victim has complained they feel unsafe), and has not taken adequate steps to address that risk.

Discussion

[110] It must be accepted that there will be an ever present threat of violence in New Zealand's prisons, given that it is common for prisoners to have prior convictions for violence. Mr Symonds said that, based on data from the last five years, every year between 74 to 78 per cent of the prison population have previous convictions for violent offending. Incoming prisoners receiving sentences for a violence related offence sits annually at 40 per cent. In other words, approximately three quarters of the prison population have a history of violent offending, and every year around 40 per cent of new prisoners have been convicted of a violence offence. About 30 per cent of the prison muster is gang affiliated.

[111] Even with the culture of zero tolerance towards violence, in these circumstances the risk cannot be mitigated against entirely. I accept Mr Symonds' evidence that prisoner-on-prisoner violence often happens with very little warning. Most incidents are spontaneous and very difficult to predict. Sudden assaults can happen for reasons that are unrelated to the attacked prisoner – a difficult phone call with a family member, bad news from the outside, or other personal circumstances can make prisoners lash out unpredictably. It cannot be reasonably expected in those circumstances that Corrections officers should predict spontaneous incidents where there have not been any warning signs.

[112] That said, I now turn to each of the assaults to analyse whether Corrections knew there were pre-indicators of violence specific to Mr B and Mr A, and Mr C and

Mr A; whether Mr A had indicated he felt unsafe in each case; and whether Corrections took adequate steps to mitigate any such risks.

The first assault: 5 January 2017

[113] Mr B's criminal convictions are unremarkable. His convictions span eight years and largely consist of offences against property. He has one conviction for a violent offence, for assaulting a Police officer in 2013 (for which he received 100 hours community service). His misconduct reports are also unremarkable. In October 2016 he tossed a cup of water over a Corrections officer, and in November 2016 he had a razor blade wrapped in electrical wire and foil in his possession in his cell.

[114] Against that background, Mr A put to successive Corrections officers in cross-examination that Mr B was known to be an aggressive and violent prisoner. The Corrections officers all denied this to be the case. Mr G's response was particularly instructive; he said Mr B was "noticeable because he was always interacting with staff, sort of [a] bit needy, wanting, asking questions."

[115] Mr A also asserted he had complained to Mr F about the threats Mr B had made through the grille, and Mr F should have recorded the complaints and alerted other Corrections officers. He also asserted that there was a culture of Corrections officers in Whanganui Prison deliberately not recording complaints about prisoner-on-prisoner aggression in writing because "it was too much paper work".

[116] I completely reject there was such a culture. I was particularly struck by the evidence of Ms O, a Corrections officer, in this regard. As a result primarily of her evidence, but also the totality of all the evidence, I find that had Mr A made a formal complaint to Mr F it would have been formally recorded. No complaint was recorded, and I think this is because it is likely that any complaint made by Mr A would have been made by him somewhat informally, given the nature of what he was complaining of at that point in time (namely verbal threats and gestures).

[117] I am also persuaded to this point of view by an answer Mr A gave under cross-examination, about his general approach to making complaints. In relation to

his time in Rimutaka Prison, he said "it's not possible to report all incidents where reporting is considered as nark, so reporting an incident is quite [a] risky business, so I had to take caution, and that would mean sometimes that I couldn't report many of them." Mr A also failed to raise the alleged behaviours with Mr H during a conversation with him earlier in the day on 5 January 2017.

[118] I also find that Mr B and Mr A being together was not at all foreseeable. It was pure chance that Mr A was on the phone in the main hallway at the exact time the grille to unit 3 was opened by the Corrections officers for the purposes of making their deliveries.

[119] Whilst there may have been a technical breach of internal policy in there being the briefest of intervals when the grille was not secured after the entry of the Corrections officers into unit 3 it could not be said that Mr B was unsupervised for any length of time. He was pinned to the floor within seconds after his escape and assault on Mr A, which itself only lasted a matter of seconds. The Corrections officers could not be said to be negligent in these circumstances.

