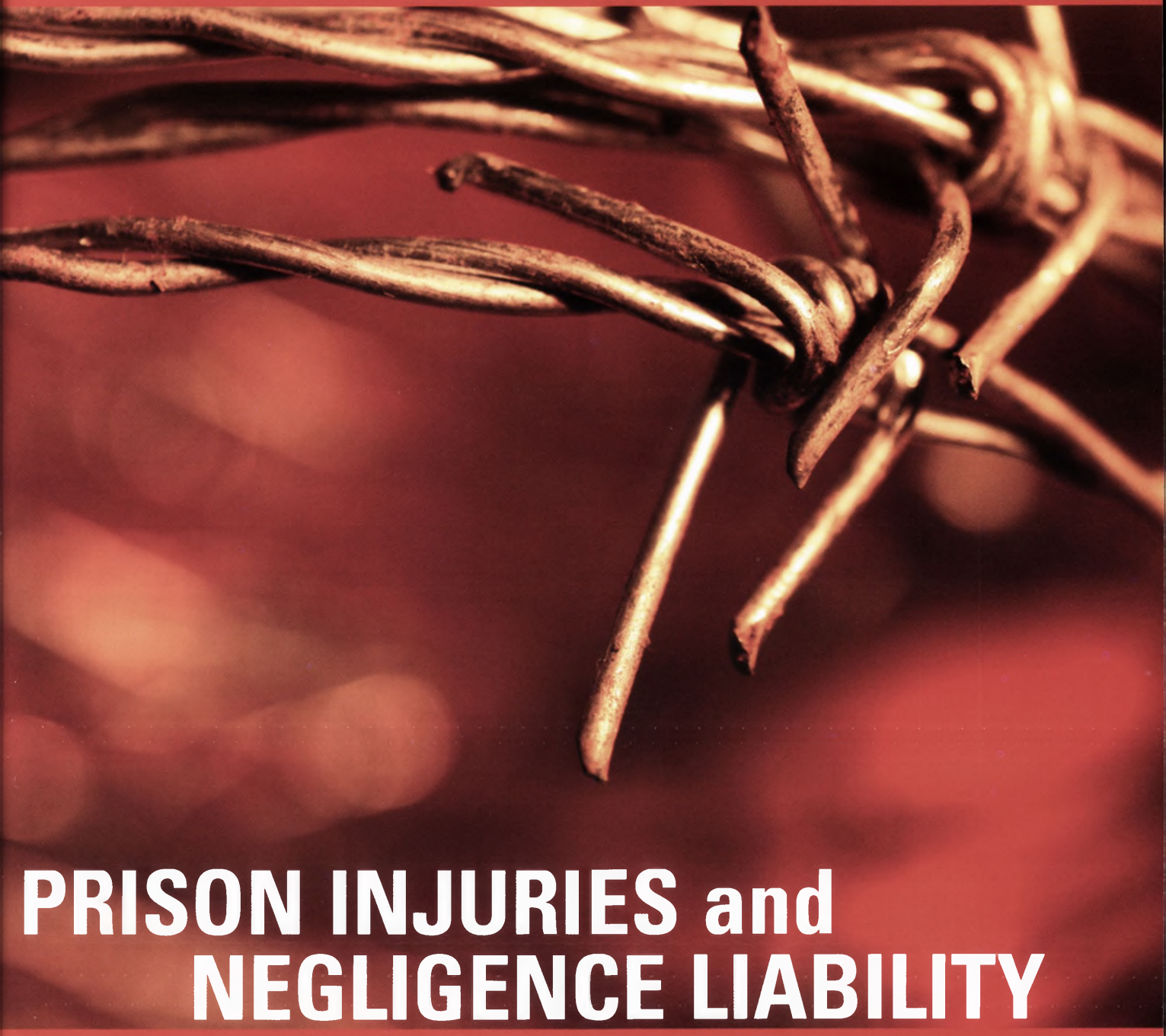

PRISON INJURIES and NEGLIGENCE LIABILITY

By Ross Abbs

The prison environment exposes inmates to many risks of harm. When a prisoner is injured, there may be scope to sue the relevant prison authority in negligence. Generally speaking, claims by prisoners are determined under the ordinary principles of negligence, although it should be noted that a prison authority will benefit from any allowances specific to public authorities. However, notwithstanding that they essentially involve the application of generic tests and standards, prison injury cases are worth considering as a discrete class because they tend to present recurrent factual features, as well as characteristic patterns of argument on breach of duty. This article focuses on the issue of breach, before briefly noting the effect of legislation regulating 'offender damages'. >>

That prison authorities are obliged to take reasonable care for the safety and welfare of prisoners is uncontroversial.[1] Insofar as personal injury is concerned,[2] the duty is general[3] and pervasive. It demands that attention be given to prisoners' needs in terms of sustenance and healthcare,[4] and a safe physical environment. It encompasses a requirement that steps be taken to protect prisoners from the depredations of fellow inmates,[5] and to prevent prisoner self-harm.[6]

The breadth of the duty reflects the level of control that a prison authority has over both the prison environment and prisoners themselves. Prisoners are in many respects substantially dependent on their gaolers. This is simply a function of their confinement: they 'are without freedom and without capacity to provide for their own needs'.[7] To that extent, they are particularly exposed to certain risks of injury should their interests be neglected. In the words of Allsop P of the NSW Court of Appeal (NSWCA), the relationship between prison authority and prisoner is one characterised by 'control by the [authority] of the [prisoner] and its assumption of responsibility over the [prisoner]', matters which 'no doubt pervade the whole life and existence of those in prison: most aspects of life, and autonomous existence, are subject to control and direction.'[8] Given the nature of the relationship involved, it may be that the duty is properly to be regarded as non-delegable.[9]

PRISON INJURIES AND THE NEGLIGENCE CALCULUS

