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Case No: HQ11X00649

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2012

Before :

THE HONOURABLE MR JUSTICE MACKAY

- -

Between:

(1) Robert Burn **(2) Wayne Ashmead de Mann** **(3) Ann Marie Shalloe**	**Claimants**
- and - **The Ministry of Justice**	**Defendant**

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Craig Sephton QC and Jonathan Richards (instructed by **Price and Slater**) for the **Claimants**
Alan Payne (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 19-23 March 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MACKAY

Mr Justice Mackay:

1. Joe Farnan was a violent, devious and cunning prisoner held at HMP Wormwood Scrubs. On 8 January 2007 he executed a successful escape in the course of which each of these Claimants suffered psychiatric injury in the form of PTSD. They say that was caused by breach of duty on the part of the Defendant. This is the trial of that issue.

2. The escape was a highly organised affair. Farnan had carried out a dummy run on 13 December 2006 when he feigned epilepsy and was escorted to Hammersmith Hospital, doubtless spying out the land and the opportunities for a real attempt. Thereafter he arranged for confederates outside the prison to help him execute his plan. He then feigned illness in his cell and persuaded a prison doctor that he was having or had had an epileptic fit. In fact he was faking. He was then taken to Hammersmith Hospital chained to a gurney and handcuffed to one of the three prison officers.

3. On arrival the ambulance doors were opened by the two confederates. One had a handgun, the other brandished a large pair of bolt croppers and both wore masks. The man with the handgun held it to the centre of the forehead of the second Claimant and shouted aggressively "let him fucking go" causing him to fear that he would be shot. The second man threatened to cut the second Claimant's hand off if Farnan was not released. The officers complied with their training and released Farnan, who made good his escape with the two men.

Farnan's History

4. Curiously for a case with so many documents there is no complete record of Farnan's antecedents. But the following previous matters are recorded, reliably as I find.

5. On 19 May 2000 when on remand and on being returned from court to Feltham Young Offender Institution in a secure prison van Farnan pretended to have hanged himself within the cell inside the van. When the guard opened the door he assaulted him causing minor injuries and then either stabbed or threatened to stab him with a weapon which turned out to be a sharpened pencil, thus escaping from the van. At the time he was on remand for his involvement in a series of armed robberies in which imitation firearms had been used.

6. On 5 April 2001, having been recaptured, he was sentenced to 13 years imprisonment (reduced on appeal to 11) on counts which included conspiracy to rob and firearms offences.

7. By 10 April 2005 he had progressed to category D and was in an open prison from which he absconded on 13 September 2005. He was caught some two months later.

8. On 10 July 2006 at Harrow Crown Court for offences committed while he was unlawfully at large, which included conspiracy to rob, aggravated vehicle taking and possessing a bladed article, he was sentenced to imprisonment for public protection with a minimum term of five years.

9. The day after this court appearance the contractor responsible for conveying him to and from the Harrow Crown Court reported that on the journey to court Farnan had asked if he could be placed in cell 6 as his allocated cell 5 was his "unlucky number", and his request was granted. The next day the vehicle was routinely examined. A broken screwdriver was found on the floor of cell 6 and the edge of the window had marks indicating that it had been used in an attempt to remove the window surround and force open the escape hatch. The only person who had been in cell 6 prior to this examination was Farnan. The view of the carrier was that the screwdriver had been "concealed internally" by him.

10. After receiving this sentence Farnan was returned to HMP Wormwood Scrubs where he was placed in category C. It is agreed by the relevant experts that this was wrong, given the sentence he had received, indicating as it did that the court was satisfied he posed a significant risk of serious harm to the public, as well as the attempted escape from the van. He should have been placed in category B.