[120] In all of these circumstances I find that Corrections had appropriate policies in place at Whanganui Prison to manage prisoner-on-prisoner violence, that Mr B was not known to be violent, and that Corrections could not have foreseen the risk Mr B posed to Mr A. The actions of the Corrections officers in relation to the first assault did not constitute a breach of the duty of care owed to Mr A to keep him safe from violence at the hands of other prisoners.

The second assault: 25 April 2017

[121] The second and third assaults were both committed by Mr C, a retired (or retiring) member of the Black Power gang. He was housed in East 2 in Te Waimarie at the time Mr A returned there from Te Moenga on 15 April 2017. A review of Mr C's criminal conviction history records a lengthy history of offending across a number of offence types. Some of the offending involved violence, particularly male assaults female, aggravated robbery, aggravated assaults, and sexual offending against both males and females. Mr C did not have any reports or convictions for misconduct in

prison. He was a messman, a position he could not have held unless he had been trusted by Corrections officers.

[122] At the time of the second assault, Mr C and Mr A had both been housed in East 2 together for approximately two months without incident (other than Mr A's complaints about the stereo volume). There is nothing in the evidence to suggest that Mr A was fearful of Mr C for any reason prior to the second assault. There is also nothing in the evidence to suggest the assault was premeditated. It appears clearly to have been a singular response to Mr A's invective during the delivery of a meal to his cell by Mr C.

[123] I do not find that Corrections ought to have foreseen the risk posed by Mr C to Mr A prior to the second assault. Corrections officers were aware of tensions over Mr C's use of his stereo, but nothing else; that in and of itself would not foreshadow risk of violence between the two prisoners. Mr C had not made any explicit threats to Mr A. Mr A had complained only about the noise at that point, and not about any apprehension of prospective violence towards him at the hands of Mr C. In the absence of any specific indicators of violence or knowledge of risk posed by Mr C to Mr A, I consider the second assault was a spontaneous assault. Corrections had no reason to foresee the assault.

[124] I also note Corrections officers had not left Mr A unsupervised in Mr C's company, and they intervened immediately to stop the assault when it occurred. This, together with the brevity of the assault, prevented Mr A from sustaining any serious injuries.

[125] In all the circumstances I find that there were no pre-indicators of violence specifically directed towards Mr A by Mr C. Mr C was not known to have been violent to other prisoners, and Mr A had not complained about him posing a risk of violence. Therefore I conclude that there was no conspicuous risk posed by Mr C to Mr A, such that Corrections should have foreseen this assault. The actions of the Corrections officers in relation to the second assault did not constitute a breach of the duty of care owed to Mr A.

The third assault: 10 June 2017

[126] At the time of the third assault Mr A was housed in East 1 and Mr C in East 2. Mr D confirmed that prisoners from the two wings could only have interaction with one another if it was approved by a Corrections officer. Mr K confirmed that prisoners from the two wings could only be present in a yard together if the yard was supervised by a Corrections officer.

[127] By the time of the third assault, Corrections should have been aware of the tension between Mr C and Mr A. There was a clear pre-indicator of violence by Mr C towards Mr A (in that Mr C had already assaulted Mr A). Although it is correct to categorise the second assault as spontaneous, I do not accept this absolved Corrections from being vigilant about any future contact between Mr C and Mr A. They had recognised that themselves, by immediately relocating Mr A to East 1 after the second assault.

[128] As a result of the second assault it would have been customary, according to Corrections policy and procedure, for an officer to have explored the dynamic between the two prisoners, spoken to them both to ascertain the prospect of reconciliation, and completed an evaluation of any future risk. Often a meeting between the two would be promoted, and the particular tension thereby resolved. Mr D said that he was "pretty sure" the two had had a meeting to see "if they could make up", as this was standard practice at the time. Due to the effluxion of time since the events in question, he conceded that such a meeting may not have taken place. However, the strong impression I got from Mr D's evidence is that he genuinely believed a meeting had taken place, even if he was unable to recall any of the details of it.

