

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S ECI 2020 01530

MARK ROWSON

Plaintiff

v

THE SECRETARY, DEPARTMENT OF JUSTICE

First Defendant

THE COMMISSIONER, CORRECTIONS VICTORIA

Second Defendant

THE STATE OF VICTORIA

Third Defendant

JUDGE: Ginnane J
WHERE HELD: Melbourne
DATE OF HEARING: 29 April 2020
DATE OF JUDGMENT: 1 May 2020
CASE MAY BE CITED AS: Rowson v Department of Justice and Community Safety
MEDIUM NEUTRAL CITATION: [2020] VSC 236 – First Revision 4 May 2020

TORT – Duty of care to prisoner – Risk of contracting COVID-19 – Application to be released from prison for purpose related to health – Application yet to be determined – Whether prima facie case that duty of care breached – Discretionary considerations – Appropriate interlocutory orders – *Corrections Act 1986* ss 47(1), 57A, 112D, 112O.

INJUNCTIONS – Interlocutory injunctions – Preserve subject matter of proceeding – Inherent jurisdiction – *Supreme Court Act 1986* s 37.

HUMAN RIGHTS – Charter of Human Rights and Responsibilities – Right of recognition and equality – Right of Life – Humane treatment when deprived of liberty – Whether rights unreasonably limited – *Charter of Human Rights and Responsibilities Act 2006* ss 7(2), 8, 9, 22, 38.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr E Nekvapil with Ms J Kretzenbacher	Fitzroy Legal Service

For the First, Second and
Third Defendants

Ms K Walker QC, Solicitor-
General for Victoria with
Mr L Brown, Crown Counsel
for Victoria and Mr C Tran

Victorian Government
Solicitor's Office

HIS HONOUR:

Background

- 1 Mr Mark Rowson seeks orders releasing him from Port Phillip Prison at Truganina because of his health risks, including the risk that he will die, if he is infected with the COVID-19 virus.
- 2 He is 52 years old and suffers from heart disease including chronic atrial fibrillation, angina, asthma, poor blood pressure and decreased renal function. He has also been prone to lung infections and pneumonia throughout his life.
- 3 He is currently serving a sentence of five years, three months and 14 days for fraud offences. He is eligible for parole in March 2022.
- 4 If released, he says that he will live at his mother's home under strict conditions imposed by Corrections Victoria. He considers that he would remain in the legal custody of the Secretary as required by the *Corrections Act 1986* for a person sentenced to imprisonment.
- 5 On 27 March 2020, the Secretary of the Department of Justice signed an 'Instrument of Exemption and Order of Separation' in respect of prisons under the *Corrections Regulations 2019*, which in the following recitals captures the risk that the pandemic poses to prisoners and those who work at prisons or visit them:
 1. Noting, the Minister for Health, the Hon Jenny Mikakos MLC, declared a state of emergency under the Public Health and Wellbeing Act 2008 in the State of Victoria on 16 March 2020 in relation to and in respect of the pandemic coronavirus COVID-19.
 2. Noting that there is an acute risk that the pandemic coronavirus COVID-19 poses danger to the safety, security and good order of each of Victoria's prisons, the safe custody and welfare of all prisoners and the safety of any person working in each prison and any prisoner and any person entering each prison.
- 6 Mr Rowson's case in essence, although developed in much detail, relies on the risks that the Secretary identified in recital 2 of the Instrument.
- 7 The evidence before the Court suggests that prisoners in a number of prisons around

the world are being released because of the risks that the pandemic poses to their health.

8 The restrictions imposed on the activities of members of the general public to deal with the virus have mainly resulted from directions made by officers of the Executive. However, the Court has jurisdiction, when cases are brought before it arising in connection with the risks posed by the COVID-19 virus, to consider whether specific orders are necessary to protect the health of particular individuals, including prisoners.

9 For instance, the Court has power at an interlocutory hearing to make orders to protect the subject matter of the proceeding, which in this case includes Mr Rowson's health. The Supreme Court, as a common law court, has 'ample jurisdiction'¹ to preserve the subject matter of litigation by interlocutory order whether by a stay, mandatory injunction or otherwise. Dixon CJ in *Tait v The Queen*² described the exercise of power as follows:³

We are prepared to grant an adjournment of these applications without giving any consideration to or expressing any opinion as to the grounds upon which they are to be based, but entirely so the authority of this Court may be maintained and we may have another opportunity of considering it.

10 Fortunately, no cases of the virus have been detected amongst prisoners or prison employees in Victoria. Prison authorities have taken a number of protective measures to address risks. However, on Mr Rowson's evidence there appears to be a gap between what policy anticipates should occur and what is actually occurring, at least in his unit. There is expert evidence suggesting that the chance of Mr Rowson being infected is low while he is in prison. But, there is also evidence that if an infection of prisoners or prison staff occurred, it could spread quickly in the Prison with great risk of serious illness to older prisoners and those with significant illnesses like Mr Rowson. Although the number of new cases of infection has

1 *Patricks Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [No 2] (1998) 72 ALJR 869 at 870 (Hayne J).

2 (1962) 108 CLR 620, 624.

3 *Ibid.*

decreased in recent days, the ongoing risks from the virus are shown by the continuing lockdown in Victoria which largely confines citizens of a free society to their homes and which shows no signs of ending.

