OUTER HOUSE, COURT OF SESSION

[2017] CSOH 110

PD1589/13

OPINION OF LORD ERICHT

In the cause

DANIEL KAIZER (AP)

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

Pursuer: Mitchell QC; Crawford; Drummond Miller LLP
Defender: Ross QC; Anderson Strathern LLP

22 August 2017

Introduction

[1] On 4 December 2009, while the pursuer was on remand at HMP Aberdeen, he was assaulted in the prison gym by a fellow prisoner, Keith Porter. Mr Porter was subsequently convicted of attempted murder. Lord Woolman imposed an order for Lifelong Restriction on Mr Porter with a punishment part of 5 years, to commence at the expiry of his current sentence. His sentencing statement included the following:

> "On 4 December 2009, you attempted to murder a fellow prisoner at Aberdeen Prison. You swung a bar bell at his head and fractured his skull. At the time of committing the crime, the victim was exercising in the gym. He presented no threat to you. Fortunately, the blow did not result in more serious consequences, such as death or brain damage. But the victim has been left with headaches, concentration

> problems and other psychological difficulties since the attack. He is a Polish National. The jury, which returned a unanimous verdict of guilty, decided that the crime was racially motivated.
>
> This was not an isolated incident of violence in your life. It was part of an escalating pattern of conduct. Your criminal record makes disturbing reading. Although you were only 23 years old, you have over 30 convictions. Many involve violence. In 2005 you were convicted of four charges with a racial element. Various attempts have been made both in prison and in the community to address your problems, but without success.
>
> On 11 July 2009 you attempted to murder another Polish male, although the charge did not include a racial aggravation. You pled guilty to that crime one week before you committed the present offence. That is very troubling. The extreme gravity of the first attempted murder is reflected in the fact that you received an extended sentence totalling 15 years."

[2] The pursuer claims that the attack was an implementation of a threat made to him by Porter in the gym around a week prior to the attempted murder and reported to a prison officer, Gary Lumsden at that time. He seeks damages at common law against the Scottish Ministers, as being responsible for the Scottish Prison Service.

The Law

[3] The defenders accepted that the Scottish Prison Service had a duty to take reasonable care for the safety of those within the prisons which they operate, including the prisoners. They accepted that that duty may extend to taking reasonable steps to avoid a foreseeable risk of a prisoner sustaining injury at the hands of another prisoner. However, they argued that what the duty of care required, and what would amount to negligence would vary according to the facts of any given case.

[4] The classic statement of the law in this area is that of Lord Diplock in *Home Office* v *Dorset Yacht Co Ltd* 1970 AC 1004 at page 1063:

> "A is responsible for damage caused to the person or property of B by the tortious act of C (a person responsible in law for his own acts) where the relationship

> between A and C has the characteristics (1) that A has the legal right to detain C in penal custody and to control his acts while in custody; (2) that A is actually exercising his legal right of custody of C at the time of C's tortious act and (3) that A if he had taken reasonable care in the exercise of his right of custody could have prevented C from doing the tortious act which caused damage to the person or property of B; and where also the relationship between A and B has the characteristics (4) that at the time of C's tortious act A has the legal right to control the situation of B or his property as respects physical proximity to C and (5) that A can reasonably foresee that B is likely to sustain damage to his person or property if A does not take reasonable care to prevent C from doing tortious acts of the kind which he did."

[5] Senior Counsel for the pursuer submitted that all five of these characteristics were satisfied in the current case. In particular, he submitted in relation to characteristic (5) that it was reasonably foreseeable that a threat of violence may lead to actual violence. In relation to characteristic (3), he submitted that but for the failures of the defenders, the attempted murder would not have occurred.

[6] I was referred to a number of authorities, both in Scotland and in England, where claims had been made in relation to assaults in prison. It is clear from the authorities, to which I will return later, that they turn very much on the facts and circumstances of the particular cases and so it is to the facts and circumstances of this case that I now turn.

The November Incident

[7] It was common ground that an incident (the "November Incident") involving the pursuer and Mr Porter had taken place in the prison gym around a week before the attack on 4 December. The gym was in an external building separate from the main house block which contained the residential areas. The ground floor of the gym building contained a games hall. The upper floor of the gym building contained a weights room and an office which was entered through a door from the weights room and contained a large window

from which some, but not all, of the weights room could be observed. The weights room had a variety of gym equipment, including exercise machines and dumbbells.