[129] In this case, there is no independent record of any restorative processes having been initiated either by the prisoners themselves or Corrections officers. Mr A said any such meeting, if it did happen, must have occurred before the second assault. I have some reservations about Mr A's recollection, because prior to the second assault he and Mr C were at loggerheads over the stereo and this was plainly not resolved as at 25 April 2017. But equally, the evidence from Corrections on this can only be described as scant. I am not able to be certain about what actually did occur in this

case, as there is no record of the tension between the two men having been addressed in any formal sense (other than by Mr A's relocation to East 1).

[130] Mr A explained that he was worried about encountering Mr C after the second assault, because he was a patched gang member with gang affiliates who were in Te Waimarie at the same time. Mr A gave evidence that he had made requests to Mr I, Mr D and Mr J for a non-association alert to be issued in respect of Mr C. None could recollect these requests having been made by Mr A. No non-association alert was ever generated in IOMS.

[131] There was some disagreement between various Corrections officers about the necessity of a non-association alert in this case. Some officers said it is standard practice to issue an alert, others said it is not. For instance, Mr Symonds explained Corrections cannot overuse non-association alerts, "otherwise we would never be able to house all of our prisoners in our prisons". He explained that a fight would not necessarily automatically generate an alert – Corrections officers would interview both parties and assess alternative options and risk levels.

[132] I also note that none of the Corrections officers recollected any notification from Intel that there was any ongoing tension between the two in the months leading up to the third assault.

[133] There was some suggestion that Corrections officers had permitted Mr A and Mr C to be in each other's company in the day room, to play table tennis, on at least one occasion between the second and third assaults. Mr K's recollection was that this was after the second assault, and he "didn't think that there would be actually any issues moving forward."

[134] It appears Mr K relied on his presence in the unit together with his numerous interactions with and observations of the prisoners (whom he knew well) to inform his assessment of the state of the relationship between Mr C and Mr A, particularly in light of the fact there was no non-association alert and no adverse new information from Intel. The evidence is silent as to whether or not the usual PTAT occurred that day. But conversely, there is nothing to suggest that the rating on the unit that day

would have been anything other than green. In other words, there does not appear to have been any increased tension detected in the unit that day.

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

[136] I also note Mr Symonds' evidence that a Corrections officer would usually take responsibility to check whether a prisoner would be safe in any situation they were putting them in. In other words, even if Mr K thought Mr A had consented to go into the yard knowing Mr C was there, Mr K also had a duty to satisfy himself that Mr A would be safe in the yard with Mr C. I also note the evidence of Mr D that Corrections officers should have been present in the yard, according to Corrections policy at the time, because there were prisoners of different classes in the yard together.

[137] I am satisfied on the evidence available to me that Corrections has excellent policies and practice in place at Whanganui Prison to deal with keeping the prison population (significant numbers of whom have violent predispositions) safe from one another. In this instance, however, it appears those policies and practices were not observed to a reasonable standard of care. The Corrections officers involved are to be commended for immediately facilitating Mr A's relocation to another unit. But in circumstances where it was possible Mr A and Mr C's paths may have crossed again, they should have been more vigilant. The evidence is equivocal as to whether, given the nature of the second assault, a formal non-association alert should have been generated. But the IOMS record of the second assault was a clear indicator to any Corrections officer managing both men that care should have been taken in any further interactions between Mr A and Mr C.

[138] Mr C and Mr A should not have been in contact with each other without direct supervision from Corrections officers in person after the second assault, and they especially should not have been unsupervised in the yard for so long without a

supervisory presence in person. Singular reliance in this case on supervision by way of live CCTV footage from the guardroom was an inadequate response in the circumstances. It is abundantly clear from the evidence that the duties undertaken by the Corrections officer in the guardroom means that there are periods of time when the officer's attention is necessarily diverted elsewhere. It is not a failsafe preventative mechanism for regulating the safety of prisoners in the yard. That is evident from the fact that Mr A was assaulted for up to five minutes before Corrections officers were able to respond and intervene. That is long enough for a serious tragedy to unfold, which thankfully did not occur in this case.