11 In this application Mr Rowson has presented prima facie evidence of a number of breaches of hygiene occurring in his prison unit and that no risk assessment of the virus as suggested by accepted national guidelines has been undertaken in the Prison. That evidence establishes for the purpose of this application a prima facie case that the prison authorities have breached their duty to take reasonable care for his health. As this is an interlocutory application, I do not make final findings of fact as I would at a trial.

12 Nonetheless, the discretionary considerations which are balance of convenience considerations, do not favour Mr Rowson's release from prison. They include that he still has much of his sentence to serve, that he has an application for a corrections administration permit ('CAP') yet to be determined and the means by which he could remain in the Secretary's custody outside of prison is not clear. Then there is the point stressed by the defendants that no case of the virus has yet been detected in a Victorian prison.

13 But the risk to Mr Rowson and other prisoners remains. For the purpose of preserving his health during the conduct of this proceeding, the appropriate outcome of this interlocutory application is that the defendants arrange for the undertaking of an independent risk assessment of the risk to prisoners and employees who work in the Prison. The assessment should include the screening of staff and visitors when they enter the Prison. Subject to any further submissions about the form of orders, any recommendations in the assessment should be implemented.

Section 57A application

14 In addition to his Court action, Mr Rowson has applied for a CAP pursuant to s 57A of the *Corrections Act 1986* ('*Corrections Act*') to release him from the Prison. After

difficulties having his application processed by prison authorities, it has been assessed by prison management, who have recommended to the Secretary that it be not approved. Mr Rowson has been given the opportunity to advance further material before the Secretary makes a decision. Therefore no challenge to the determination of the s 57A application is before the Court.

15 Sections 57 and 57A of the *Corrections Act* provide:

57 Custodial community permits

- (1) The Secretary may issue, in accordance with this Division, the following custodial community permits to prisoners –
 - (a) **a corrections administration permit;**
 - (b) a rehabilitation and transition permit;
 - (c) a fine default permit.
- (2) The Secretary may issue, in accordance with this Division, a fine default permit to a person in the custody of the Chief Commissioner of Police.

57A Corrections administration permit

- (1) Subject to subsection (1A), the Secretary may issue a corrections administration permit to a prisoner for any of the following purposes –
 - (a) **a purpose related to the health of the prisoner;**
 - (b) a purpose related to the administration of justice, including (but not limited to) being under police protection on account of evidence given, or to be given, by the prisoner in a legal proceeding within the meaning of the **Evidence (Miscellaneous Provisions) Act 1958;**
 - (c) to visit a person with whom the prisoner has had a long-standing personal relationship if that person is seriously ill or in acute personal need;
 - (d) to attend the funeral of a person with whom the prisoner had a long-standing personal relationship;
 - (e) to visit another prison.
- (1A) The Secretary must not issue a corrections administration permit to a prisoner under subsection (1) in circumstances in which the prisoner may be removed from prison in accordance with a police custody transfer order.

- (2) The Secretary may issue the permit for a period of up to 3 days.
- (3) Despite subsection (2), the Secretary may issue the permit for a longer period if the permit is to be issued –
 - (a) under subsection (1)(b) and the prisoner will be under police protection while the permit is in force; or
 - (b) for a purpose related to the health of the prisoner.
- (4) Subject to section 6B, a prisoner who is authorised to be absent from prison under the permit continues in the legal custody of the Secretary while absent.

The evidence

16 The evidence consisted of affidavits and expert reports with the deponents and experts not being cross-examined. As this is an interlocutory application, the Court does not make final findings of fact as it would at the trial of the proceeding.

The plaintiff's affidavit

17 Mr Rowson said that he has lived in the Gorgon Unit which has 54 cells. His current single cell is around 2600mm x 3000mm in size.

18 He described a number of instances of poor hygiene practices in the Unit which he considered created risks of the spread of the virus. These included that surfaces, such as touch screen kiosks, in the common areas of the Unit that are touched hundreds of times a day by staff and prisoners are not cleaned nor are prisoners given gloves to touch them. Prison officers when conducting a muster have to open the trapdoor to each cell and count the number of prisoners in each cell. They do this without wearing gloves or not changing them. They also have to unlock the cell. Prisoners are provided with one bar of soap a week and have to buy additional bars, but since the beginning of the COVID-19 crisis they have been limited to one bar a week. He has not seen any hand sanitiser in the prison, save for those in the prison clinic that can only be used by health staff.

19 Mr Rowson states that his access to flowing water, flushing toilets and other matters of basic hygiene have sometimes been interrupted due to maintenance issues. The temperature of the water supply in his cell has been lukewarm, so he does not have

access to hot water to wash his hands and body, or clean his cell. He has never seen any cells in his unit being cleaned or sanitised after a prisoner leaves the cell and before a new prisoner moves in. He has never had any mattress or pillow cleaned, sanitised or replaced. To access cleaning or disinfectant supplies, he has to request a prison officer to unlock the store room, and this request has been refused on a number of occasions.

20 Mr Rowson is concerned about the hygiene of the Prison's commercial laundry. He reports that the bed linen often contains human faeces, blood, bodily fluid and other infectious materials. Whilst he does not work in the laundry, prisoners that do mix with him on a daily basis.

21 Mr Rowson is a prisoner billet in the prison library which means he is responsible for cleaning and disinfecting the shared areas of the accommodation unit and library. He states that he has not been given any special advice about cleaning procedures to avoid the spread of COVID-19.

