The duty of care to prisoners

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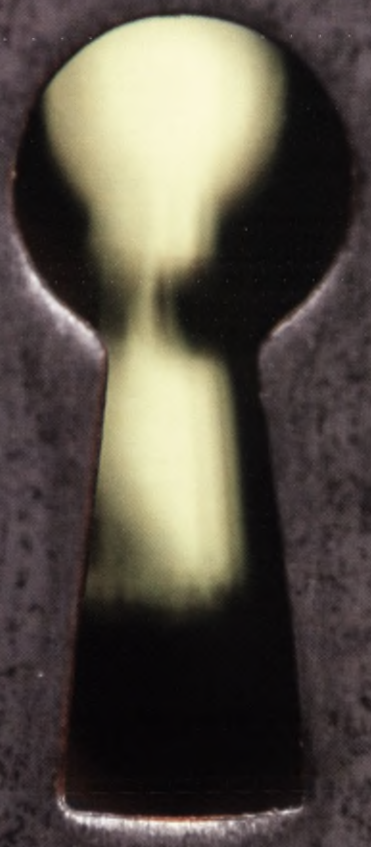

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The involuntary position of prisoners and their vulnerability gives rise to a special duty of care, which includes the duty of prison authorities to protect prisoners from their own acts of self-harm and from assaults by fellow prisoners.

Despite the duty of care, however, the entitlement to damages is substantially reduced, at least in NSW, by the application of the *Civil Liability Act* 2002, which substantially removes any effective redress for negligence or abuse by prison authorities and other prisoners.

THE LEGAL PRINCIPLES

Prison authorities owe a duty of care to those in custody. The negligent supervision of prison authorities, leading to an attempted suicide of a prisoner (which was foreseeable and reasonably preventable), is not obviated by the fact that the death or injury was inflicted by the prisoner on him or herself. The relative of a deceased prisoner sued successfully in *Kirkham v Chief Constable of Greater Manchester,*[1] a case that showed that where the duty of care exists, there may be a positive duty upon a defendant to protect a prisoner from the negligent or malicious acts of others.

In *Reeves v Commissioner of Police of the Metropolis,*[2] a claim was brought for compensation to relatives by the partner of a man who hanged himself in a police cell in circumstances where police officers had been alerted to the risk that he might commit suicide. The House of Lords affirmed that the fact that the man's act was deliberate, informed and he was not of unsound mind did not negate the duty of care to guard against the very act that led to his death. Those entrusted with the custody of the man had a duty to take reasonable care for his safety, whether he was of sound or unsound mind and, accordingly, his decision to take his own life did not entitle the defendant to rely on the defences of *novus actus interveniens*[3] or *volenti non fit injuria.*[4]

In *Cekan v Haines,*[5] the NSW Court of Appeal accepted the existence of such a duty in Australia, although the plaintiff in that case failed to establish negligence on the facts because the injury could not reasonably have been prevented.

In *Quayle v NSW,*[6] the family of a deceased Aboriginal youth who hanged himself while in unlawful police custody was held to be entitled to recover damages for nervous shock. In *L v Commonwealth,*[7] Justice Ward in the Northern Territory Supreme Court heard a claim by a prisoner on remand, who was placed in a cell with two convicted prisoners who sexually assaulted him. In the light of the convicted prisoners' known history, it was held that the prison authority breached its duty of care to the plaintiff.

In *NSW v Thomas,*[8] the plaintiff sued for nervous shock in respect of the death in custody of a remand prisoner who committed suicide. Based on the failure to adequately supervise a prisoner who was known to be at risk, the claim failed: it was brought under s4(1) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), which required that the plaintiffs suffer nervous shock as a result of being within sight or hearing. During final addresses, counsel for the plaintiffs sought to amend their pleadings to rely on common law rights, but were refused. The trial judge found for the plaintiffs on this ground. On appeal, it was held that the judgment could not stand on the pleadings, but that leave to amend should be given and fresh verdicts entered for the plaintiffs in the sums ordered below. Of course, the need to suffer nervous shock by being within sight or sound no longer exists, and can now be sustained progressively, following the High Court's decisions in *Tame v NSW*[9] and *Annetts v Australian Stations Pty Ltd.*[10]

> The *Civil Liability Act* substantially removes any effective redress for negligence or abuse by prison authorities and other prisoners.