[8] The pursuer gave evidence that on a morning around a week before the attempted murder he had been in the gym for about 20 minutes and had nearly finished using a particular machine. Two men approached him. One had ginger hair, and had not been seen before by the pursuer. The other had dark hair and evil eyes and the pursuer had seen him previously briefly in the hall getting food. The pursuer subsequently learned that the name of the dark haired man was Porter. The ginger man spoke to the pursuer in an aggressive manner and said that he and his pal wanted to use the machine that the pursuer was using. The pursuer said "give me two or three minutes then it's yours". The ginger man turned around and walked back to Porter and they spoke to each other. The pursuer carried on with what he was doing. Porter came to towards the pursuer swearing and saying that because he said it the pursuer had to do it. Porter called him a "Polish bastard" and said he would "smash his fucking Polish face in." The pursuer went straight to prison officer Gary Lumsden who was in the office. He told Mr Lumsden that he was scared and told him about the two men and told him exactly what they said. Lumsden went straight to the door of the office but the two men were away. The pursuer did not say who the men were, as he did not know their names. He said that one was ginger and the other one dark. Lumsden told the pursuer not to worry and that Lumsden would sort it out. There had only been five people in the weights room at that point: the pursuer, Lukas Rusek, a Nigerian prisoner and the two men. Lumsden said to Rusek words to the effect of do me a favour and look after the pursuer and if somebody touches him you protect him; I give you my permission to protect him. The pursuer understood that Mr Lumsden was asking Mr Rusek to act as the pursuer's bodyguard.

[9] Lukas Rusek gave evidence that he was a prisoner who was in the gym that day. Due to the passage of time, he did not remember every detail. But he did remember that Lumsden called him to watch and keep an eye on the pursuer. He told Rusek to keep an eye on the pursuer because it might be that something was going to happen. Mr Rusek thought that Mr Lumsden mentioned the name Keith Porter, but was not 100 per cent sure about this. His recollection was that Lumsden said that maybe there is going to be a problem with Porter because the pursuer and Porter had an argument.

[10] Gary Lumsden was aged 50 with 18 years experience as a PE instructor with the Scottish Prison Service. He was called by the defenders and gave evidence that the gym was busy all the time and prisoners like to go to the gym to get out of their cells and keep fit. He said there was "argy-bargy" all the time but a lot of it was "banter" not going to violence. Violence was not common because the prisoners wanted to go to the gym and did not want to be banned from the gym. By "argy-bargy" he meant boys ripping into each other about things such as how strong they were: it was banter, laughing and joking. There was always somebody trying to "rip the piss" out of someone else for one reason or another.

[11] Mr Lumsden remembered the pursuer coming into the office about a week before the assault. Mr Lumsden was on his own at his desk. The pursuer came in and was complaining about something to do with dumbbells: that they had been used or somebody had taken them. Mr Lumsden asked who it was and the pursuer gestured to the door with his hand as if to say it is somebody out there, but did not tell him who it was. Mr Lumsden told him that if he did not tell him who it was he could not do anything about it because there were 12 guys in the gym including him. The pursuer walked out of the office and Mr Lumsden walked out with him and said in front of everyone "right guys the equipment in the gymnasium is for everyone to use" or words to that effect. After that, the pursuer

started training again and Mr Lumsden went back into the office to work on the computer. At the end of the session, Mr Lumsden spoke to Mr Rusek and said "you'll need to keep an eye on your pal". Mr Lumsden did not mean that any harm was going to come to the pursuer: he just meant for Mr Rusek to keep an eye on him as the pursuer was a bit "sheepish". He was positive that the conversation with the pursuer was not as the pursuer described it: nothing was said about any violence, only about equipment being taken off him. In cross-examination, Mr Lumsden changed his position as to the contents of the conversation in the office. He confirmed that it had always been his position that nothing was said by him to the pursuer in the office beyond the equipment being taken off him. He was then asked whether the pursuer said anything about getting bullied and in a series of answers his position developed from "can't remember", to "maybe he said to [the pursuer] are they bullying you?" but he could not remember, to "maybe I said is someone bullying you and I've said who and he hasn't told me". On re-examination, he was asked whether he actually remembered saying "are you being bullied" or whether he was just guessing, and he replied that he thought he actually said it and he never got a response.