Mr Christopher Davies' affidavit

22 Mr Davies, a solicitor at the Fitzroy Legal Service, stated that he attended the Prison on 22 April 2020 for the purpose of a professional 'non-contact box visit' with Mr Rowson. Mr Davies states that he was not separated by glass or anything similar from Mr Rowson during his visit.

23 Mr Davies set out in his affidavit details of Mr Rowson's instructions to him about the contents of a number of the defendants' affidavits. These included that he has not seen personal protective equipment used in the protective quarantine unit and has seen staff in the Gorgon Unit regularly not using it.

24 Mr Rowson told Mr Davies that gym access is still occurring and that he has seen prisoners from other units regularly using the gym. He has not seen a poster about COVID-19 at the Prison since February. He has not received any advice about existing prevention and management measures. He has not received any advice about social distancing and says that it is not possible in all circumstances to observe

it. He has met with a prisoner who was in the protective quarantine unit for nine days. He witnessed a prisoner, who was initially identified as having relevant symptoms, being sent to the quarantine unit for testing and then being allowed to return to the Gorgon Unit despite having a high temperature. He has not seen anyone assessed by the use of a digital thermometer and staff on many occasions had told him that they had not been tested. He has seen some staff moving from the quarantine unit to the Gorgon Unit on a regular basis.

25 Mr Davies says that before entering the Prison he was not asked any questions about his health or whether he was experiencing any COVID-19 symptoms and that his temperature was not checked before entering. There was some evidence that temperature checking was introduced on Wednesday this week, the day of the hearing.

Ms Karen Fletcher's affidavits

26 Ms Karen Fletcher, a solicitor at the Fitzroy Legal Service, made two affidavits, which included exhibits of media reports about the virus.

Professor Richard Coker

27 Professor Coker was asked to provide an expert report about COVID-19 and the risks associated with it in a prison setting. He is the Emeritus Professor of Public Health at the London School of Hygiene and Tropical Medicine. He has held a number of other academic appointments, including being adjunct professor at the Faculty of Public Health at Mahidol University, Bangkok, Thailand. He was an honorary consultant at Public Health England for 14 years until 2019.

28 Professor Coker's evidence was that the main method of transmission of COVID-19 is by infected respiratory droplets contacting mucous membranes.

29 Professor Coker said that an estimated 44% of transmissions occur before cases present symptoms. Thus, preventing transmission from asymptomatic cases is critically important in containing the virus. He noted that unconfirmed and asymptomatic

cases of COVID-19 are especially problematic as visitors, employees, or new or transferred prisoners may expose existing prisoners. He said that research suggests that around half of secondary cases of COVID-19 occur as a result of exposure to an asymptomatic individual. The majority of COVID-19 cases are not severe.

30 Professor Coker said that the risk that an incarcerated individual will be exposed to COVID-19 rises substantially if the virus enters a prison because social distancing and personal infection control measures are difficult to implement in a prison environment. The risk caused by the virus should it enter a prison would be comparatively greater than in the general community. The risk increases as the number of people passing through the prison increases. Other risk factors in prisons include overcrowding, unsanitary conditions, poor ventilation and poor health care procedures. Professor Coker reported that without timely and effective containment steps, a prison offers fertile ground for transmission of the virus.

31 Professor Coker stated that factors such as pre-existing comorbidities, sex and advanced age can also increase the risk of serious disease and death if a person is infected by the virus. In his opinion, Mr Rowson's age, comorbidities and sex do not increase his risk of exposure to the virus. However, they do affect his risk of developing COVID-19 and dying from it. He estimated that the likelihood of Mr Rowson presenting a severe case of COVID-19 to be 10% and his estimated risk of dying at around 30% with further risk should medical attention be delayed.

32 Professor Coker explained that the detection of COVID-19 cases can be determined in a number of different ways but that the tests have limitations. He noted that the sensitivity rate of tests ranges from 78% to 92% and basic swabs tests have a sensitivity rate of 78%.

33 In Professor Coker's opinion, congregate settings like prisons provide an optimal setting for an outbreak and the prison population may be naive to the seriousness of COVID-19. He stated that an outbreak within the prison could not be stopped even if measures are taken in response to a confirmed case.

34 To reduce the risk of exposure, Professor Coker advised that prisons should have strong hygiene regimes, access to diagnostic facilities, therapeutic support including pharmaceuticals and respiratory support, and that intensive care units may be needed for severe cases.

35 The defendants submitted that the empirical sources of evidence underpinning Professor Coker's report were largely based on overseas case studies that have higher rates of infection than Australia.⁴ As a specific example, the defendants referred to Professor Coker's statement that '[a]n increased exposure risk is occurring to prisoners and prison employees around the world because many prisoners, many prison staff, and many prisons already have documented COVID-19'.⁵ They noted that this is not the case in Australia and that his opinion does not translate to the situation in Victoria.

36 In a supplementary report, Professor Coker stated that the case studies he relied upon in his primary report are still valid examples of what is likely to happen if the virus entered the prison population. He conceded that he is 'not familiar with the health care provided to prisoners in Victoria'. He said that the risks and methods by which the virus could enter a prison are the same in all countries, even if their magnitude may differ.

Mr Douglas Isles

37 Mr Douglas Isles prepared an actuarial report about COVID-19 in the Australian community and the extent of any inaccuracy in reported figures. He is a Fellow of the Actuaries Institute of Australia and an investment specialist and member of the Management Committee of Platinum Asset Management, Sydney.

38 Mr Isles considered it highly probable that the official figure of 1,243 active COVID-19 cases reported in Australia as at 26 April 2020 did not capture the actual rate of

⁴ Transcript of Proceedings, *Mark Rowson v The Secretary, Department of Justice & Ors* (Supreme Court of Victoria, S ECI 2020 01530, Ginnane J, 29 April 2020) 104 ('T').

⁵ Professor Coker's Expert Report p 11.

infection given the number of asymptomatic cases of infection, the incubation period and the prerequisites originally required before a person would be tested. He considered that the actual number of active cases is 25% higher than reported.

The defendants' evidence

Professor Benjamin Cowie

39 Professor Benjamin Cowie provided an expert report on COVID-19. He has extensive experience in viral epidemiology and communicable disease, with a particular focus on hepatitis. He is Director, WHO Collaborating Centre for Viral Hepatitis, Victorian Infectious Diseases Reference Laboratory, Doherty Institute for Infection and Immunity. He holds a number of appointments as a medical epidemiologist including as the co-head, Doherty Public Health and consultant infectious diseases physician, Victorian Infectious Diseases Services, Royal Melbourne Hospital. He is a Professor, Professorial Fellow in the Faculty of Medicine, Dentistry and Health Sciences, University of Melbourne.

40 Professor Cowie's report listed the number of confirmed COVID-19 cases in Victoria as at 26 April 2020 as 1,349, being 0.02% of the population or one person per 4,740 people. He wrote that the proportion of asymptomatic cases of COVID-19 is 'significant and higher than was initially assumed' and he estimated that 2.5 infections have occurred for every one infection diagnosed.

41 Between 13 and 26 April 2020, in Victoria there were an average of 5.8 new cases per day with 58.8% of the total number of infections classified as being acquired overseas. The number of new cases has steadily fallen following a significant rise between 11 and 28 March 2020.

42 Professor Cowie predicted that the number of positive test results will remain largely unchanged during the next week, being the week following 27 April 2020. However, he was unable to confidently predict long term trends given that the trend may be affected by matters such as adherence to social distancing, resumption of on-site schooling, resumption of travel and other social and health policies.

43 Professor Cowie stated that if infection rates remain stable, the cumulative risk of infection over the next 4 weeks would range between 0.006% and 0.013%, that is, there is a 1 in 7,880 - 15,760 chance of contracting COVID-19.

44 Based on the assumptions he was asked to make and on the contents of Mr Rowson's affidavit, Professor Cowie considered it most likely that the current risk of infection to a prisoner is lower than the risk of infection in the general community. But the risk would be higher than to the general population if a COVID-19 outbreak occurs in Port Phillip Prison.

45 Professor Cowie considered that Mr Rowson's medical conditions exposes him to a higher risk of severe disease and death were he to contract COVID-19. But he did not consider his conditions affected his risk of actually contracting COVID-19. Based on the current risk of infection in the prison population of Victoria, Professor Cowie considered that Mr Rowson is at a lower risk of infection in prison than is a member of the community.

Dr Cameron Loy

46 Dr Cameron Loy is the Principal Medical Officer for the Department of Justice and Community Safety and a registered medical practitioner with General Registration and Specialist Registration in General Practice. He is a Fellow of the Royal Australian College of General Practitioners and because of professional appointments, is familiar with custodial conditions in Victoria.

47 He made an affidavit about COVID-19 and Victorian prisons. He said that as at 23 April 2020, there had been 93,000 tests for COVID-19 in Victoria, with 1,337 confirmed cases of whom 1,251 have recovered and 16 have died.

48 There has been no positive COVID-19 case in Victoria's prison population or, to his knowledge, elsewhere in Australian prisons. Dr Loy said that a prison system wide approach has been in place for 9 weeks to combat COVID-19 which is contained in the Commissioner's Requirement 1.4.9 Management of prisoners during the COVID-19 pandemic.

49 Commencing on 28 March 2020, protective quarantine measures have been put in place which require a 14-day quarantine following a person's admission to prison. Upon entry, prisoners are given a comprehensive assessment of their health and wellbeing. If any health concerns arise, testing and relevant medical assistance are available, including tests for COVID-19.

50 If any prisoner were to contract COVID-19 with mild symptoms, they would be managed in their cell while in isolation. If symptoms worsened, the prisoner would be sent to the St John's Sub-acute Unit at Port Phillip Prison or to St Vincent's Hospital. The Prison has a unit which accommodates prisoners with mid-range illnesses before they are required to be sent to hospital. The health care at the Prison is expected to be of the same standard as that provided by the public health system.

51 Dr Loy referred to a publication in the British Medical Journal which reported that adults over 70, and those with underlying respiratory disease, cardiovascular disease and cancer were considered high risk. However, underlying conditions are often confounded by other factors such as gender and smoking status.

52 He referred to the Corrections Victoria's Annual Prisoner Profile (2017-2018) that showed that 13% of the male prison population is older than 50 years, and 5.8% of the male prison population is older than 60 years.

53 He said that all prisoners have access to a shower, hand basin with hot water and a toilet. In a single prisoner cell like Mr Rowson's, only the occupant has access to the facilities of that cell.

Mr Ali Assafiri

54 Mr Ali Assafiri is the Deputy General Manager of Port Phillip Prison. In his affidavit he described features of the Prison. He said as follows.

55 Port Phillip Prison is operated by G4S on behalf of the State of Victoria. It was commissioned in 1997 and is a modern prison, with several new units built in the last few years. It is a maximum security prison. The current prison population is just

over 1,000 prisoners, though there is capacity for up to 1,107 prisoners. Mainstream prisoners and protection prisoners in the general accommodation units at Port Phillip have the same out of cell hours, usually 11.5 hours every day. Mainstream prisoners are not able to mix with protection prisoners. It provides remand, sentenced, mainstream, protection and specialist accommodation. The units are primarily individual buildings with an area for exercise adjacent to each unit. Each unit in the prison is staffed by a range of prison officers, who are called corrections officers at Port Phillip. The prison is staffed continuously, but with fewer officers on duty overnight when the prison is effectively in lockdown whilst prisoners are locked in their cells to sleep. The number of officers in each unit depends upon the number of prisoners in the unit, and the security rating of the prisoners. As part of general security, corrections officers are monitored by their superior officers. It has several specialist units, including the St John's Sub-acute Unit, which provides an intermediary medical service between unwell prisoners remaining in their cells and being treated at the medical centre as an outpatient, and hospital treatment, which is primarily conducted at the secure St Augustine's Unit at St Vincent's Hospital. On 18 April 2019, Mr Rowson was placed in the Gorgon Mainstream Unit, and continues to be accommodated in a single occupancy cell. Gorgon is one of the original units at Port Phillip, and it was commissioned in 1997. Mr Rowson is a medium security prisoner, so is eligible to be transferred to a medium security prison, but he has sought to remain at maximum security Port Phillip to be in the vicinity of St John's Unit and to be more accessible to his mother.

Ms Melissa Westin

56 Ms Melissa Westin is the Acting Deputy Commissioner, Custodial Operations, Corrections Victoria, in the Department of Justice and Community Safety. Her substantive position is Assistant Commissioner, Security and Intelligence Division within Corrections Victoria. She made an affidavit detailing features of the Victorian prison system, the age profile of the 7,710 prisoners and the steps taken to deal with the COVID-19 pandemic. She described the Department's COVID-19 response, including the provision of signage, suspension of visits and providing video

connections and links to avoid the need for visits to prisoners and more detailed initial checks on new prisoners. She also referred to the quarantining of prisoners for 14 days if they have returned from overseas or been in contact with anyone with COVID-19 symptoms. Now, all new prisoners regardless of symptoms are quarantined. Other measures include reducing the hours during which prisoners are out of their cells, the establishment of quarantine units, giving prison officers management plans and fact sheets on how to stop the spread of COVID-19, instructing staff working in quarantine and isolation areas not to go to other parts of the prison for the duration of their shift, except in an emergency and instructing them to stay at home if they are unwell. Prisoners are reminded of hand hygiene. Advice has been obtained from Infection Prevention Australia. Isolation procedures have been adopted for prisoners with symptoms of COVID-19 and checks have been introduced including a digital thermometer check of all prison officers, administrative staff and professional visitors entering the prison.

Ms Hannah Brown

57 Ms Hannah Brown is the Executive Director of Justice Health in the Department of Justice and Community Safety. Ms Brown detailed its response to COVID-19. Justice Health is a business unit within the Department. She described the healthcare services in the Victorian prison system, including the health and mental health assessments of prisoners. She said that Justice Health had sought to translate the advice from public authorities so that it is appropriate for the Victorian prison environment, has sought regularly to brief Corrections Victoria on the status of the pandemic in Victoria, worked with Corrections Victoria to resolve operational challenges to mitigate the risk of COVID-19 entering the prison system and keeping staff and prisoners safe. Justice Health has also worked with health service providers to support the implementation of policies, procedures and measures for the protection of the prison system. She detailed specific measures adopted including developing a prisoner factsheet and staff factsheet in response to the pandemic, developing Guidelines for Corrections Victoria Staff, developing questions to be asked on arrival at prisons of prisoners, staff and visitors and quarantining prisoners

depending on the answers to the questions and not permitting entry to staff and visitors. She described the steps that would be taken if a prisoner were to contract COVID-19. In a second affidavit, Ms Brown described the other prison options that Mr Rowson might seek to choose.

58 Ms Brown referred to the CDNA National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correctional and Detention Facilities in Australia and said that the policies, procedures and measures in place for Victorian prisons are consistent with those guidelines. Those guidelines were developed by the Communicable Diseases Network Australia (CDNA) and endorsed by the Australian Health Protection Principal Committee. The opening paragraphs of the guidelines explain:

... this document is adapted from the CDNA National Guidelines for COVID-19 Outbreaks in Residential Care Facilities in Australia, and documents and guidelines from various international health authorities including the Public Health Agency of Canada and the Ministry of Justice and Public Health England.

This guideline is provided to assist public health authorities, administrators of correctional facilities, employees of correctional facilities and healthcare workers by providing best practice information for the prevention and management of COVID-19 outbreaks in detention and correction facilities. This guideline captures the knowledge of experienced professional and provides guidance on good practice based upon the available evidence at the time of completion.

59 Under the heading 3.2 Prevention, the guideline states:

There is currently no vaccination to prevent COVID-19. Avoidance of exposure is the single most important measure for preventing COVID-19 in correctional and detention facilities. Facilities must have, and be vigilant in implementing, effective infection control procedures. Facilities are expected to use risk assessments to ensure the risks of a COVID-19 outbreak are as low as possible. This can involve examining the layout and the environment, equipment, workforce training, systems, processes or practices that affect any aspect of how inmates are managed and how their person and clinical care are delivered.