11. On 13 December 2006, as I find, he feigned an epileptic attack in the prison and was taken on his reconnaissance trip to Hammersmith Hospital. He complained on arrival of feeling "unwell" and told the triage nurse that "he could not feel his hands and face and he also had spasms for a few seconds in the ambulance". All observations on him were unremarkable and nothing was found on blood and toxicology tests. The doctor performed a full examination and recorded his impression as "seizure? cause". The discharge plan was to send him back to prison with close observation that night and he was "advised to return if tonic-clonic seizures re-occur". There is no evidence as to what discharge report if any the prison received, but he was closely observed that night. Although I am now driven to find that Farnan was faking his symptoms on this occasion the examining doctor after a thorough examination appears to have accepted that he had suffered a seizure of some sort and his only doubts were as to its causation.

12. Thereafter he made various complaints of headache on 18th and 21st December and on 28th the prison medical officer requested an out patient appointment for "ongoing headaches and abnormal movements".

13. On a date in late 2006 but before 29 December SO Hughes received information from a prisoner, hoping to improve his chances of transfer to Category D, that an unnamed prisoner had told him that other prisoners had said that Farnan had been saying to others that next time he went to court he would try to escape. Hughes thought this was important information so arranged for the informant to meet SO Gibbons who was in the Security Department. The man repeated his story, named the relevant prisoner as Farnan, who was said to have described his attempt to escape from the escort van and to have said the next time he had an opportunity he was going to escape. This information, though based on hearsay should have been recorded in a security intelligence report or SIR and was not.

14. On 29 December Officer Pemberton was told by another prisoner that Farnan had been seeking advice from another as to what symptoms he should present to get to Hammersmith Hospital. He had said that he intended to get to hospital during the next few days so that he could have a parcel of drugs dropped off and bring them into the prison. He also said that he had "done a dummy run". This was referred to the Head of Operations and Security. On 30 December 2006 a risk assessment of

the escape risk posed by Farnan was carried out which gave him the score of 151. The first Claimant said that this was the highest score he had heard of. Over a score of 80 security advice is to consider a three man escort.

15. The resulting document, bearing the misleading date of 13 December, gave this risk assessment of Farnan, which I should set out in full.

> "Extensive poor custodial record for escape x 1 (was at large for 3 months). Attempted escape x 2. A very subversive prisoner who has been involved in the drug culture in every prison he has been located in. Bully, intimidates staff, at any given opportunity. Found in possession of razor blades, assaults his visitors, ringleader in concerted indiscipline whilst at HMP Belmarsh, and refuses to bang up. Escaped from escort during which he stabbed security guard with a pencil after pretending to hang himself, attempted to escape a further two times, faked illness/hanging in order to try and escape, concealed a screwdriver on escort Harrow CC and tried to remove window surround. Mobile phones, assaults, packages over the wall.
>
> **Intel received that Farnan is going to fake illness in order to escape/ receive drugs. Staff be extra vigilant at all times given an opportunity will attempt to escape**". (original emphasis, in red and bold)

16. The form contained these further entries:-

Any risk to hospital staff: Yes, violent, fakes illness/hangings.

Risk to the Public: High

Risk of Hostage Taking: High

Prisoners Escape Potential and Likely Assistance: High

17. The intelligence received by SO Hughes and reported to security made its way on to the " 5 x 5 " computerised intelligence record in these terms:-

> "On 29/12/06 information received that FF5736 Farnan is going to fake illness in order to get to outside hospital to receive drugs. Concern is raised by security staff that this may in fact be an escape attempt. Farnan has previously escaped twice. Only to be sent to outside hospital under extreme circumstances, and with a minimum of three staff on the orders of [Governor Jan Wilcox, head of security operations]"

The Events of 8th January 2007

18. A curious feature of this case is that the Defendant has not called some of the most obviously relevant witnesses as to the events of this day or the days that preceded it. I received no evidence from Doctor Paul Neelamkaril (who was called by most

people Doctor Paul) nor have I heard evidence from the duty healthcare nurse known as H1, the ambulance attendant whose identity is known, or most importantly Governor Wilcox who was Head of Security and who had issued the edict that Farnan was not to leave the hospital except in "extreme circumstances". The only reference to that edict is in the 5 x 5 I have quoted above, and Wing Staff and Medical staff would not have access to that record.