[12] This was one of several instances of Mr Lumsden changing his position in the witness box. He also changed his position on whether the pursuer was upset. His original position in cross is that he could not recollect how the pursuer looked when he came into the office, but if the pursuer had come in looking shaken and upset then Mr Lumsden would have done something else from what he had done: he would not have let the pursuer go until the pursuer had told him what had happened and would have got additional staff over to the gym. Later in cross-examination, when explaining why he had asked Mr Rusek to keep an eye on the pursuer, Mr Lumsden stated that obviously the pursuer was upset about something because he came into the office in the first place.

[13] Another example of Mr Lumsden changing his position was that, in cross when asked how many officers were typically on duty in the gym in the morning, he very confidently responded that there would be two and when the defender's counsel asked if he was sure about that, he rapidly changed his position to saying that without a roster it would be hard to say, and then said "if you tell me there is one on there was one and if you tell me there were three on there were three". Yet another example is that he stated confidently in chief in relation to the November Incident that there were 12 guys in the gym including the pursuer and that they were all in the weights room but then rapidly changed his position to being that there was a maximum of 12 but he could not tell unless he checked the diaries and saw the names, he then sought to justify his earlier answers being on the basis that it was night time and it was always full at night time. In fact on the unchallenged evidence of the pursuer the incident took place in the morning.

[14] After the attempted murder on 4 December, the pursuer met with prison officer Mr Archie Orr and gave him an account of the November incident. The meeting took place on 8 December 2009 and as a result Mr Orr completed a confidential racial incident report form. At the time of the interview the pursuer had recently returned from hospital and was suffering from his injuries.

[15] Mr Orr included the following in the form:

> "Mr Kaizer stated that about a week ago he was using the biceps machine. A ginger haired person called Sean tried to take the bar I was using. I told him I was not finished with it. Then the black haired guy Porter said 'hurry up you stupid cunt'. Since that incident there were no further problems…
>
> He believes [the assault on 4 December] was due to the disagreement the previous week and they think he was an idiot because he could not speak good English."

[16] Mr Orr gave evidence that he did not ask the pursuer about whether any racial threats were made on the first occasion.

[17] I found the pursuer to be a credible and reliable witness and I prefer his evidence to that of Mr Lumsden.

[18] The pursuer gave his evidence in a straightforward, calm and consistent manner. I consider that Mr Porter's general disposition to be racially hostile (which can be seen from Lord Woolman's sentencing statement) supports the credibility and reliability of the pursuer's account.

[19] By contrast, I did not find Mr Lumsden to be a credible nor reliable witness. Mr Lumsden was dogmatic, assertive and argumentative. He laughed when the pursuer's counsel put the pursuer's position to him, and also when the pursuer's counsel was putting to him a description of the other prisoners in the gym. He frequently changed his position.

[20] Further doubts are cast on the credibility and reliability of Mr Lumsden when his account of what he said to Mr Rusek about keeping an eye on the pursuer is compared with the accounts of the pursuer and Mr Rusek.

[21] I found Mr Rusek to be a credible and reliable witness. Mr Rusek gave his evidence in a considered and thoughtful manner. He had no reason to lie to help the pursuer: Mr Rusek had no particular connection with the pursuer other than knowing him as a fellow Pole when in prison some eight years before he gave his evidence in the witness box. Mr Rusek was busy exercising so did not see or hear what passed between the pursuer, Mr Porter and the ginger headed man. However, he did give evidence as to what Mr Lumsden had said to him. His evidence is set out at paragraph [8] above but the import of it was that Mr Lumsden thought that the pursuer was at risk from Mr Porter. The pursuer's evidence of the conversation is set out at [9] above and although there are differences as to the wording the import is similar: Mr Lumsden thought that the pursuer

was at risk and needed to be protected. On the other hand Mr Lumsden's evidence was that he asked Mr Rusek to keep an eye on him because he was sheepish and not because he was at risk. I accept the evidence of Mr Rusek on this point. In any event, on Mr Lumsden's account it is difficult to see why, if what the pursuer said in the office was as innocuous as Mr Lumsden claims, Mr Lumsden should have felt any need to make the effort on that particular day to address the pursuer's sheepishness by asking Mr Rusek to keep an eye on him. Accordingly I find that Mr Lumsden was aware that the pursuer was at risk from Mr Porter.

[22] I find the confidential racial incident report form to be of little assistance in assessing credibility and reliability. The information in the report was filtered through the mind of Mr Orr, whose prime focus was on the December attempted murder and not the November incident. The pursuer was suffering from his injuries at the time he was interviewed. The report is supportive to some extent of the pursuer's current position, in that it reports that he stated at that time that he believed that the attack was due to the disagreement the previous week, and referred to the view Porter took of him because he could not speak good English. However, the strength of that support is weakened by lack of any reference to the specific words which the pursuer says Mr Porter used.

[23] Taking all of the above into account, I find that Mr Porter did threaten the pursuer to "smash his fucking Polish face in" and that this was reported by the pursuer to Mr Lumsden in the office.

Period Between the November Incident and the Attempted Murder on 4 December

[24] It was a matter of agreement that Mr Porter was transferred to HM Prison Barlinnie on 26 November 2009 and that on 27 November 2009 at the High Court in Glasgow he pled

guilty to attempted murder of a Polish national. He was transferred back to HM Prison Aberdeen on about 3 December 2009. It is clear from this that for most of the time between the November incident and the assault on 4 December, Mr Porter was away from HMP Aberdeen and not in a position to carry out his threat. He did however assault the pursuer on 4 December, the day after he returned from Barlinnie.

Attempted Murder on 4 December

[25] On 4 December Mr Porter was in the gym. Prison officer Kenneth Murray was the sole prison officer on duty in the gym.

[26] There were around 11 inmates in the gym using the equipment, including Mr Rusek and the pursuer and George Stewart. Mr Rusek had been aware from a newspaper report of the circumstances of the crime to which Mr Porter and George Stewart had just pled guilty, in particular that it involved an assault on a Polish National involving insertion of a broom handle into his anus. Mr Rusek spoke to Mr Stewart and said something like "you fucking hero", which was a reference to the conviction, and there was a brief exchange of words, after which the co-accused, George Stewart, kept staring at Mr Rusek and the pursuer, trying to intimidate them. Mr Rusek then went to exercise on a machine. While he was on the machine, he was attacked by three people and beaten up by being punched in the face.

[27] The pursuer gave evidence that he and Mr Rusek were exercising on machines. Three men attacked Mr Rusek, who could not defend himself because of the position he was in on the machine. The fourth person, Mr Porter, was behind the pursuer "smashing me like he promised". The pursuer received extensive head injuries as referred to in the sentencing statement.

[28] The prison officer, Mr Murray, was in the office and his attention was drawn by seeing a movement of three prisoners towards Mr Rusek, through the window. He went out into the gym and saw Mr Porter standing with the bar bell above his head. Mr Murray screamed at Porter who stepped back and threw the bar down. Mr Murray grabbed the pursuer and pulled him into the office. He did so because he thought the pursuer was in danger and he therefore took him to a place of safety. Mr Murray got the impression at the time that Porter was focused on committing an act of violence.

[29] Mr Archie Orr, a prison officer with over 29 years experience with the Scottish Prison Service, gave evidence that he was asked by the Governor to investigate the 4 December incident. He interviewed the pursuer and completed a confidential racial incident report form on 8 December 2009, which is referred to in paragraphs [14 and 15] above. He asked about whether any reference had been made to the pursuer's Polish nationality during the 3 December assault, but he did not ask directly whether there had been any racial threats on previous occasions.

[30] Counsel for the defenders submitted that, in light of the evidence regarding the 4 December assault, it was doubtful to what extent, if at all, the November incident and the assault were connected. However, I note that the initial discussion on 4 December was between Mr Rusek and George Stewart and neither Mr Porter nor the pursuer were involved in this. I note that the attack on Mr Rusek was conducted by George Stewart and two others and Mr Porter was not involved in that. Only Mr Porter and none of the others was involved in the attack on the pursuer. The attack by Mr Porter on the pursuer did not commence until the attack on Mr Rusek was underway. I note also that the attack was directed to the pursuer's face and head, and not to other areas of his body, which was consistent with the threat to smash his face in. I also note that Mr Porter was absent from

HMP Aberdeen from 26 November, shortly after the threat, returning on 3 December, the day before the attempted murder, so that there was little opportunity to carry out the threat until the visit to the gym on 4 December. In all of these circumstances, it seems to me that the reason for the attack on the pursuer was not what Mr Rusek had said to George Stewart, but that it was a separate attack on the pursuer by Mr Porter. Accordingly, I hold that the attack on the pursuer on 4 December was in implementation of the threat made by Mr Porter around the week before to "smash his fucking Polish face in".

Expert Evidence

[31] Both the pursuer and the defender led expert evidence.