Affidavit of Ms Debra Coombs

60 Ms Coombs is a Principal solicitor in the Victorian Government Solicitors Office. She made an affidavit about the defendants' responses to discovery requests made by

Mr Rowson.

Mr Rowson's case

61 Mr Rowson's primary position was:

1. That he was not aware of any other option in prison where:
 - (a) COVID-19 related risk to him and was adequately reduced; and
 - (b) his medical needs (including medical treatment and proper health needs);could be properly looked after.
2. He seeks an injunction to ask that the defendants be restrained until the hearing and determination of this proceeding or further order from holding him in prison.
3. If the defendants would like to nominate an alternative option that eliminates risks, while keeping Mr Rowson in prison, they should put that before the Court.

62 After the conclusion of submissions, Mr Rowson reformulated the orders that he seeks as follows:

1. An injunction that the defendants be restrained until the hearing and determination of the proceeding or further order, from holding him in prison;
2. Alternatively to 1, if it is refused, an injunction that the defendants be restrained until the hearing and determination of this proceeding or further order, from holding him in prison, unless and until the defendants have conducted, independently of G4S, an assessment of the COVID-19 related risks to prisoners at Port Phillip Prison and any recommendations of that assessment of that prison have been implemented.
3. Alternatively to 1 and 2 and only if they are refused, an injunction requiring the defendants to:
 - (a) conduct, independently of G4S, an assessment of the COVID-19 related risks to all prisoners at Port Phillip Prison; and
 - (b) implement any recommendations of the assessment;within 14 days of the date of this order.
4. The plaintiff have liberty to apply.

63 Mr Rowson submitted that the Court should adopt a precautionary approach

recognising the weight to be given to human life. As long as there was a small but identifiable risk of significant harm, it was more appropriate to take action than not. Prisoners are unable to protect themselves, they are 'sitting ducks'.

64 Because of Mr Rowson's medical conditions, the evidence is that should he contract COVID-19 his chance of developing a severe disease is about 10% and if he were to develop a severe disease his risk of death would be in the order of 30%.

65 Mr Rowson's case is first brought in tort and he pleads that the defendants owe him a duty to take reasonable steps to ensure that he does not suffer serious injury or death from COVID-19. He pleads that the defendants threaten or intend to breach that duty as evidenced by the failure to exercise the discretion contained in s 57A by which he could be released under a CAP or otherwise has not taken reasonable steps to ensure that he does not suffer serious injury or death from COVID-19. He pleads that if the defendants do not take reasonable steps to ensure that he does not suffer serious injury or death from COVID-19, then there is an imminent danger that he will suffer serious injury or death as a result of the defendants breaching the duty of care that they owe to him. He relies on the evidence of hygiene breaches in his Unit to which I have referred.

66 Mr Rowson relied on the statement of Mason J in *Wyong Shire Council v Shirt*⁶ as to the test for determining whether there has been a breach of the duty of care.

67 Mr Rowson relied on the Federal Court's Nauru refugee cases, particularly the judgment of Bromberg J in *Plaintiff S 99/2016 v Minister for Immigration and Border Protection*, concerning the power to grant mandatory injunctions to a plaintiff suffering from imminent risk of serious harm.⁷ He also relied on the decision in *Prisoners A to XX Inclusive v State of New South Wales*.⁸

68 Mr Rowson contended that the balance of convenience favours him, because once

⁶ (1980) 146 CLR 40 at 47-48.

⁷ (2016) 243 FCR 17.

⁸ (1994) 75 A Crim R 205.

COVID-19 enters Port Phillip Prison, it will be more difficult to contain and his risk of becoming infected would be substantially higher than the risk of the general community. If COVID-19 enters the prison, it will spread very quickly. Because of the conditions of his imprisonment and the 'congregational' setting or environment, he is not able to act in accordance with the public health advice of the governments, such as social distancing or sanitary measures.

69 While there is a public interest in prisoners serving their term of imprisonment, s 57A recognises that in particular circumstances, prisoners should be let out of prison while remaining in the custody of the Secretary of the Department.

70 The evidence established that no risk assessment was done at Port Phillip Prison. While there might be statements of policy, it is another matter if they are being implemented. The State has adopted policies and laws to recognise the particular risk in prisons, but they may not be implemented.

71 Professor Coker's evidence establishes that 44% of COVID-19 transmissions occur before the person transmitting the virus shows symptoms. This is worse in 'a congregational environment' like a prison. Professor Cowie's statement that Mr Rowson is safer in gaol than in the community, has to be read with the conclusion that once a person is in prison their risk is much higher.

72 Prisoners are given rights by s 47(1) of the *Corrections Act* including:

- (f) the right to have access to reasonable medical care and treatment necessary for the preservation of health including, with the approval of the principal medical officer but at the prisoner's own expense, a private registered medical practitioner, dentist, physiotherapist or chiropractor chosen by the prisoner.

73 In addition, assuming he can establish the material facts that he pleads, he has a strong case for an injunction to restrain the first defendant acting unlawfully under s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006*.

Recent amendments to Corrections Act

74 On 25 April 2020, the *COVID-19 Omnibus (Emergency Measures) Act 2020* commenced

which inserted Part 10B into the *Corrections Act*.

75 Counsel for Mr Rowson submitted that these temporary amendments contain provisions that have the power to protect prisoners from COVID-19. Specifically, counsel referred to s 112O which contains measures that can be taken by the Secretary or the Governor to reduce the risk of COVID-19 within a prison without removing a person from prison. It states:⁹

112O Restriction of movement and placement of prisoners

- (1) The Secretary or the Governor, for the purposes of preventing, detecting or mitigating the risk of COVID-19 or related health risks in relation to a prison, prisoners, prison staff, visitors or any other person, may order any of the following –
 - (a) the separation, quarantine or isolation of a prisoner from some or all other prisoners;
 - (b) the establishment of separate cells, units, areas in, or parts of, the prison for occupancy by prisoners;
 - (c) the prohibition or restriction of movement and placement of prisoners in one or more, or all, prisons –
 - (i) to secure part of a prison from entry, exit or use; or
 - (ii) to secure one or more prisons, or all prisons, from entry, exit or use.

76 Before making an order under s 112O(1), the provisions under subsections (4) and (5) must be considered, and (6) requires reasons to be provided to the prisoner if an order is made under s 112O(1)(a). The considerations are as follows:¹⁰

- (4) Before making an order under subsection (1), the Secretary or the Governor (as the case requires) must consider the following –
 - (a) the safety, protection and welfare of any prisoner;
 - (b) the safety, protection and welfare of any other person;
 - (c) the safety, management, good order and security of the prison.
- (5) Before making an order under subsection (1)(a), the Secretary or the Governor (as the case requires) must consider, as far as reasonably practicable, the following –

⁹ *Corrections Act 1986* (Vic) s 112O.

¹⁰ *Ibid* s 112O(4)-(5) (emphasis added).

- (a) **any medical and psychiatric conditions of the prisoner;**
- (b) the vulnerability of the prisoner;
- (c) any risk that the prisoner may pose to the prisoner's welfare or the welfare of any other person;
- (d) if the prisoner has any physical limitations or a disability;
- (e) the prisoner's cultural background.

Mr Rowson submitted that the Secretary or Governor had the option of granting a CAP should a s 122O(1) order be inconsistent with any of the considerations under subsections (4) and (5).

Charter submissions

77 Mr Rowson's counsel relied on three human rights under the *Charter of Human Rights and Responsibilities* ('Charter').¹¹ These were the right to recognition and equality before the law,¹² the right to life¹³ and the right to humane treatment when deprived of liberty.¹⁴

78 Mr Rowson's counsel referred to the United Nations Human Rights Committee general comment on the right to life.¹⁵ The extract included the following:¹⁶

The duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonable foreseeable threats. ...

States parties are thus under a due diligence obligation to undertake reasonable positive measures, which to not impose on them disproportionate burdens. ...

States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by ... imprisoning or otherwise depriving individuals of their liberty, States parties assume responsibility to care for their life.

79 Counsel also argued that the defendants' obligation to protect the physical and

¹¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹² *Ibid* s 8.

¹³ *Ibid* s 9.

¹⁴ *Ibid* s 22.

¹⁵ *Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36 (30 October 2018) ('General Comment').

¹⁶ *Ibid* 5-6.

mental health of prisoners is recognised by the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* which require that prison accommodation meets the requirements of good health.

80 Counsel argued that a failure to release Mr Rowson from prison was an unreasonable limitation of his human rights contrary to s 7(2) of the Charter.

81 However, Mr Rowson's reliance on the Charter was mainly related to his application for a CAP. He pleaded that by failing to exercise the power in s 57A(1)(a) of the *Corrections Act* to reasonably reduce the threat to him of serious injury or death from COVID-19, the first defendant has thereby acted incompatibly with his human rights and has therefore acted unlawfully under s 38(1) of the Charter. He seeks in his statement of claim remedies relating to the defendants' failure to exercise the power to grant him a CAP. Because his section s 57A application is yet to be determined, I have primarily based my decision in this interlocutory application on his cause of action in tort.

The defendants' case

82 The defendants submitted that Mr Rowson had not established a prima facie case and his case was described as exceptionally weak. There is no prima facie case of negligence, the standard of care has not been articulated and no breach of duty is established. There is no prima facie case of unlawfulness within s 38 of the Charter.

83 Declining to make the orders sought does not expose the plaintiff's health to any material risk. Professor Cowie's opinion is that the current risk of a prisoner in Port Phillip Prison becoming infected with COVID-19 is most likely lower than the current risk of infection in the general community.

84 The balance of convenience lies against Mr Rowson's claims. He is in gaol for serious offences and on public policy grounds he should serve his sentence. The Court should be cautious to respect the limits of its own institutional competence and the traditional allocation of responsibilities between the executive and the judiciary. The prima facie case is weak and, if necessary, the defendants can move to a final

hearing.

85 I note that Nettle JA stated in *Anderson v Pavic*:¹⁷

[P]rison legislation should ordinarily be interpreted so as to give full scope to the power of correctional authorities to carry out tasks of prison administration and management without undue influence from the courts.¹⁸

86 The defendants also submitted that Mr Rowson's claims are premature because no decision on his application for a CAP under s 57A has yet occurred and therefore an order in the nature of mandamus cannot issue.

87 The defendants submitted that the starting point was the likelihood of the virus entering the prison. Measures have been taken to avoid that occurring. These included the exclusion of all personal visitors and the limitation of professional visitors to essential circumstances. New prisoners are quarantined for 14 days upon entry. In the case of staff, temperature checks will begin today. If they show any symptoms, they will not be allowed into the prison.