19. I have considered whether I ought to draw any adverse inferences from the failure of the defence to call any or some of these witness – see Herrington v British Railways Board [1972] AC 877 per Lord Diplock at 930G. On reflection I have not done so. Doctor Paul has left a note which would no doubt have formed the basis of any evidence he gave. The absence of Governor Wilcox a serious matter, but I must do the best I can with what I have. Strenuous albeit belated attempts were made to adjourn the trial to enable her to be called, pursued even to the Court of Appeal, and I am satisfied that her absence is the result of inefficiency rather than any desire to shield her from the court.

20. At about 12:30 or 12:35, as I find, Farnan set off the alarm in his cell on E Wing (he was held at his own request in a one man cell) and lay down on the floor jerking and writhing having deliberately wet himself and obtained by some means some form of liquid and/or other substance which he put in his mouth and ejected so as to simulate vomit.

21. Almost immediately Officer Burn the first Claimant, a careful and impressive witness as I find, looked through the hatch, saw Farnan on the floor making his jerking movements and writhing and he went into the cell leaving Officer Shalloe, whom he had summoned, in the doorway.

22. He noticed something around Farnan's head which might have been vomit and went to him and tried to reassure him, checked his breathing, put towels under his head and cleaned up some of the mess he had made. He had no concerns about his breathing and he was not blue. The jerking had stopped by this time as I am satisfied. Shalloe who stood at the doorway would have noticed it though she was not particularly concerned to inspect the condition of Farnan.

23. At all times from this point onward Farnan remained lying on the floor in a foetal position with his arms and legs held rigid and his hands gripping his shoulders. His eyes were tight shut and his teeth clenched.

24. Burn told Shalloe to call for the nurse Hotel 1, as she was known, who arrived at about 12:43, tried to take Farnan's pulse and blood pressure without success, but was able to check that his blood sugar was normal and probably administered oxygen. She asked Shalloe to radio the control room to send for the doctor to attend.

25. Doctor Paul arrived at approximately 13:00. The nurse was attending to Farnan on the floor. Doctor Paul, from a position in or close to the doorway of this not very large cell, leant forward to look at Farnan and immediately asked if the ambulance had been called. It had not and therefore on the doctor's instruction, as I find, the ambulance was called at about 13:00. Beyond bending down to look at Farnan

Doctor Paul conducted no further examination of him. Doctor Paul's own note of his involvement reads as follows:-

> "Not the duty doctor at 1pm. Nurse Margaret told me that there is an emergency on E wing. I attended promptly. When I came the patient was lying on the floor. Both legs and hands rigid and flexed. Was coming from mouth a bit saliva. Nurse Aisha is in attendance. On O2. Sucked out some fluids. Called an ambulance. Is breathing. BM stick = 6.4 m.mol. No detailed history is available. I was told that he was not on any medication. Incontinence of urine. Had similar history 2/52 ago. The patient was sent out by ambulance. D[iagnosis] ? epileptic fit".

26. I am satisfied that the decision to call the ambulance was that of Doctor Paul and the later decision that he should leave the prison in the ambulance to go to hospital was also his, albeit it was not opposed by the paramedics. Officer Shalloe went to the orderly and security offices and was made the officer in charge of the escort party, given a route form and gate pass and was shown the risk assessment of 30 December referring to the high risk escape. She was in due course provided with the paraphernalia necessary for an escort known as the escort bag with its telephone, handcuffs and, eventually, a closet chain together with a PER form and risk assessment. The ambulance left the scene at 13:42 with Farnan handcuffed to the second Claimant Mr Ashmead De Mann and it arrived at the hospital at 13:52.