[32] The pursuer led the evidence of John T McCaig, a consultant in prison management. Mr McCaig had joined the Scottish Prison Service in 1974 as a prison officer and had retired from the Scottish Prison Service at the end of November 2009. He had been successively Deputy Governor in Her Majesty's Prisons Greenock, Polmont and Barlinnie and had ended his career as Deputy Chief Inspector of Prisons. As Deputy Chief Inspector of Prisons, he had inspected HMP Aberdeen in October 2008, that is approximately a year before the attempted murder of the pursuer. Since retiring he had spent six months working in Ankara with the Council of Europe as "resident expert" on a project of prisoner form for Turkey. He has also provided short term expert advice to the Ministry of Prisons in Georgia and Turkey. He now has a part time role with the Parole Board of Scotland where he uses his knowledge and experience of prisoner risk factors to form a range of decisions on potential prisoner release/recall and risk reduction.

[33] The defenders led the evidence of Philip Martin Wheatley CB LLB FRSA CCMI. His experience was in the England and Wales Prison Service. After graduating with an LLB, he

joined the English and Welsh Prison Service as a prison officer in 1969 and retired in 2010. He was Senior Assistant Governor at Leeds Prison then Deputy Governor of Gartree Prison and Governor of Hull Prison. In 1990 he became Prison Service Area Manager responsible for the performance of nine prisons in the East Midlands. In 1992 he became Assistant Director, in charge of the division of Headquarters responsible for, amongst other things, identifying and allocating category A prisoners, security policy, intelligence analysis, police liaison, the maintenance of good order and the development of anti-bullying strategy. In 1995 he was promoted to Director with a seat on the Prison Service Management Board, responsible for the six high security prisons. In 1999 he was appointed as Deputy Director General of the Prison Service responsible for all operational management and for prison security and Suicide Prevention Policy. In 1993, he was promoted to become Director General of the Prison Service. Since retiring as Director General, he continued to work in a variety of prison related roles. For example he was a non-executive director of the Northern Ireland Prison Service, he has provided advice to the Governments of Bermuda and the Punjab and Pakistan at the requests of the Foreign and Commonwealth Office, he advised G4S on prison matters in the UK, South Africa and New Zealand, he has made specialist contributions on prison management at international conferences, and since retirement has visited eight different jurisdictions and made over 60 visits to prisons.

[34] Both experts gave their evidence in respect of two different hypotheses: the "Kaizer Hypothesis" (which was based on the assumption that as a matter of fact the pursuer had told Mr Lumsden about the threat), and the "Lumsden Hypothesis" (which assumed as a matter of fact that the pursuer had not done so). As I have held that the pursuer did as a matter of fact tell Mr Lumsden about the threat, then it is the Kaizer Hypothesis which applies, and I now turn to what the consequences of that finding in fact are.

[35] It was common ground between both parties' expert witnesses that in these factual circumstances the November Incident should have been reported by Mr Lumsden. Accordingly I find that Mr Lumsden should have reported the threat.

[36] However, parties and their experts were in dispute as to what the consequences of such a report would have been. This went to the question of causation: whether it was more likely than not that the attempted murder would have taken place.

[37] Mr McCaig's opinion was that if Mr Lumsden had reported the incident, it was possible that the pursuer and Mr Porter would not have been in the gymnasium at the same time on 4 December 2009. Even if they had, it was most likely that Mr Murray would have been aware of the investigation and the circumstances and as a consequence it was less likely that there would have been an unsupervised window of opportunity for Mr Porter to carry out the attack on the pursuer.

[38] Mr Wheatley's opinion was that as things stood there was not sufficient intelligence to justify either segregating Mr Porter from other prisoners or barring him from the gymnasium, given that the threat he made to the claimant was not specific to that location. He would have expected the Scottish Prison Service to respond by alerting all staff who might supervise these two prisoner areas about the threat made by Keith Porter against the pursuer, and to be on the lookout for any signs of further problems between the two prisoners. The Scottish Prison Service should also have ensured all staff were aware of Mr Porter's potential for racist violence and they should report any evidence of further animosity or racism. Alerting staff in this way would have increased the possibility of gaining further intelligence which could possibly have been used to justify the segregation of Mr Porter under Rule 94. Segregation from other prisoners would, in his view, have been the only reliable way of removing the risk of a serious assault by Mr Porter. In his view, had

such an approach been taken it would not have been likely to provide enough evidence to segregate Mr Porter under Rule 94 before 4 December 2009.