[139] In summary, in this case, there was a known incident of violence by Mr C against Mr A. Proactive steps had been taken to house them separately to minimise that risk immediately. The decision not to issue a non-association alert was unfortunate, with the benefit of hindsight, but not causative of the breach because Mr K was still alive to the risk nonetheless. Mr K did make the necessary enquiry of Mr A before sending him into the yard, but it appears it was not explicit enough to have properly alerted Mr A to the prospective danger. Even though Mr K thought he had informed consent, he should not have relied on Mr A's response without assessing the "feel" of the yard and making his own independent assessment on the day given the known history between the two men. Leaving Mr A in the yard without supervision, contrary to what a Corrections officer said was standard policy to keep these classes of prisoners separate, fell below the requisite duty of care.

[140] I find that all of the Corrections officers involved in this matter acted in good faith and in Mr A'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 Mr A and Mr C together in the yard without supervision. This constitutes a breach of the duty of care owed by Corrections to Mr A.

In breaching its duty, did Corrections cause the damage suffered by Mr A?

[141] I find the breach of the duty caused the damage suffered by Mr A (in the form of his physical injuries). Mr K's decision making on the day of the third assault created

the opportunity for Mr C to assault Mr A. But for Mr K putting Mr A in the yard, Mr A would not have suffered the injuries he did.

Was the damage Mr A suffered a sufficiently proximate consequence of the breach (in other words, was it too remote)?

[142] Given the findings I have made, it must be evident that the physical injuries Mr A suffered were a sufficiently proximate consequence of the breach to give rise to liability in negligence.

Are exemplary damages warranted?

The law

[143] Compensatory damages for Mr A's personal injuries are barred by s 317 of the Accident Compensation Act 2001. Mr A also seeks aggravated damages, which are also excluded by s 317, as they are compensatory in nature.[59] However, s 319 provides that exemplary damages are available.

[144] I note at the outset there is some doubt as to the availability of exemplary damages for vicarious liability. Given the primary purpose of exemplary damages is to punish the wrongdoer and act as a deterrent (rather than compensate the victim of the wrong), there is doubt about the appropriateness of shifting that punishment onto a principal or employer.[60] The Court of Appeal in 2003 was sceptical of the deterrent effect of vicarious liability, and in finding the Crown was not vicariously liable for exemplary damages in relation to misconduct by foster parents who were acting as agents of the state, the Court held: [61]

> [92] … the need for deterrence or incentive will not … outweigh the unfairness of punishing an employer or principal which has not itself breached a duty of care.
>
> [93] The balance may possibly be different in a case in which an official of the state, for example a police constable, has deliberately, recklessly or … in a grossly negligent manner directly inflicted personal injury on the plaintiff, particularly if … that official has not been able to be identified and so the

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59 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [88]; *Falwasser v Attorney-General* [2010] NZAR 445 (HC) at [96]-[97].

60 Todd, above n 1, at 1351.

61 *S v Attorney-General* [2003] 3 NZLR 450 (CA).

> wrongdoer has not been punished or disciplined. We therefore leave open the possibility that in such a case the Crown may be held vicariously liable.

[145] Since then, exemplary damages have been awarded in cases involving assaults by Police officers.[62]

[146] In relation to exemplary damages, the Supreme Court in *Couch v Attorney-General* in 2010 held:[63]

> [178] Exemplary damages are anomalous. Civil remedies are not generally designed to punish. The reach of exemplary damages should therefore be confined rather than expanded. Outrageousness is not a satisfactory sole criterion. The concept lacks objective content and does not contain sufficient certainty or predictability. Exemplary damages should be confined to torts which are committed intentionally or with subjective recklessness, which is the close moral equivalent of intention.
>
> [179] Applying that principle to the case of negligently caused personal injury (that is, injury caused through breach of a duty of care), exemplary damages may be awarded if, but only if, the defendant deliberately and outrageously ran a consciously appreciated risk of causing personal injury to the plaintiff. Whether running such a risk should be regarded as outrageous will depend on the degree of risk that was appreciated and the seriousness of the personal injury that was foreseen as likely to ensue if the risk materialised.

