

a judgment of the High Court dismissing A's claim against the respondent.²

[2] The application was out of time so an extension of time to seek leave to appeal is required. Given the delay is brief, we grant the application for an extension.

[3] The relevant background to A's claim against the respondent (sued in respect of Ara Poutama Aotearoa | Department of Corrections (Corrections)) is as follows.³

[4] A was a serving prisoner when he was assaulted by another prisoner.⁴ The assault lasted for up to five minutes before Corrections staff intervened, and involved punches to his head and face. He suffered bruising to the side of his face, a cut lip and redness on the top of his head. The assault was by another prisoner, C, and took place in June 2017.

[5] The background was that C had earlier assaulted A in April 2017. A was then moved to a separate wing of the prison. However both wings had access to the exercise yard.

[6] The Corrections officer, K, encouraged A to go into the exercise yard. But C was in the exercise yard at the time. K said he thought there had been a reconciliation between A and C, but this must have been wrong. C assaulted A while he was in the exercise yard.

[7] In the High Court, A claimed exemplary damages for negligence and compensation for breaches of his rights under ss 9 and/or 23(5) of the New Zealand Bill of Rights Act 1990 (Bill of Rights). Only the claim under s 23(5) is relevant to the present application. Section 23(5) provides for a person who is deprived of liberty a right to be treated with humanity and with respect for the inherent dignity of the person. A claimed Corrections' failure to keep him safe from C was a breach of s 23(5).

² *A v Attorney-General* [2020] NZHC 3401 (Doogue J) [HC judgment].

³ The facts are set out in more detail in the CA judgment, above n 1, at [12]–[23].

⁴ There were other assaults but these were found not to have involved any breach of duty or rights and we say no more about them.

[8] The High Court Judge found as a matter of fact that the error made by the Corrections officer was just that: an error. It involved a breach of a duty of care to A and was causative of his injuries.⁵ In short, it was negligent but not more. So, Corrections would have been liable for negligence, but for the fact that claims for damages for personal injury are barred by s 317 of the Accident Compensation Act 2001. The Judge did not consider there was a case for exemplary damages for negligence⁶ and this was not challenged in the Court of Appeal.⁷

[9] The High Court Judge summed up the position in these terms:⁸

[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 [the Bill of Rights], or his right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment under s 9.

[10] The Court of Appeal agreed:⁹

It is plain on the Judge's findings that [the relevant Corrections officer] and the other Corrections officers involved were sensitive to the appellant's needs, honestly believed his safety was not at risk, and treated him throughout thoughtfully, and with humanity and respect for his inherent dignity.

[11] As the High Court factual findings were not disturbed in the Court of Appeal, there are, in effect, concurrent findings of fact.

[12] Counsel for A, Mr Ewen, says that the Court of Appeal put a gloss on the statutory wording of s 23(5). He argues that there is a point of public importance as to the scope of s 23(5).

[13] We accept that the scope of s 23(5) is a matter of public importance. But this Court has already addressed that in a prison context in *Taunoa v Attorney-General*.¹⁰

⁵ HC judgment, above n 2, at [139]–[142].

⁶ At [151].

⁷ CA judgment, above n 1, at [9].

⁸ HC judgment, above n 2.

⁹ CA judgment, above n 1, at [49].

¹⁰ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

[14] We do not consider there is any need for this Court to revisit what was said in *Taunoa* about s 23(5). We think it is reasonably clear that on the facts of this case the incident happened because a Corrections officer made an honest, non-systemic mistake which was incapable of offending against s 23(5). The proposed appeal therefore has insufficient prospects of success to justify the grant of leave to appeal.

[15] Mr Ewen also argues that the Court did not give sufficient weight to jurisprudence from the European Court of Human Rights. But as the respondent points out the European Court was considering the right to life provision in the European Convention, not the equivalent of s 23(5). We do not see this point as justifying the grant of leave to appeal.

[16] The application for an extension of time to apply for leave to appeal is granted. The application for leave to appeal is dismissed. As A is legally aided, we make no award as to costs.

Solicitors:

Ord Legal, Wellington for Applicant

Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent