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Liability for the acts of third parties: *Kaizer v The Scottish Ministers* considered

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The author considers the law in relation to liability for the acts of third parties, with a particular focus on the acts of those who have been released from or who are being held in custody. She then considers the most recent contribution to the jurisprudence in this area, namely the opinion of Lord Ericht in Kaizer v The Scottish Ministers *[2017] CSOH 110.*

Introduction

The fact that a defender can, in certain circumstances, incur liability in respect of the acts of a third party is now well established. Guidance as to when such liability might attach is to be found in the well-known House of Lords' judgments in *Dorset Yacht Co Ltd v Home Office* [1970] A.C. 1004 and *Maloco v Littlewoods Organisation Ltd* [1987] A.C. 241 and these cases are revisited here. The article goes on to consider the issue of liability for the acts of those who have been released from custody or are being held in custody and examines, in particular, the recent opinion of Lord Ericht in *Kaizer v The Scottish Ministers* [2017] CSOH 110.

The legal background

Dorset Yacht Co Ltd v Home Office [1970] A.C. 1004 provides authority at the highest judicial level that a defender may owe a duty of care to a pursuer in respect of the acts of a third party. Before considering *Dorset Yacht Co Ltd*, however, it is useful to have regard to some earlier cases. There is early Scottish authority which recognises that a defender may owe a duty of care in respect of the acts of third parties. In *Scott's Trustees v Moss* (1889) 17.R. 32, the occupant of a recreation ground advertised that a descent from a balloon would be made by parachute within the grounds at a given time. The descent was made into a field of turnips on a farm adjoining the grounds and a crowd which had gathered outside the grounds rushed in and damaged the fences and turnips. The occupant of the turnip field brought an action for damages against the occupant of the recreation ground. It was averred that the descent into the cultivated ground might have been foreseen by the defender, that the gathering of the crowd and the damage was the natural and probable result of the defender's actings and that the defender was liable for the damage caused by his fault or negligence. The Inner House held the action to be relevant. Lord Shand stated (at p.37)

*"*I agree that in the ordinary case the mere bringing of a crowd together does not lead to the inference that the person who has been instrumental in assembling the crowd is answerable for its actings. I think the principle which ought to receive effect is that if the collection of the crowd, and the actings of the crowd, are the natural and probable consequence of the action of the defender—a consequence which the defender ought to have foreseen,—then the case is relevant.*"*

Some years later, in *Smith v. Leurs* (1945) 70 C.L.R. 256, Dixon J. stated (at pp. 261-262):

"But, apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, *special relations* which are the source of a duty of this nature." (emphasis added)

The question in the leading case of *Dorset Yacht Co Ltd v Home Office* was whether the general rule or the exception to it applied: in other words, did "special relations" exist. The alleged facts of *Dorset Yacht Co Ltd* were as follows. A party of boys was undertaking Borstal training on Brownsea Island in Poole Harbour under the supervision and control of three Borstal officers. One night, in breach of their instructions, the officers simply went to bed leaving the trainees to their own devices. Seven of the boys escaped and boarded a yacht in the vicinity. They collided with the plaintiffs' yacht, the Silver Mist, which was moored nearby. They then boarded the Silver Mist and did further damage to it. The plaintiffs sued the Home Office for damages. The question of law for their Lordships' consideration was whether the Home Office or the Borstal officers owed any duty of care to the plaintiffs capable of giving rise to liability in damages. By a majority (Viscount Dilhorne dissenting), the House of Lords held that there was sufficient proximity between the borstal officers and the plaintiffs to result in the imposition of a duty of care owed by the former to the latter. Lord Reid stated that if the officers had obeyed their instructions they could and would have prevented the trainees from escaping. All the escaping trainees had criminal records and five of them had a record of absconding from Borstal institutions. The three officers knew or ought to have known that the trainees would probably try to escape during the night, would take some vessel for that purpose and would probably cause damage to it or another vessel. There were numerous vessels moored in the harbour, and the trainees could readily board one of them. It was a likely consequence of the officers' neglect of duty that the plaintiffs' yacht would suffer damage.

For Lord Morris of Borth-Y-Gest, the risk of the boys interfering with a yacht and damaging it was "glaringly obvious" (at p.1034) and the principle expressed by Lord Atkin in *Donoghue v Stevenson* 1932 S.C. (H.L.) 31 applied. Lord Morris stated (at p.1037-8): "If A can reasonably foresee that some act or omission of his may have the result that loss or damage may be suffered by B who is someone who would be closely and directly affected by the act or omission, there will be some circumstances in which a legal duty will be owed by A to B and some in which it will not. The question arises as to what is the dividing line and on which side the present case falls. The fact that the immediate damage suffered by B may have been caused by C does not affect the question whether A owed a duty to B; such fact would only relate to a question whether the act or omission of A did result in damage to B. Some

act on the part of C might be the very kind of thing which would be likely to happen if there was a breach of duty by A."

As to on what side of the dividing line the instant case fell, Lord Morris stated (under reference to *Smith v. Leurs* (1945) 70 C.L.R. 256, *supra*), that there was "a special relation" in that the officers were entitled to exercise control over boys who, to the officers' knowledge, might wish to escape and who might well damage property nearby. It followed that a duty of care was owed by the officers to the owners of the nearby yachts.

Lord Pearson, having also referred to *Smith v. Leurs*, and having stated the general rule "that one man is under no duty of controlling another man to prevent his doing damage to a third" also took the view that *Dorset Yacht* fell under the exception to the rule. This resulted from the special relation which existed. Lord Pearson stated (at p.1055): "The Borstal boys were under the control of the defendants' officers, and control imports responsibility. The boys' interference with the boats appears to have been a direct result of the defendants' officers' failure to exercise proper control and supervision."

Lord Diplock observed that this was the first time that the specific question of liability for the acts of third parties had been posed at a higher judicial level than that of a county court (although, of course, in Scotland, the matter had been considered by the Inner House in *Scott's Trustees v Moss*, *supra*). His Lordship stated (at p.1061): "This appeal…raises the lawyer's question: "Am I my brother's keeper?" A question which may also receive a restricted reply."

Lord Diplock proceeded to state his view as follows (at pp.1070-1):

"[A]ny duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and recapture."

His Lordship continued (at p.1071):

"In the present appeal the place from which the trainees escaped was an island from which the only means of escape would presumably be a boat accessible from the shore of the island. There is thus material fit for consideration at the trial for holding that the plaintiff, as the owner of a boat moored off the island, fell within the category of persons to whom a duty of care to prevent the escape of the trainees was owed by the officers responsible for their custody."

The facts in *Maloco v Littlewoods Organisation Ltd* [1987] A.C. 241 were quite different. There, the defenders purchased a cinema with a view to demolishing it and replacing it with a supermarket. During the preliminary works, young persons obtained access to the premises at night. Some fire raising attempts occurred on the premises but the defenders were not informed of these incidents. Subsequently, a fire was deliberately started, resulting in serious damage to neighbouring properties, the owners of which sought reparation from Littlewoods. Lord Goff outlined three situations in which a duty of care in respect of the acts of a third party would arise. Firstly, such a duty would arise in cases where there existed a *special relationship* between either (a) the defender and pursuer based on an assumption of responsibility or (b) the defender and the third party, such as one whereby the defender is responsible for controlling the third party. Secondly, a duty would

arise where the defender negligently created a source of danger upon his property and it was reasonably foreseeable that a third party would interfere and cause damage. Thirdly, a duty would arise where the defender has knowledge of third party interference on his property but fails to take reasonable steps to abate it. In the circumstances of the case, no duty arose. None of the three situations outlined above applied. It was significant that Littlewoods had no knowledge of the previous fire raising attempts.

The authorities in respect of those released from custody

Dorset Yacht Co Ltd concerned the *escape* (rather than the release) of Borstal trainees from an open institution. In approaching the duty issue, Lord Diplock focused on the need for special relations between the plaintiffs and defendants which must expose the person "to a particular risk of damage in consequence of that escape which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public" (p.1070). In Lord Diplock's view, the duty was owed only to those with property situated in the vicinity of the island from which the borstal boys escaped and he cautioned against recognising a duty to a wider category of the public. (See, also, *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53 where the last victim of the Yorkshire Ripper, Jacqueline Hill, was held to be at no special risk from the activities of the Yorkshire Ripper. There was thus insufficient proximity of relationship between the police and Miss Hill to result in the imposition of a duty of care upon the defendant. Lord Keith stated (at p.62): "Miss Hill was one of a vast number of the female general public who might be at risk from [the Ripper's] activities but was at no special distinctive risk in relation to them, unlike the owners of yachts moored off Brownsea Island.") It should be noted that Lord Diplock, in his speech in *Dorset Yacht*, distinguished (at pp.1070-1071) between an escaped prisoner and one who is released. How then have the courts responded to claims made in respect of injury or damage inflicted by those who have been released from custody? Both the Scottish and English courts have had occasion to consider such claims, with each case turning on its own specific facts.

In *Thomson v Scottish Ministers* 2013 S.C. 628 the pursuer's daughter was murdered by a prisoner who had been released on "short leave." The pursuer sought damages from the Scottish Ministers as representing the Scottish Prison Service (SPS). The pursuer averred that the SPS knew or ought to have known that, when released on leave, the prisoner posed a real and immediate risk of danger to those persons with whom he would be expected to have dealings during his weekend release, including the pursuer's daughter. Following debate, the Lord Ordinary dismissed the action as irrelevant. The pursuer reclaimed. The Second Division recognised that each of the elements of the tripartite test (reasonable foreseeability, proximity and policy: see *Caparo Industries Ltd v Dickman* [1990] 2 A.C. 605) was a necessary, if not sufficient, ingredient for the imposition of a duty of care. The court concluded that no duty of care was owed to the deceased. In cases of this kind, the pursuer required to establish a special relationship which exposed the deceased to a particular risk of damage as a result of negligence by the defenders in the context of that relationship; or that the victim was the subject of a special or distinct risk in consequence of the defender's actions.

The Division concluded that the Lord Ordinary had been correct to find there was no "proximity" between the deceased and the SPS. As far as policy was concerned, the Lord Justice-Clerk (Carloway) made the following significant observation (at para.59):
"[I]f liability were to be imposed upon the SPS on such a tenuous basis as is advanced, it would potentially render the SPS and perhaps also the Parole Board open to claims from any person who became a victim of a prisoner released before the mandatory date of his/her liberty. Such a regime would have potentially serious consequences for the proper functioning of both these institutions in the care and rehabilitation of prisoners and hence to society as a whole."
The reclaiming motion was refused.
In *Palmer v Tees Health Authority* [2000] P.I.Q.R. P1 the Court of Appeal held that a custody authority responsible for the release of an allegedly dangerous psychiatric patient did not owe a duty to a four year old child whom the patient murdered. If the identity of the victim was unknown, there was insufficient proximity of relationship between the defendants and the victim. A similar result ensued in *K v Secretary of State for the Home Department* [2002] EWCA Civ 775. There, the Secretary of State released a dangerous sex offender into the community, notwithstanding a court recommendation that he be deported. Following the offender's release, he raped the claimant. Her action against the Secretary of State was struck out as the averred facts did not support an allegation of proximity between the claimant and the Secretary of State.

Liability of public custodians for the criminal acts of those in their care
In both Scotland and England, some victims of assaults which have been carried out in a prison setting have brought claims in negligence against the relevant prison authorities. As with all negligence actions, it is incumbent upon the pursuer in such cases to establish that he was owed a duty of care and that breach of that duty was causative of his loss. Such cases have turned on their own facts and circumstances. Looking first at the Scottish authorities, in *Leslie* v *Secretary of State for Scotland* 1999 Rep L.R. 39 a prisoner was assaulted by another prisoner, as a result of which he lost his left eye. The assault happened in a prison corridor when the pursuer and other prisoners were making their way from the accommodation halls to the worksheds. The attacking prisoner stopped in the corridor telling warders that he wished to speak to another prisoner. When the pursuer appeared in the corridor he was assaulted with a makeshift knife. There was evidence at the proof that the pursuer's attacker was not known by the prison authorities to pose any greater risk than normal and, in those circumstances, the Secretary of State was found not to have been negligent. In the course of his opinion, the Lord Ordinary (Nimmo Smith) stated (at para.7.05):
"[T]here 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 known 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 attack. But these considerations do not arise in the present case, and there was no reason to regard [the attacker] as posing any particular risk of violence

towards other prisoners, including the pursuer."
In *Whannel* v *Secretary of State for Scotland* 1989 S.L.T. 671, on the other hand, an inmate of Polmont borstal succeeded in an action against the Secretary of State in respect of stabbing injuries inflicted by a fellow inmate in the kitchen. Lord Morton held that the kitchen staff should have been told about the attacker's past history of violence and bullying. If they had been told they would have kept the attacker under close supervision. Lord Morton stated (at p.674):
"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 [the attacker's] previous history and propensities."
In *Hendrie* v *The Scottish Ministers* 2002 Rep L.R. 46 a prison officer sought damages from the Scottish Ministers in respect of injuries to his back which he sustained when he intervened in a fight between two inmates at Polmont Young Offenders Institution. Lord Kingarth held that information that there had been a physical altercation between the two inmates the previous weekend and that the matter was unresolved, would not, of itself, suffice for liability to be established. However, the existence of *additional circumstances*, namely 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 meant that the safe and reasonable step would have been to transfer one of the two inmates out of the west wing pending the imminent removal. The pursuer's action succeeded.
There is also authority from south of the border to the effect that a duty of care may be owed by prison authorities to prisoners to protect them from injury at the hands of fellow prisoners who are under the prison's control: see *Palmer* v *The Home Office,* Court of Appeal, 25 March 1988 (unreported) 1988 WL 1609043 and *Stenning* v *Secretary of State for The Home Office* [2002] EWCA Civ 793 (see para.45). In neither of those cases was liability established however- in *Palmer* because there was no *particular risk* posed by the assailant and in *Stenning* because previous threats made by the attacker were of a generalised nature only. Some older English authorities (which predate the decision in *Dorset Yacht Co Ltd*) are also instructive. In *Ellis v Home Office* [1953] 2 All E.R. 149 the plaintiff, while detained as a remand prisoner in Winchester Prison, suffered injuries following a brutal attack by another prisoner who was mentally defective. The plaintiff sought damages from the Home Office. The assailant, however, had given the authorities no reason to suspect that he was liable to violence. Devlin J. therefore found for the defendants on the basis that, as there was no reason to anticipate an act of violence, negligence had not been established. The Court of Appeal upheld the judgment and Singleton L.J. stated (at p.154):
"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."
In *D'Arcy v Prison Commissioners*, The Times, November 17, 1955, the plaintiff, while a prisoner in Parkhurst Prison, sustained injuries at the hands of fellow prisoners. He alleged negligence against the Prison Commissioners. The Commissioners did not deny that they were subject to a duty to take reasonable care and the jury found in favour of the plaintiff.
In *Dorset Yacht Co Ltd*, Lord Morris, under reference to both *Ellis* and *D'Arcy*, considered it "eminently reasonable" (at p.1040) that those in charge of the prison owe a prisoner (who is clearly not free to order his own movements) a duty to take reasonable care to protect him from being assaulted by a fellow-prisoner who may have shown himself to be one who might cause harm. In those two cases, his Lordship noted, the defendants had the power to control the persons who caused injury to the respective plaintiffs. Lord Diplock, in turn, in *Dorset Yacht*, accepted the *Ellis* and *D'Arcy* decisions as correct. He observed that in both cases, the attacking prisoner was in the *actual* custody of the defendant at the time of his tortious act and the relationship between them gave to the defendant a continuing power of physical control over the acts of the prisoner. In addition, in each case, the defendant, in the exercise of a legal right and physical power of custody and control of the *plaintiff*, had required him to be in a position in which the defendant ought reasonably and probably to have foreseen that he was likely to be injured by his fellow prisoner. Lord Diplock stated (at p.1062):
"In my view, it is the combination of these two characteristics, one of the relationship between the defendant custodian and the person actually committing the wrong to the plaintiff and the other of the relationship between the defendant and the plaintiff, which supply the reason for the existence of the duty of care in these two cases…The latter characteristic would be present also in the relationship between the defendant and any other person admitted to the prison who sustained similar damage from the tortious act of a prisoner, since the Home Office as occupiers and managers of the prison have the legal right to control the admission and the movements of a visitor while he is on the prison premises. A similar duty of care would thus be owed to him."
Previous decisions of the English courts (including *Ellis* and *D'Arcy*) allowed Lord Diplock in *Dorset Yacht Co Ltd* to arrive, by induction, at the following proposition (at pp.1063 -1064):
"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."