There is a limit to how far the duty of care of prison authorities goes. In *Thorne v Western Australia,*[11] an escaped prisoner assaulted his estranged wife. Although negligent in permitting the escape, the warden and gaoler were found not liable for the wife's injuries because they did not have sufficient knowledge of the prisoner's background to have taken his threats against his wife seriously. Had they known more, they may have been found liable. In *Godfrey v NSW (No. 2),*[12] the Department of Corrective Services was held liable for injuries suffered by a pregnant shopkeeper and her prematurely born son after she was held up by a prisoner whose escape from gaol was caused by the defendant's want of reasonable care. It was held that the prisoner's commission of armed robberies on escape was reasonably >>

foreseeable, as was the likelihood that physical or psychological harm would result. The mother claimed for nervous shock and the child for physical damage arising from premature birth. However, the NSW Court of Appeal reversed the decision,[13] holding that there was no established category of duty of care owed by a prison authority to prevent harm caused by an escaped prisoner beyond the immediate vicinity of a gaol, and that no duty of care should be recognised in this case. This was justified by the extent and indeterminate nature of the potential liability and the absence of any control over it; the possible distortion of the penal decision-making process (public policy); and the remoteness of the injury in time and place from the negligent conduct.

> An exception to the restrictions on recovery for negligence is where the injury is a consequence of a serious offence by another person.

In *Cran v NSW,*[14] the plaintiff was a homeless person who suffered psychological injury after prolonged incarceration due to neglect by police and prosecuting authorities. After 64 days in gaol on a drug possession charge, laboratory tests showed that the material in his possession did not contain any illegal drugs. Despite the fact that he was in custody, no fast-tracking of the testing had been undertaken. However, the court held that there was no relevant duty of care due to the policy considerations identified in *Elguzouli-Daf v Commissioner of Police of the Metropolis.*[15] In *Rush v Commissioner of Police,*[16] the issue was whether the Australian Federal Police (AFP) owed a duty of care to the Bali Nine charged in Indonesia with heroin trafficking and at risk of a death sentence. The AFP had been warned by the father of one of those charged but chose not to intervene, despite the fact that this put Mr Rush's son at risk of a death sentence. It was held that there was no such duty on the AFP, and the action was dismissed.

The duty of care owed to a prisoner is clearly an exception to the general principle set out in *Modbury Triangle Shopping Centre Pty Ltd v Anzil,*[17] which established that the law does not generally impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk is foreseeable. In respect of prisoners, the degree of control and the inability of prisoners to protect themselves from the risk of injury by other prisoners, or from the risk of self-harm, can be seen to give rise to an exceptional duty of care.

This is well illustrated in *Bujdoso v NSW.*[18] Convicted of child sexual offences, the plaintiff was located in a low-security area of Silverwater Prison in NSW. It was conceded that he was owed a duty of care in the terms described in *State of NSW v Napier,*[19] where President Mason of the Court of Appeal said:

> 'The control vested in a prison authority is the basis of a special relationship which extends to a duty to take reasonable care to prevent harm stemming from the unlawful activities of third parties.'

It was conceded that supervision was minimal. Prisoners convicted of sexual offences – described in prison as 'rock spiders' – were known to be at special risk. The plaintiff did not wish to be placed under protection and wished to stay away from other paedophiles. The prison authority, however, knew of a threat to the prisoner but did not tell him of it. Despite this, the plaintiff was nervous about his position and disclosed this to the prison psychologist. One prisoner had reported to authorities that the plaintiff was in danger. Nothing was done to meet the threat. He was left in an area with a large number of prisoners without any significant supervision. It seems likely that with a large turnover in prisoners, a prisoner from his former prison recognised him and let other prisoners know of the reason for his incarceration. There were substantial periods when there were no prison officers in the block. He was beaten with iron bars by three or four men, suffering a fractured skull and other serious injuries.

In his judgment, Justice Ipp referred to *Howard v Jarvis,*[20] saying that the duty of care 'arises from the control exercised by the prison authorities over prisoners and the vulnerability of the prisoners over whom they have control'. A lack of proper supervision of prisoners can readily constitute a breach of the duty of care.[21] Knowledge of the risk and the extent of the risk of an assault is relevant to the duty, and whether or not it has been met.[22]

The trial judge had held that, in placing trust in the other prisoners, the approach of the prison authority was reasonable. The NSW Court of Appeal did not agree. Justice Ipp concluded that the prison authority had breached its duty of care to the prisoner and the trial judge had erred in finding to the contrary. Justices Sheller and McColl agreed.