[39] I accept Mr Wheatley's evidence that had staff been alerted after the November incident it would have been unlikely that enough evidence would have been provided to segregate Mr Porter under Rule 94 before 4 December 2009. Segregation under Rule 94 is a very serious matter. Detailed procedures require to be gone through, and it is judicially reviewable. For most of the intervening period, Mr Porter was away at HMP Barlinnie in connection with his appearance at Glasgow High Court.

[40] However, I do not accept Mr Wheatley's evidence that the only action which was available to the Scottish Prison Service which might have prevented the assault was the segregation of Mr Porter under Rule 94. In cross-examination, Mr Wheatley was asked whether there was a reason not to take any lesser measure. He was very clear in his response. He did not think that the risk could have been mitigated in any other way. The threat could only be removed by taking him out and locking him up separately, and could not be mitigated in any other way. He also took the view that there was not sufficient intelligence to bar him from the gymnasium, given that the threat he made was not specific to that location: the normal association of prisoners within a wing would have provided ample opportunities for Mr Porter to assault the pursuer. When asked in cross-examination to look at less perfect methods than segregation, Mr Wheatley's position was that you have to have something that works: a solution that does not remove the risk is not a solution; and his expert opinion was that lesser methods would not mitigate the risk.

[41] The issue for me is one of causation: was it more likely than not that the attempted murder would not have taken place.

[42] I did not find that Mr Wheatley's evidence gave me much assistance on this matter. He was very emphatic that a Rule 94 segregation was the only way to remove the risk. If there were no segregation, then the risk could not be removed as there would be ample opportunity for the pursuer to be attacked whether in the gym or elsewhere in the prison. However, it is not the general question of risk which is relevant here. It is whether the particular attack which actually did occur on a particular day in a particular location could have been prevented.

[43] In his oral evidence, Mr McCaig was asked about what kind of effect the presence of a prison officer in the gym would have on the likelihood of assault. His evidence was that in his opinion the presence of a prison officer on the floor has the same effect as a beat Bobby: it acts as a deterrent. Mr McCaig referred to Mr Murray's evidence that the prisoner had a fixed stare and a weapon and yet responded to Mr Murray's instructions, and expressed the view that this suggested that Mr Murray carries authority and he is able to control prisoners by the use of instructions and commands, and accordingly that would suggest that by being around the floor and picking up early rumblings he would have intervened with successful results. In Mr McCaig's opinion, if Murray had not left the weights room to go into the office to answer the phone, the assault would not have happened. In re-examination he confirmed his view. He stated that he would expect that if Mr Murray had been forewarned of the prior incident and was spending more time on the floor, he was of the view that the presence of a prison officer closely observing prisoners has an effect on their behaviour and that very rarely is there an assault in view of a member of staff. Accordingly, it would be much less likely that the assault would have happened with Mr Murray having been seen to be closely observing all the prisoners in the area. On the balance of probabilities it was more likely that the assault would not have happened in these circumstances.

[44] I accept the evidence of Mr McCaig on this matter. From Mr Murray's evidence and his impressive demeanour in the witness box, I formed the impression that Mr Murray was a very competent and conscientious prison officer who had managed to bring the 4 December incident to an end merely by the force of his authority and presence, notwithstanding that he was the only prison officer present and Mr Porter was armed with a bar. Had he been aware of the previous incident and so not left the room unsupervised by going to the office to answer the telephone, it seems to me more likely than not that his authority and presence would have prevented the assault taking place in the first place. I accept the evidence of Mr McCaig, based on his experience of prisons, to the effect that the presence of a prison officer is a deterrent to assault. It seems to me that the implementation that day in the gym of the threat made previously was opportunistic. Had the opportunity to implement the threat not arisen at that time and place, the particular attack for which damages are being sought in this action would not have taken place.

[45] Accordingly I find on the balance of probabilities that if Mr Lumsden had reported the threat the attempted murder would not have taken place.

Alternative Basis of Fact

[46] I heard evidence from the two expert witnesses, and submissions, on an alternative factual basis which parties referred to as the "Lumsden scenario" namely that it was Mr Lumsden's account of what the pursuer had told them which was true, and accordingly that the pursuer had not told Mr Lumsden of the specific threat to "smash his fucking Polish face in". I have rejected this scenario as a matter of fact and therefore need not consider it further. However, for the sake of completeness I record here the parties' positions on this scenario.