It would be in accordance with this approach that Lord Ericht would direct himself in the Scottish case of *Kaizer v Scottish Ministers* [2017] CSOH 110, to which attention is now turned.

***Kaizer v The Scottish Ministers* [2017] CSOH 110**

The facts and circumstances of *Kaizer* were as follows. On 4 December 2009, while the pursuer was on remand at Aberdeen Prison, he was assaulted by a fellow prisoner, Keith Porter. The pursuer, a Polish National, was exercising in the prison gym when Mr Porter swung a bar bell at his head and fractured his skull. Mr Porter was subsequently convicted of attempted murder, the jury taking the view that the crime was racially motivated. The pursuer was left with headaches, concentration problems and other psychological difficulties following the attack. He sought damages at common law against the Scottish Ministers, as being responsible for the Scottish Prison Service. The pursuer asserted that the attack was in implementation of a threat made to him by his assailant in the gym around a week earlier when, following a discussion about the use of a certain machine, Porter had threatened to "smash [Kaizer's] fucking Polish face in." The pursuer averred that he informed a prison officer, Gary Lumsden, of the threat at the time but Lumsden failed to report the incident. The case came before Lord Ericht on a proof as to liability.

The defenders accepted that the Scottish Prison Service had a duty to take reasonable care for the safety of those within the prisons which it operated, 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 a fellow prisoner. However, they submitted that what the duty of care required, and what would amount to negligence, would vary according to the facts of the particular case.

Lord Ericht identified (at para.4) the "classic statement" of the law in this area as that of Lord Diplock in *Dorset Yacht Co Ltd* where the five characteristics required for the imposition of liability had been set out (the relevant dictum is quoted above). Senior counsel for the pursuer argued that all five characteristics were satisfied in the instant case. In particular, it was submitted that, in relation to characteristic (5), it was reasonably foreseeable that a threat of violence may lead to actual violence and, in relation to characteristic (3), the attempted murder would not have occurred but for the failures of the defenders.

Lord Ericht observed (at para.49) that it was "well established in law" that prison authorities can be liable for assaults by one prisoner on another, but each case turned on its facts and circumstances. Having heard the evidence in the instant case, Lord Ericht found that Mr Porter had threatened the pursuer in the manner described and that this was reported to prison officer, Gary Lumsden, who had been in the office at the time. Accordingly, Mr Lumsden was aware that the pursuer was at risk from Mr Porter. Between 26 November and 3 December, however, Mr Porter was at HM Prison Barlinnie in connection with a court appearance in Glasgow and was not therefore in a position to carry out his threat. He did, however, assault the pursuer on 4 December, the day after his return. On that day, Mr Porter was in the gym with other prisoners, including Mr Rusek (another Pole), Mr Stewart and Mr Porter. Following an exchange of words between Mr Rusek and Mr Stewart, Mr Rusek was attacked by three people. Mr Porter then launched his attack

upon the pursuer. Counsel for the defenders submitted that it was doubtful to what extent, if at all, the November incident and the assault were connected, given that it occurred during an attack by three other inmates on another Polish prisoner, Mr Rusek. Lord Ericht took the view, however, that the assault by Mr Porter on the pursuer was a "separate attack" which did not commence until the attack on Mr Rusek was underway. The attack was directed to the pursuer's face and head, which was consistent with the earlier threat to smash his face in. Accordingly, Lord Ericht held that the attack on the pursuer on 4 December was in implementation of the threat made by Mr Porter around a week earlier.

At the time of the attack, Mr Murray was the only prison officer on duty in the gym. The upper floor of the gym building contained a weights room and an office. The office was entered through a door from the weights room and contained a large window, from which part, but not all, of the weights room could be seen. Mr Murray was in the office when his attention was attracted by a movement of the three prisoners towards Mr Rusek, which he saw 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. Perceiving the pursuer to be in danger, Mr Murray pulled him into the office.

At the proof, expert evidence was led by both the pursuer and the defenders. The pursuer led the evidence of John McCaig, a consultant in prison management, while the defenders led the evidence of Philip Wheatley, a former Director General of the Prison Service in England and Wales.