In *NSW v Bujdoso,*[23] the High Court unanimously rejected an appeal from the Court of Appeal's findings, holding that a prison authority is under a duty to take reasonable care to ensure the safety and security of otherwise vulnerable prisoners over whom the prison authority effectively exercises complete control. This duty is strengthened by the fact that, since violence is often part and parcel of prison life, close supervision is often required.[24] In this case, the threat was not merely a general one in relation to 'rock spiders'; the state had actual knowledge of specific threats to an individual,[25] but took no effective steps to protect the prisoner. The fact that the prison authority sought to require the prisoner to sign a disclaimer as to the threat of physical danger while incarcerated did not relieve it of its duty of care. The existence of the disclaimer[26] merely showed the extent to which the state knew of the danger to the prisoner. The plaintiff did not have to show that reasonable measures would have guaranteed his safety. It was sufficient to show that measures could reasonably have been undertaken, but were not.[27]

LEGISLATIVE 'REFORM' IN NSW

The response of the NSW government was predictable. Instead of providing better protection for prisoners at risk, it chose to substantially remove their right to sue. It did this in several ways. The *Civil Liability Act* 2002 had already been amended to try and prevent criminals suing in negligence.

Section 54 provides:

'54 (1) A court is not to award damages in respect of liability to which this part applies if the court is satisfied that:

(a) the death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and

(b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.

(c) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.

(2) If a Court awards damages in respect of a liability to which this section applies, the following limitations apply to that award;

(a) No damages may be awarded for non-economic loss, and

(b) no damages for economic loss may be awarded for loss of earnings.

(3) A "serious offence" is an offence punishable by imprisonment for six months or more.

(4) This section does not apply to an award of damages against the defendant if the conduct of the defendant that caused the death, injury or damage concerned;

(a) constituted an offence (whether or not a serious offence), or

(b) would have constituted an offence (whether or not a serious offence)

if the defendant had not been suffering from a mental illness at the time of the conduct.

(5) This section operates whether or not a person whose conduct is in issue was acquitted of an offence concerning that conduct by reason of mental illness or was found by a court not to be fit to be tried for an offence concerning that conduct by reason of such an illness.'

Section 54A effectively reduces the rights of the mentally ill to those of someone capable of making informed decisions. This significantly reduces the rights and protection of a large proportion of the prison population.

Just as seriously, s54 says that where criminal conduct contributes materially to the death, injury or damage, or risk of death injury or damage, then there is no recovery. Presumably, this means that if a person is in prison and suffers injury through the negligence of the prison authorities, then because they are there through their own misconduct, this has contributed materially to the risk and they lose their right to recover damages. An exception is where the injury is the consequence of a serious offence by another person, which left it open for the plaintiff in *Bujdoso* to claim.

In 2005, the NSW Parliament inserted special provisions for offenders in custody. Instead of the usual threshold of 15% of a most extreme case, s26C requires a threshold of death, or permanent impairment of at least 15%, in order to be able to sue for any economic loss or non-economic loss whatsoever. Moreover, permanent impairment is to be assessed using the *American Medical Association Guides*, which were never intended for compensation purposes. They have been criticised by a Legislative Council Committee, which unanimously recommended that they cease being used because they are erratic, arbitrary and unjust.[28]

Moreover, damages for economic loss are capped by s26E to weekly payments of workers' compensation, rather than actual loss, and economic loss ceases at age 65 under s26F. Non-economic loss is severely capped under s26I to the modest amounts available under the workers' compensation legislation. What, if any, damages are left must be made available for victim support payments under s26J.

A further restriction was added to these restrictions on recovery. Section 3B(1)(a) of the *Civil Liability Act* (NSW), passed in 2002, excluded liability for 'civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual >>

misconduct'. With minor exceptions, the *Civil Liability Act* did not previously apply to restrict the recovery of damages for an assault or an action in negligence against a prison authority 'in respect of' an assault.

The *Crimes and Courts Legislation Amendment Act* 2006, which amends the *Civil Liability Act* 2002, changes the exemption, so that it now exists only when suing the person who committed the intentional act. Thus, schools and churches whose teacher or clergyman assaulted or sexually abused a pupil are no longer liable for damages at common law. Prison authorities obtain the same protection. Worse, the amendment is expressly retrospective in effect, so that it applies to existing courses of action and actions that are on foot but not finally determined. Even where liability has been determined but damages not assessed, the effect is that the right to common law damages has been removed. Protests by the Shadow Attorney-General, the Bar Association and the Law Society at this abuse of retrospective powers were ignored. An amendment in the Legislative Council to avoid retrospectivity was lost when the Christian Democrat, the Reverend Fred Nile, voted with the government.