[47] Senior Counsel for the pursuer submitted that on this alternative factual scenario, the November Incident should have been reported, even if the identity of the perpetrator was not known. The pursuer sought to find support of this proposition in the Scottish Prison Service Anti-Violence Policy and Anti-Bullying Strategy ("ABS"); the evidence of Mr McCaig as to how the ABS operated in Scottish Prisons and in particular at HMP Aberdeen at the material time; the evidence of Mr Orr, who stressed how seriously the Governor and the prison management at HMP Aberdeen took bullying and racism; and evidence from Mr Murray who relied upon the anti-bullying system to inform him of such disputes. He submitted that Mr McCaig's evidence should be preferred to Mr Wheatley's as Mr Wheatley's experience was in the English prison system, not the Scottish, and the Scottish ABS required the November Incident to be recorded.

[48] Senior Counsel for the defenders argued that the Anti-Bullying Strategy did not go so far as to provide that every dispute that might be bullying required to be reported, and the minor dispute over use of gym equipment reported to Mr Lumsden did not require to be reported under the Anti-Bullying Strategy. Even if the November Incident should have been reported in the ABS, it did not follow that liability was established as failure to comply with non-statutory policies and guidance does not give rise to a civil cause of action nor does it, of itself amount to negligence. Mr Lumsden had no reason to consider that Mr Porter posed an immediate threat, and did not act in breach of the duty to take reasonable care to protect the pursuer from reasonably foreseeable risk of harm. In any event, making a report under the ABS would not have prevented the assault on 4 December: the reporting of such a minor incident would not have led to action being taken which would have prevented the pursuer and Mr Porter being in the gym together on 4 December.

The Law

[49] The courts have recognised that the management of prisoners is a difficult task. Nonetheless, it is well established in law, in cases from *Dorset Yacht* onwards, that prison authorities can be liable for assaults by one prisoner on another.

[50] I was referred to a number of authorities, both in Scotland and in England, where claims for damages have been made by the victims of assaults in prison. These cases turn on their facts and circumstances, so it is now necessary to consider them to see what guidance they can give to the situation where the attacker has previously threatened the victim that he will "smash his fucking Polish face in" and this has been reported to a prison officer.

[51] In *Leslie* v *Secretary of State for Scotland* 1999 Rep LR 39 a prisoner was assaulted with a makeshift knife in a prison corridor. The case failed largely on matters of fact and evidence, but in the course of his opinion Lord Nimmo Smith stated:

> "I have already pointed out that there was no evidence to support the averments about a previous history of violence on the part of [the attacker]. Entirely different considerations would arise if a prisoner with a non-history of violence towards other prisoners was able to loiter without being moved on, all the more so if he was known to be ill disposed towards an individual prisoner who might be exposed to attacks. But these considerations do not arise in the present case, and there was no reason to regard Patrick Flynn as posing any particular risk of violence towards other prisoners, including the pursuer."

[52] The current case falls within the category of cases in which Lord Nimmo Smith anticipated that different considerations would apply. In the current case, as the threat had been reported to the prison officer, it was known that Porter was ill disposed towards the pursuer who might be exposed to attack, and there was reason to regard Porter as posing a particular risk of violence to the pursuer.

[53] In *Whannel* v *Secretary of State for Scotland* 1989 SLT 671 a borstal inmate sought damages from the Secretary of State in respect of stabbing injuries which he sustained in an

assault by a fellow inmate in the kitchen. Lord Morton of Shuna in the Outer House held in favour of the pursuer. He held that the kitchen staff should have been told about the attacker's past history of violence and bullying. He stated:

> "If that had been done it would seem on the evidence most unlikely that [the attacker] would have been able to obtain a knife or use it on the pursuer. I consider that the stabbing of the pursuer was an incident of a kind such as might have been anticipated if there was no communication to the kitchen staff about Robertson's previous history and propensities."

[54] In the current case, I consider that the assault on the pursuer was an incident of a kind such as might have been anticipated if there was no communication onwards to the prison authorities by Mr Lumsden of the threat which had been reported to him.

[55] In *Hendrie* v *The Scottish Ministers* 2002 Rep LR 46 a prison officer was awarded damages in respect of injuries sustained when he intervened in a fight between two inmates at a young offenders institution. At paragraph [24] Lord Kingarth held that information that there had been a physical altercation between the two inmates the previous weekend and that the matter between them was not regarded as being settled, would not, if that was all that was known, be enough for the pursuer to succeed. However, there were additional circumstances, such as the knowledge that one of the inmates was due to be transferred out the following day, and that it was possible that a weapon had been involved, and accordingly the safe and reasonable step would have been to transfer one or other of the inmates out of the west wing pending the imminent removal.