88 To reduce the spread of the virus within the Prison, prisoner's time out of cells have been reduced. They have to keep 1.5 metres apart when mixing in the yard and there will be less prisoners mixing because of their reduction in hours outside the cell. There is increased cleaning and soap is provided and, in some locations, hand sanitiser. If prisoners present with symptoms of COVID-19, they are isolated and tested. If COVID-19 does enter the prison, quarantine measures can be taken and medical care is available if required.

89 Professor Cowie's report stated that the risk of being infected by the virus is 0.006%. The number of cases of new infections has decreased rapidly. It is lower in the prison than in the general community because of steps that have been taken by the prison system. Even at the height of the infection in March and early April there was no transmission into a prison.

¹⁷ [2005] VSCA 244 (Warren CJ, Maxwell P and Nettle JA).

¹⁸ Ibid [32].

90 Professor Coker's report was largely based on overseas experience. He had not taken into account the measures taken in Victoria.

91 The Federal Court Nauru cases concerned persons with grave medical conditions, who could not be treated on Nauru and which put them at risk of imminent harm. *Tait v The Queen*¹⁹ concerned a prisoner who was about to be executed. There is no legal basis to give Mr Rowson an early release and there is a public interest in him completing his imprisonment.

Consideration of submissions

92 The High Court described the duty of care that prison authorities owe to prisoners as follows:

It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and to which they generally lawfully conduct themselves. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there ...²⁰

93 For the reasons I give below, I do not consider that the Court should order that Mr Rowson be released from prison. I do however consider the Court has power to make such an order in an extreme case under its inherent jurisdiction to preserve the subject matter of litigation.

94 But, in this case, in circumstances where no diagnosis of an infected person in prison has occurred, I am not persuaded that such an order should be made either as a matter of balance of convenience or the justice of the case.

95 I take into account that Mr Rowson's application under s 57A is pending, even though the preliminary indication is that it will be rejected. Such an application is the normal process for the release of a person serving a term of imprisonment.

¹⁹ (1962) 108 CLR 620.

²⁰ *New South Wales v Bujdoso* (2005) 227 CLR 1, 13 [44].

- 96 Corrections Victoria has taken steps to guard against the entry of the virus into the Prison and to control it if it does enter. There is no evidence that any prisoner or staff has been infected by the virus.
- 97 However, Mr Rowson points to a number of issues in his Unit which, if correct, could be addressed to further reduce that risk. This includes the non-adoption of distancing measures, including at times such as queuing for food and medication. Prisoners who are required to work in activities such as the laundry are often unable to maintain physical distance from other prisoners. Prisoners are limited to purchasing one bar of soap a week. Prisoners are responsible for cleaning, maintenance or other tasks related to the operation of the prison. Mr Rowson is responsible for cleaning the library. Then there is the fact that prisoners touch hundreds of surfaces a day, including electronic touch screens. Prison staff have to touch the surfaces when doing musters. Then there is lack of cleanliness and the ability of prisoners to come into other prisoner's accommodation units.
- 98 I do not on this interlocutory application make findings of fact, but consider the competing accounts of events and of risks. Thus I do not make findings of fact that each instance of lack of appropriate hygiene to which Mr Rowson refers has occurred, but rather that his evidence provide a sufficient basis, when taken with the absence of a risk assessment, to establish a prima facie case that the defendants have breached its duty of care to him, which exposes him to risk of significant injury.
- 99 While no infection has been detected amongst prisoners or employees, the Commonwealth Government and the Victorian Government, in particular, have continued the current lockdown. That is a significant step because it prevents the normal operation of a free society and largely confines citizens to their homes under sanction of substantial fines. Those governments obviously think it is appropriate that the lockdown continue. There is no end in sight.
- 100 Based on Mr Rowson's evidence, as developed in Mr Davies' affidavit, there is a risk that the virus may gain entry to the Prison and if it does it will spread more rapidly

than in the usual community because of the 'congregational' nature of a prison. That risk is not insignificant.

101 It is therefore appropriate to consider what orders, if any, should be made pending the final hearing of this proceeding. No risk assessment of the Gorgon Unit or the Prison as a whole has occurred as the CDNA recommended. Section 37 of the *Supreme Court Act 1986* recognises the Court's wide power to grant injunctions.

102 In my opinion, to ensure that as far as possible Mr Rowson's health should be preserved for the purposes of this litigation and more generally, the Court should, as an interlocutory measure, adjourn his summons on the basis that a risk assessment should be carried out and, subject to any further submissions about the form of such an order, any recommendations made by it should be implemented. It is an appropriate order to ensure that the subject matter of the litigation is preserved. The justice of the case supports the making of mandatory orders to that effect.²¹ Putting the matter another way, the balance of convenience supports such orders.

103 I will hear the parties as to the form of orders.

Acknowledgment

104 I acknowledge that the Court has been greatly assisted in hearing and deciding this important application by the considerable assistance of counsel and solicitors. Particular mention should be made of Mr Nekvapil and Ms Kretzenbacher and the lawyers at the Fitzroy Legal Service, who at short notice and on a pro bono basis through the Justice Connect program have ably assisted Mr Rowson to present his case. Together with counsel and solicitors for the defendants, they have greatly assisted the Court in attempting to determine this proceeding in a fair and timely manner.

²¹ *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65, [39]-[40].