In *Zreika v State of NSW*,[29] the NSW Court of Appeal followed its own decision and that of the High Court in *Bujdoso*. Zreika was assaulted while a prisoner at Parramatta Correctional Centre. The prison authorities were informed that a group of prisoners wished to kill him when he was at another gaol, and that someone had been paid to do so. He had been moved to the Parramatta Correctional Centre for his own safety. However, he was not warned about the death threats against him and no special security arrangements were made to protect him. The court also heard that supervision was generally inadequate to protect prisoners at Parramatta. The prisoner was in a yard about the size of a football field and was struck severely from behind, rendering him unconscious. Judge Ashford in the NSW District Court rejected the claim. Justice Ipp in the Court of Appeal said that the trial judge's reasons were 'riddled with errors'. In particular, there was ample evidence that there were no prison officers in the yard at the time of the bashing; ample evidence as to the specific risk and the prison authority's knowledge of it; and ample evidence that information spreads readily from one prison to another as inmates are moved around. The trial judge had suggested that there was no evidence that the presence of a prison officer in the prison yard would have prevented the assault. Justice Ipp pointed out that this appeared to be an incorrect test of causation. The true test was whether a proper system of supervision would have reduced the likelihood of injury. Justice Ipp was critical of the absence of supervision by prison officers and the absence of close-circuit television. He said:

> 'By allowing some 150 prisoners to congregate in a yard the size of a football field the opponent, not to put too fine a point on it, was asking for trouble. In my view it was guilty of negligence and to a serious degree.'[30]

As to causation, Justice Ipp said:

> 'It is a matter of commonsense that the presence of sufficient guards (the claimant contended for two) and close-circuit television would mean that any prisoner intending to commit a violent act would hesitate seriously before doing so because he might be seen and punished. The omission to provide any kind of deterrence against violence, in my view, materially contributed to the assault.'[31]

There was no evidence that measures to provide adequate supervision would have been so costly as to not be reasonably affordable. Justices Beazley and Bryson agreed.

That outcome has not prevented the NSW government from trying to seize the damages awarded to the plaintiff Bujdoso in a series of legal proceedings. Justice Sully at first instance and the Court of Appeal in *State of NSW v Bujdoso*[32] rejected attempts to seize the damages and place them in a 'victim trust fund' under the *Civil Liability Act* 2002. The NSW Attorney-General has indicated that an appeal is likely.

CONCLUSION

In summary, the vulnerability of prisoners gives rise to a special duty of care, which includes the duty to protect prisoners from their own acts of self-harm and assaults by fellow prisoners. However, the entitlement to damages is substantially reduced, at least in NSW, by the application of the *Civil Liability Act* 2002. The right to sue in negligence against a prison authority is substantially removed unless criminality was involved. It remains to be seen whether other states and territories follow the lead of NSW and add reduced access to civil compensation to the penalties already enforced on prisoners. In NSW it seems that, in practice, prisoners have little useful protection from negligence or abuse by prison authorities and other prisoners. ■

Notes: **1** [1990] 2 QB 283; 3 All ER 246. **2** [2000] 1 AC 360; [1999] 3 WLR 363. **3** A new act intervening which breaks the chain of causation. **4** That to which a person consents cannot be considered an injury. **5** (1990) 21 NSWLR 296. **6** [1995] Aust Torts Reports 81-367 (District Court of NSW, Hosking J). **7** (1976) 10 ALR 269. **8** [2004] NSWCA 52. **9** (2002) 211 CLR 317. **10** (2003) 211 CLR 317. **11** [1964] WAR 147. **12** [2003] Aust Torts Reports 81-700. **13** *NSW v Godfrey* [2004] NSWCA 113. **14** (2004) 62 NSWLR 95. **15** [1995] QB 335 at 349. See also *Sullivan v Moody* (2001) 207 CLR 562 at 578; *Tame v NSW* (2002) 211 CLR 317, *Tache v Abboud (No. 1)* [2002] VSC 36 and *Welsh v Chief Constable of Merseyside* (1993) 1 All ER 692. **16** [2006] FCA 12. **17** (2000) 205 CLR 254. **18** [2004] NSWCA 307. **19** [2002] NSWCA 402. **20** (1958) 98 CLR 177. **21** *Ellis v Home Office* [1953] All ER 149 at 154. **22** *Ibid*, at 161; *Ralph v Strutton* (1969) 62 Qd R 348 at 356-358; *L v Commonwealth of Australia* (1976) 10 ALR 269 at 273-274. See also the cases cited by Heydon JA in *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* [2002] Aust Torts Reports 81-636 at 68,335. **23** (2005) 80 ALJR 236. **24** At [44]. **25** At [48] and [50]. **26** At [39] and [48]. **27** At [51]. **28** Report of the NSW Legislative Council General Purpose Standing Committee No. 1 on personal injury compensation legislation, December 2005, Recommendations 4, 7 and 8. **29** [2006] NSWCA 272 (29 September 2006). **30** At [17]. **31** At [19]. **32** [2007] NSWCA 44 (13 March 2007).

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