It was common ground between the expert witnesses that the November incident should have been reported by Mr Lumsden and indeed, Lord Ericht so held. The parties and their experts disagreed, however, as to what the consequences of such a report would have been and this was germane to the question of causation, namely whether it was more likely than not that the attempted murder would not have taken place.

Mr McCaig's opinion was that if Mr Lumsden had reported the incident, the pursuer and Mr Porter would possibly 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 it was therefore less likely that there would have been an unsupervised window of opportunity for Mr Porter to attack the pursuer. Mr Wheatley's opinion, on the other hand, was that segregation from other prisoners would have been the only reliable way of "removing the risk of a serious assault by Mr Porter" (at para.38) and it would have been unlikely that enough evidence would have been provided in order to segregate Mr Porter before 4 December 2009. Lord Ericht observed (at para.42) however that it was not "the general question of risk" which was relevant. Rather, "it [was] whether the particular attack which actually did occur on a particular day in a particular occasion could have been prevented."

Lord Ericht did not accept Mr Wheatley's evidence that segregation was the only action which would have prevented the assault. He preferred the evidence of Mr McCaig in whose opinion the assault would not have happened if Mr Murray had not left the weights room to go into the office to answer the phone. Mr McCaig's view was that if Mr Murray had been forewarned of the prior incident and was seen to be closely observing the

prisoners, it would be much less likely that the assault would have happened. Very rarely was there an assault in view of a member of staff.
Lord Ericht stated (at para.44):
“Had [Mr Murray] 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.”
Lord Ericht concluded, on the balance of probabilities, that if Mr Lumsden had reported the threat, the attempted murder would not have taken place.
Turning to the law, and having conducted a tour d’horizon of the relevant authorities, Lord Ericht sought to derive guidance from those cases in relation to the established facts in the instant case. Different considerations applied here than applied in *Leslie* where, it will be remembered, there was no reason to regard the assailant as posing any particular risk to the pursuer. In the instant case, by contrast, Lord Ericht observed (at para.52): “[A]s 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.”
Having considered the facts and outcome in *Whannel* (where negligence was constituted by a failure on the part of the prison authorities to communicate the assailant's violent history to members of the borstal kitchen staff) Lord Ericht stated that the assault upon Mr Kaizer “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.” Under reference to *Hendrie,* Lord Ericht noted (at para.56) that in the instant 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.” (emphasis added)
Lord Ericht went on to observe that in the instant case, a *particular risk* was constituted by the threat (cf *Palmer* v *The Home Office,* Court of Appeal, 25 March 1988 (unreported) 1988 WL 1609043). The threat was of a particular type of attack on a particular prisoner (cf *Stenning* v *Secretary of State for The Home Office* [2002] EWCA Civ 793).
Having conducted his review of the authorities, Lord Ericht stated (at para.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.”
His Lordship concluded (at para.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."
Thus the defenders were found to have failed in their duty of care to the pursuer.

Conclusion
It is now well established that, in certain circumstances, a defender can be liable for the acts of third parties. At a more specific level, it is also clear that prison authorities may incur liability for assaults by one prisoner upon another. Claims in damages by prisoners are on the increase (as acknowledged in the editor's note at 7.08 in *Leslie*) and the impecuniosity of most attackers makes it likely that the prison authorities will be the target of any such litigation.
The courts are not blind to the difficulties faced by prison authorities in the management of prisoners, a point acknowledged in Lord Ericht's opinion in *Kaizer* (at para.49) and in the earlier case of *Palmer* v *The Home Office,* Court of Appeal, 25 March 1988 (unreported) 1988 WL 1609043. In *Palmer*, Lord Justice Neill stated that "[t]hose 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." The courts are alive to the need for prison authorities to balance considerations of prisoner safety with other considerations such as rehabilitation of inmates (see, e.g. *Stenning, supra,* at para.48). Liability will not necessarily result in every case where one prisoner is assaulted by another-the outcome in each case will, of course, be fact sensitive. Nonetheless, where specific threats are made by one prisoner to another and made known to prison officials, it is clear that those threats should be reported and appropriate supervision put in place. If that is not done, and the threat is then implemented, it seems likely, following *Kaizer,* that the prison authority will incur liability.
The outcome in *Kaizer* offers up a salutary lesson to prison authorities. They should take heed of this important judgment. Should they choose to ignore it, they do so at their peril.