27. The paramedic's notes show that Farnan was hyperventilating and had a high respiratory and pulse rate. His pupils appeared to be equal and reactive. There is an incomprehensible note about his Glasgow Coma Scale score. He is described as having been found lying on the floor with his legs and arms rigid in a foetal position and fists clenched. He had been examined and found to be hyperventilating with a clear bilateral air entry in all lung fields. "Unable to assess if drugs taken. Patient had similar episode last week. No diagnosis stated to LAS. Patient appeared stable on route to A&E" the note concluded.

The Prison Service and its Duty of Care

28. The Prison Service owes to its staff the same duty any employer owes namely to take reasonable care for their safety in the carrying out of their employment. When issues arise as to whether that duty has been broken the scope or reach of that duty, upon which proof of breach will depend, is protean in its nature and has to be adapted to the circumstances prevailing at the time. Prisons are dangerous places populated by many dangerous people who have been entrusted to the Prison Service for safe detention. In the course of a Prison Officer's working career he or she will often have of necessity to be placed in harm's way. The Prison Service also owes a duty to the public to prevent the escape of dangerous prisoners and a duty to prisoners themselves which will include a duty to take reasonable care of their physical well being in accordance with common law and articles 2 and 3 of the European Convention of Human Rights – see Brooks v S of S for the Home Department [2008] EWHC 3041 Admin.

29. In Sussex Ambulance NHS Trust v King 2002 EWCA Civ 953 the Court of Appeal considered the common law duty of care owed to employees whose occupations in the public service were inherently dangerous. The court held that such employees accepted risks inherent in their work but not those which the exercise of reasonable care on the part of those who owe them the duty could avoid. Hale LJ continued at 21

> "An employer owes his employees a duty to take reasonable care to provide safe equipment and a safe system of work which includes assessing the task to be undertaken training and how to perform those tasks as safely as possible and supervision in performing them".

30. However, Hale LJ considered what Denning LJ had said in Watt v Hertfordshire County Council [1954] 1WLR 835 at 838 about the balancing exercise facing such an employer and having done so continued at 23, having commented that the public service employer does not have the option of refusing to "do the job" thus: -

> "But that does not mean that they can expose their employees to unacceptable risks. The employers have the same duty to be efficient and up to date and careful of their employee's safety as anyone else. It does mean that what is reasonable they have to be judged in the light of the service's duty to the public and the resources available to it to perform those duties."

31. As Buxton LJ put it at 36, referring to Lord Denning's judgment in Watt,

> "That authority holds that in determining whether the Defendant's conduct has been "reasonable", as the law of negligence understands that term, the court must balance the risk against the utility of the activity of in which the risk arose."

32. These issues are at the heart of this claim. Mr Sephton QC for the Claimant realistically accepted that the Management of Health and Safety at Work Regulations 1999 though pleaded does not entitle these Claimants to succeed if the claim in negligence fails.

The Allegations of Breach

33. The Claimants pleaded cases can at the end of the evidence and argument be summarised as follows.

34. It is said that Farnan should have been re-categorised as a Category B prisoner after receiving his indeterminate sentence and then transferred to a training prison. As to re–categorisation this was plainly an error but one without any consequences relevant to this case. The facilities of Wormwood Scrubs in physical terms, which was built as a Category A prison, were equal to those of any prison to which a Category B prisoner would be allocated. As to his transfer to a training prison though the experts agreed that this ought to have been achievable before the date of the escape the duty to transfer him for training was not a duty owed to these Claimants but to the prisoner himself so as to progress his sentence. These allegations have really fallen away in the Claimants' final arguments.

35. Likewise the allegation that he should have been placed on the list of "nominal" prisoners as recommended in September 2006 has not been pursued. That particular form of precautionary status means that closer attention is paid to a prisoner and his actions and associations and so forth but sensibly Mr Sephton did not pursue this in his final submissions accepting that it was unlikely to have avoided this escape if it had been implemented as a suggestion.

36. There is more force in the allegation that he should have been placed on the escape list. That he merited this in the light of the risk assessment of 29 December seems to me to be made out. The only relevant consequence so far as this claim is concerned that he would have worn the conspicuous clothing of an E list prisoner and that would have told Dr Paul when he came to examine him on the 8th January, if he did not know it already, that this prisoner was regarded as one who would try to escape at any opportunity. The extent to which he should have taken in that information if had been given to him I will deal with later.