[147] I accept it is possible exemplary damages may be available for breaches of a duty of care by Corrections officers, as they are for breaches by Police officers. However, the following cases, where exemplary damages were not awarded, illustrate the high threshold required to establish exemplary damages. In *Wright v Bhosale*, the plaintiff established liability in tort (battery, false imprisonment, and assault), as well as BORA breaches.[64] He had been a passenger in a car stopped by Police, and was asked to provide identification. He refused, and was arrested, handcuffed, searched, and held in custody for two and a half hours. The Police eventually conceded that there had been no lawful jurisdiction to require the plaintiff to provide identification, and they acknowledged that the arrest and detention of the plaintiff was unlawful. The High Court made declarations relating to battery, false imprisonment, and the BORA breaches, and awarded damages.

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62 *Fredericks v Attorney-General* [2010] NZAR 91 (HC); *Murray v Gebbie* [2009] NZAR 630 (HC).
63 *Couch v Attorney-General*, above n 59.
64 *Wright v Bhosale* [2015] NZHC 3367.

[148] However, the Court declined to award exemplary damages, and the Supreme Court declined leave to appeal that decision.[65] In declining to award exemplary damages, the High Court emphasised that the Police officer was not acting intentionally, but operating under a mistake.[66] The Court found the officer was genuinely trying to do his job well in good faith, but was under a "grave misapprehension".[67] Although finding there was "a series of completely unacceptable errors on the part of the Police", the Court ultimately held exemplary damages were not appropriate.[68]

[149] In *A v Attorney-General*, the plaintiff sued in tort (deceit and trespass) and for alleged breaches of BORA, in relation to actions of the Police in executing an illegal search warrant.[69] Although liability in deceit was established, a claim for exemplary damages failed, for three reasons: the Police mistakenly believed the warrant was justified and authorised, and they were acting in good faith;[70] there was no conscious appreciation of the potential harm to the plaintiff;[71] and the Police had already "had to bear the very real and public consequences of their mistake", which acted as a deterrent and discipline to the Police.[72]

Analysis

[150] Although Mr K had some appreciation of the risk of putting Mr A in the yard with Mr C, as evidenced by the exchange he had with Mr A before doing so, I do not consider his allowing Mr A into the yard constitutes him "deliberately and outrageously [running] a consciously appreciated risk of causing personal injury" to Mr A.[73] As I have said earlier, I consider Mr K acted in good faith and with Mr A's interests at heart, but from a misguided basis. In other words, Mr K was not recklessly indifferent to the risks to Mr A of being in Mr C's company, he simply had a lapse of

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65 *Wright v Bhosale* [2017] NZSC 69 at [7].
66 *Wright v Bhosale*, above n 64, at [146].
67 At [146].
68 At [146].
69 *A v Attorney-General* [2018] NZHC 986, [2018] 3 NZLR 439.
70 At [36].
71 At [37].
72 At [38].
73 *Couch v Attorney-General*, above n 59, at [179].

judgement relying as he did on what he thought at the time was Mr A's informed acquiescence and a risk that had abated over time.

Conclusion

[151] In conclusion on this first cause of action, I find Corrections did owe Mr A a duty to keep him safe from assaults by other prisoners, where those assaults were reasonably foreseeable (because the attacker was known to be particularly dangerous, or Corrections knew there were pre-indicators of violence specific to the prisoners involved). Corrections breached that duty in relation to the third assault only. However, I do not consider the breach warrants an award of exemplary damages.

Second and third causes of action: claims under the New Zealand Bill of Rights Act 1990

[152] I turn now to Mr A's claim that the three assaults in 2017 amount to a breach of ss 9 and 23(5) of BORA.

The legislative framework and the relationship between ss 9 and 23(5)

[153] Section 9 of BORA provides:

> **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.

[154] Section 23(5) of BORA provides:

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

[155] Mr A also relied on art 10(1) of the International Covenant on Civil and Political Rights (ICCPR):[74]

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

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

[156] The principles relevant to a claim under ss 9 and 23(5) were set out by the Supreme Court in *Taunoa v Attorney-General*.[75] The majority held that "there is a hierarchy between ss 9 and 23(5) which shows they are separate though complementary affirmations of rights."[76]

[157] Section 9 is "reserved for truly egregious cases",[77] involving official conduct "which is to be utterly condemned as outrageous and unacceptable in any circumstances".[78] I note the following comments of Ellis J, in summarising the Supreme Court's findings on the content of the s 9 right:[79]

> [213] Conduct breaching s 9 will usually involve an intention to harm or conscious and reckless indifference to the causing of harm, as well as significant physical or mental suffering. The Court encapsulated what kind of behaviour was covered by s 9 is directed as follows:
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> (a) "torture" involves the deliberate infliction of severe physical or mental suffering for a proscribed purpose, such as the obtaining of information;
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> (b) "cruel" treatment is treatment which deliberately inflicts suffering or results in severe suffering or distress;
>
> (c) "degrading" treatment is treatment which gravely humiliates and debases the person subjected to it; and
>
> (d) "disproportionately severe" treatment is conduct which is so severe as to shock the national conscience, or so disproportionate as to cause shock and revulsion. It imports conduct which is well beyond treatment that is manifestly excessive.
>
> [214] The Supreme Court identified the following factors as potentially relevant to an assessment of an alleged breach of s 9:
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> (a) the nature of the conduct being examined;
>
> (b) the state of mind of the party responsible for the conduct; and
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> (c) the effect of the conduct on its victims.

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75 *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429.
76 At [339].
77 At [297].
78 At [170].
79 *S v Attorney-General*, above n 11 (footnotes omitted).

[158] By contrast, s 23(5) is aimed at protecting people from conduct that, while still unacceptable, is less serious.[80] It creates a positive protection for those who are deprived of their liberty who are therefore "particularly vulnerable", from:[81]

> … conduct 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.

[159] In terms of applying s 23(5), I note the comments of the Court of Appeal in *Attorney-General v Taunoa*:[82]

> We do not think that the words of the section need any embellishment: the use of synonyms does not assist interpretation. Rather, a Judge considering s 23(5) must undertake an evaluative exercise having regard to the conditions under which inmates are held, the extent to which these diverge from the conditions which ought to have applied if there had been compliance with legal requirements and, in some circumstances, the extent to which those legal requirements are insufficient to meet the s 23(5) standard.

[160] In *S v Attorney-General*, Ellis J held s 23(5) imposes a positive protective duty, and considered the standard of care required.[83] As with the common law duty in negligence, the fact a prisoner has been harmed does not constitute a prima facie breach of s 23(5); there is no public policy that requires Corrections to be sanctioned if appreciated risks were reasonably addressed, or unappreciated risks resulted in harm.[84] Ellis J also noted the s 23(5) threshold is "strongly worded", and held:[85]

> … a breach involving a failure to act or to protect would require that failure to act to be a clear (but not gross) departure from what might reasonably be expected in the particular circumstances. While I would not be inclined to say that the departure needs to be "major" (as it must in order to found criminal liability) it seems to me that in order to find a breach of any positive protective duty owed under s 23(5) there needs to be a clearer or more serious departure than is required to find a simple breach of the common law protective duty of care.

[161] Ellis J concluded that s 23(5) incorporates an obligation on Corrections to protect and keep prisoners safe from harm; but absent any actual illegality, there must be an unacceptable and serious departure from the standard of care expected of a

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80 *Taunoa v Attorney*-General, above n 75, at [277].
81 At [177].
82 *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) at [145].
83 *S v Attorney-General*, above n 11.
84 At [243].
85 At [244].

reasonable person in the position of the detaining authority in order to find that such a duty has been breached.[86]