[56] In the current case the threat and the reporting of it, which demonstrate a particular continuing risk of assault, are additional circumstances beyond a mere altercation in the gym.

[57] In *Palmer* v *The Home Office,* Court of Appeal, 25 March 1988 (unreported) 1988 WL 1609043, a very dangerous prisoner, who had been convicted of three murders and other

serious violent offences, and had a history of violence within the prison, was put to work in the tailor's shop where he had access to scissors with which he stabbed a fellow inmate. His claim was dismissed at first instance and he unsuccessfully appealed to the Court of Appeal Lord Justice Neill referred to the following passage from Halsbury's Laws 4th Edition, Vol 37, paragraph 1140:

> "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, including the prisoners. Actions will lie, for example, where a prisoner sustains injury at the hands of another prisoner in consequence of the negligent supervision of the prison authorities, with greater care and attention, to the extent that it is reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other prisoners"

He went on to say:

> "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. One had to look therefore, at the situation in this case as it appeared in 1979 and 1980 to those responsible for Wormwood Scrubs and the information which they had in their possession at that time. It was [the Assistant Governor's] assessment that [the attacker] though plainly a dangerous man, was not a particular risk and it was his view that it was appropriate to employ him the tailor's workshop. I find it impossible to disagree with that opinion."

[58] It is clear from this that Lord Justice Neill saw the question at issue as being whether there was a particular risk. In the current case, the particular risk is constituted by the threat.

[59] In *Thompson* v *Home Office* [2001] EWCA Civ 331 the Home Office was found not liable for a razor attack. The case turned on the prison's policy as to the availability of shaving razors so is not relevant to a situation such as ours where the issue is a threat to a particular prisoner.

[60] In *Stenning* v *Secretary of State for The Home Office* [2002] EWCA Civ 793, the claimant was held hostage in his cell by another prisoner, who inflicted serious injuries on the

complainer with a craft knife before he was successfully rescued. The attacker had previously been very difficult to manage in the prison due to his general behaviour, and was frequently abusive and threatening. For example the attacker had previously told a psychologist that he felt like killing an inmate to secure a move from Wakefield Prison, and had also written to the Governor along these lines. The claimant contended that the prison authorities had been negligent in the way they handled his attacker's management and that he had suffered injury as a consequence of their negligence. The claimant was successful at first instance, but was overturned on appeal after a thorough review of the evidence by the Court of Appeal. In giving the opinion of the court, Brooke LJ stated:

> "[the prison employee in charge of his management] made the judgement, at any rate initially, that it would be better to keep him for the time being in the one prison where he had been able to live a fairly normal life on normal location. There was no evidence at all that anyone thought he posed an immediate threat to a fellow inmate. The highest [the Governor] put it was that if in due course he became frustrated because he was not moved he might just carry out one of his threats." [paragraph 62]

The court recognised that many prisoners were extremely difficult to handle and that different considerations would apply to the management of particular prisoners (paragraph 46) and that the prison authorities had to consider various factors, including working towards the eventual release of the prisoner, maintaining prison discipline and protecting prison staff and other inmates from violence (paragraph 48). On the facts of the case, the court held that the decisions made in respect to the attacker's management were sound and logical (paragraph 73).

[61] Unlike the generalised threats made by Mr Stenning that he might attack someone, the threat in the current case is of a particular type of attack on a particular prisoner.

[62] In the light of that case-law, in my opinion, the facts of the current case fall within the circumstances in which prison authorities can be liable for assaults by one prisoner on

another. The threat which was made by Mr Porter and reported to Mr Lumsden demonstrated that the pursuer was at particular risk of violent attack.

Decision

[63] Mr Porter made a specific threat to smash the pursuer's face in. The pursuer informed Mr Lumsden of the threat. Mr Lumsden should have reported the threat, but he failed to do so. Mr Lumsden did not take reasonable care to prevent the implementation of the threat by reporting it. It was reasonably foreseeable that the pursuer was likely to sustain damage to his person if such reasonable care was not taken. Had Mr Lumsden reported the threat, on the balance of probabilities the attempted murder would not have taken place. Accordingly, all the five requirements of *Dorset Yacht* have been fulfilled. I find in favour of the pursuer in relation to liability.

[64] The Proof before me proceeded in relation to liability only. I find the defenders to have failed in their duty of care to the pursuer, find them liable to make reparation to the pursuer and allow a Proof on Quantum on dates to be afterwards fixed.