37. Governor Frake in her evidence said that following the incident in the escort van in July 2006 she thought a more thorough investigation of the circumstances should have been carried out the incident should have been placed on a SIR and referred to the Offender Management Unit for possible re-categorisation. She would have wanted a fuller report than the Serco report and would have spoken to the officers involved. If security as a result of this decided to ask the OMU for a transfer she would have expected that request to have been granted and in her opinion security would have probably asked for a transfer.

38. This evidence is relied on by the Claimants, but her views are not shared by either prison security expert in this case who set out possible options which might have been appropriate responses to the Serco incident, not including Governor Frake's suggestion, which was not canvassed by either counsel in cross-examination of either witness. This in my judgment an issue where evidence of expert witnesses is appropriate; the parties plainly thought so because they set this issue as part of the agenda for their meeting. Governor Frake was not at the prison at the time but on secondment elsewhere. Though she is entitled to express an opinion it is not one which in my judgment has a result of displacing the joint view of the experts in the case.

39. Mr Goodman thought that after the risk assessment of December 2006 a meeting should have been convened which would have included a representative of the police at which he hoped the police could have been presented with the assessment of the security department and the intelligence on which it was based and asked in principle to agree to supply a police escort should Farnan in future try to hoodwink medical staff into transferring him to hospital again. I have to say that this sounded rather optimistic as an expectation. The intelligence which formed the basis of the SIR was not of a first hand or a particularly impressive type, and the police would be agreeing to an open ended commitment on a future date to have resources available to meet a fairly short notice request that the prisoner be accompanied or escorted by police.

40. Additionally in the joint report the experts were of the view that at best what could have been achieved was the deployment of a police patrol "to manage the boundary between the prison escort and the public" within the hospital itself. The existing

intelligence, they agreed, did not really support a request for an escort from prison to hospital.

41. Therefore none of these allegations in my judgment succeed in showing negligence on the part of the Defendant and that issue must turn on an analysis of the decisions made by Dr Paul on the 8 January.

The decision to transfer to hospital

42. All witnesses agree that whatever the views of Security in a prison the decision to transfer a prisoner out of the prison to a hospital is a medical one to be taken by a prison doctor and cannot be overridden. The position was illustrated by Mr Goodman the Claimants' security expert from his own experience of a prison officer working in security. A doctor in his prison had directed that a prisoner should be transferred out and the officers with knowledge of his case were strongly opposed. Mr Goodman himself contacted the doctor and put their case the doctor stood his ground. Mr Goodman then went to the Governor whereupon a second medical opinion was obtained and the result was that prisoner did not leave the hospital; that illustrated that the final decision had to be a medical one not a security one.

43. Governor Frake's evidence was that just such an attempt was made in this case by Governor Wilcox to persuade Dr Paul to change his opinion. It is evident that the doctor stood his ground. I am unprepared to make a finding of fact to this effect. I do not challenge the good faith of the witness, but it is noticeable that her evidence was markedly more positive than her witness statement on this point where she twice said she thought she had overheard one end of this conversation, and Wilcox's own evidence to the internal Taylor enquiry into this escape contained no reference to this conversation having taken place at all; it would surely have been at the forefront of her evidence if it had.

44. Therefore the question for decision is all parties accept is whether Dr Paul's decision to direct, as I find he did, that this man should be taken to hospital for assessment was one which no reasonably competent doctor in his circumstances ought to have taken.

45. The two medical experts disagree profoundly on this issue. They have broadly similar backgrounds, albeit Dr Bicknell retained by the Claimant has rather more experience of prison settings. Neither expert draws any support from any body of learning nor research as opposed to his own clinical judgment of what in effect he would have done faced with this situation.