Case law on what constitutes a breach of ss 9 or 23(5) of BORA

[162] The Supreme Court in *Taunoa* was required to consider whether the treatment of prisoners subjected to a non-statutory regime (the Behaviour Management Regime (BMR)) between 1998 and 2004 was a breach of their rights. A majority of the Court found that the BMR resulted in breaches of s 23(5) of BORA, but not s 9. The most concerning aspects of the BMR included:[87]

(a) cell conditions that did not meet proper hygiene standards, including poor lighting, lack of clean clothing and bedding, and lack of access to toilet paper;

(b) a failure by medical officers to monitor prisoners regularly, and inadequate assessment of the prisoners' mental health;

(c) inadequate opportunity to exercise;

(d) a lack of privacy, including a "clearly unlawful use of routine strip-searches";

(e) no rehabilitation programmes were available to the prisoners, and they were also deprived of access to books and television; and

(f) prisoners were given unclear and inadequate information about the operation of the BMR.

[163] *S v Attorney-General* involved numerous claims by men who were detained in medium secure forensic hospital units, including claims of breaches of s 23(5) of BORA as a result of sexual assaults by a fellow patient.[88] Ellis J found that, while the s 23(5) protective duty was owed by the hospital to the patients, there was (at that stage, 15 years on) insufficient evidence for her to form a view about whether the

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86 At [245].
87 *Taunoa v Attorney*-General, above n 75, at [128].
88 *S v Attorney-General*, above n 11.

hospital had breached that duty.[89] She also found there was no evidence that the hospital knew of or were recklessly indifferent to a serious and immediate risk to the patient, and therefore no basis for a finding that s 9 was breached.[90]

[164] Other examples of cases where a breach of s 23(5) has been found involve assaults or unnecessary use of force by Police,[91] sentencing a prisoner to cell confinement for a period longer than allowed by statute,[92] and failing to provide sanitary products to an immigration detainee.[93]

Analysis

[165] Given the high threshold for s 9, I consider it clear that Mr A's rights under s 9 were not breached as a result of the three assaults. I therefore focus on whether the assaults constitute a breach of s 23(5).

[166] The fact that Mr A was assaulted by Mr C does not in and of itself constitute a prima facie breach of s 23(5). Something more serious is required than a breach of the common law duty to keep prisoners safe from violence at the hands of another prisoner. A review of the cases demonstrates that a breach of s 23(5) is established in systemic neglect, deprivation, or unlawful practices by the detaining authority.

[167] In this case, throughout the depth and breadth of the prison management at Whanganui Prison, there is demonstrable concern for prisoner welfare. This is reflected in the very sophisticated protective and de-escalation measures that are used to manage tension, conflict, and prisoner-on-prisoner violence.

[168] When it comes to Mr A himself, there are also documentary records of the efforts of Corrections officers to respond to his requests for voluntary segregation when he felt vulnerable and when he was assaulted. The response to the assaults included medical treatment, relocation of Mr A, and sanctions for Mr B and Mr C.

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89 At [309].
90 At [309].
91 *Falwasser v Attorney-General*, above n 59; *Murray v Gebbie*, above n 62.
92 *Vogel v Attorney-General* [2013] NZCA 545.
93 *Attorney-General Udompun* [2005] 3 NZLR 204 (CA).

[169] There is no evidence that Corrections were recklessly indifferent to the risk to Mr A right up to the door of the yard. Mr K honestly believed he had made the necessary enquiry of Mr A, even if his belief was erroneously held. He had drawn his own independent conclusions from his observations of both prisoners, and again his honest belief was that Mr A and Mr C had had a reconciliation meeting, and had played table tennis together on at least one occasion. He genuinely believed that there was no risk.

Conclusion

[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 Mr A'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.

Result

[171] I decline to award exemplary or aggravated damages in negligence.

[172] I find there was no breach of Mr A's rights under s 23(5) of BORA.

[173] I find there was no breach of Mr A's rights under s 9 of BORA.

Orders

[174] In order to protect their privacy and in light of safety concerns, I suppress the identities of the plaintiff, the other prisoners involved, and all front line Corrections officers referred to in this judgment.

Doogue J