46. In the view of Dr Bicknell, Dr Paul's examination was to an acceptable standard bearing in mind that in this small cell the nurse had taken charge of the patient's head and was administering oxygen. If, as I find was the case, all he did was bend over and look at the picture presented by the patient, Dr Bicknell thought that was adequate. In my judgment there are features of his note which must be the result of his visual examination for example where he describes the position of the patient on the floor, the rigidity of both legs and hands in flexed position the saliva coming out of his mouth and the incontinence of urine.

47. Dr Bicknell thought it reasonable to call the ambulance out straight away saying there was nothing to lose from the patient's point of view by so doing. He thought that the clinical decision takes precedence over other information. I note that Dr Paul did obtain some other information from those present which included the fact that the patient was not on any medication and had a similar history two weeks before.

48. Dr Bicknell thought that feigned epilepsy would have been a most difficult diagnosis. In his opinion if the doctor was unsure in his diagnosis, as he seems to have been by placing a question mark before it on the note, the key decision is to transfer the patient to hospital. I note that it is not suggested in this case that the prison hospital wing could have coped. Dr Bicknell said that there were three symptoms pointing towards the diagnosis namely the tonic writhing at the outset, the incontinence and the vomiting/emission of saliva. He said that status epilepticus would have been at the top of his differential diagnosis list

49. For his part Dr Lloyd-Jones was strongly critical of Dr Paul's performance. The longer the rigid attitude of the patient persisted without change the clearer it became in his opinion that this was not epilepsy. Dr Lloyd-Jones stated that the immediate calling of the ambulance is not something he should have done but he should instead have carried out a more thorough examination because as he put it you "don't know why he is lying on the floor and is unresponsive". Dr Paul he thought did not appear to consider other possibilities. The fact that the paramedics were unable to assess what was wrong despite their superior equipment, and their inevitably wider experience than the doctor of such emergencies, was not something that he thought would lead them to object to the transfer if they thought that it was not an emergency.

50. Significantly, in my opinion, when cross-examined he was asked whether the way Farnan presented himself could have represented someone suffering from a condition or a number of conditions which might have had very serious consequences for his health. He readily agreed, but went on to say "but as a doctor you would make an appropriate decision as to what was going on". Instead in his opinion what was going on was absolutely bizarre and called for an appropriate examination to justify what he was sending the man for hospital for.

51. As to what the impact of information from security would have been he was asked whether had that been known to the doctor and if he had been in doubt as to which of two diagnoses he should reach should he have allowed himself to have been influenced by that information or should he have confined himself to the medical evidence. His answer was to the effect that he had to make a clinical examination and reach a clinical decision. The security information might be a part of it but he must not let his judgment, by which I took him to mean his clinical judgement, be overruled by other matters.

52. My conclusion is that this doctor was in a very difficult position. I note that his colleague on the 13th of December, to whom the prisoner seems to have presented himself in a much more alert condition, and who was equally unable to reach a definitive diagnosis, reached the same conclusion namely to transfer. Dr Paul did observe this patient to the extent he indicated noting and recording, for example, normal breathing and the result of the blood sugar test taken by the nurse the

absence of a detailed history the absence of his medical records and the fact that there had been a previous episode two weeks before. He had therefore plainly made some enquiries of the wing staff about this man.

53. The only alternatives, as I see it, to his doing what he did would have been two. First he could have obtained rectal diazepam and administered it. This would have required him to have the drug available in the proper form, and then to have proceeded, possibly forcibly, to insert the medication and see whether the apparent status epilepticus, the condition Dr Bicknell thinks he appeared to be in, was maintained or relieved. The only other option was to tell the staff to lock him in his cell and to leave him as he was. In my judgment faced with those choices I cannot accept that the decision taken by Dr Paul was one which no reasonably competent prison doctor in his circumstances would have taken.

54. While, therefore, I have every sympathy for these Claimants, who did their difficult duty well and bravely that day, I cannot accept that they have shown negligence on the part of the Defendant and these claims must therefore fail.