The courts have been careful to emphasise that prison authorities are not obliged to guarantee the safety of prisoners absolutely.[10] The mere fact that a prisoner has suffered an injury while in custody will not of itself give rise to liability. The law recognises that a prison authority cannot guard against every possible contingency. An authority's obligation is both anchored and defined by the notion of reasonableness. Breach of duty essentially consists in failure by a defendant to respond reasonably to an appreciable risk of harm.[11]

The defendant's conduct must be assessed by reference to the magnitude of the relevant risk and the severity of any injury likely to be occasioned by its materialisation. Importantly, the inquiry is prospective rather than retrospective: the fact that the plaintiff was in fact injured in a particular way is of itself conclusive of nothing. The assessment must take into account the practicability of any precautionary measures that could have been taken, along with the 'social utility' of the risk-creating activity. These factors ground an inquiry into what, precisely, could justifiably have been expected of the defendant in the circumstances.

In the context of prison injuries, a plaintiff will generally seek to frame the risk that materialised as one that warranted an official response before proceeding to identify a measure, or an assortment of measures, that could 'reasonably' have been taken to avoid it. The plaintiff's case, thus developed, may be vulnerable to challenge in a variety of ways.

First, for example, the prison authority may dispute the significance of the relevant risk, contending that it demanded no response – or no response, at least, beyond adherence to existing practices.[12] The authority may in fact deny that it was aware of the risk. This is frequently a source of contention where the plaintiff's injuries were inflicted intentionally by another prisoner, as the plaintiff's case will partly turn on 'whether [prison] officers ... had, or ought to have had, knowledge of a real and credible threat of physical injury to the plaintiff'.[13] If the authority knew, or should have known, that the assailant had violent tendencies,[14] or that the plaintiff was a likely a target of violence,[15] then the plaintiff will have a sound footing for an argument that precautionary measures specific to his or her case should have been taken. By contrast, where there is no reason to suppose that the defendant could have anticipated an attack along the particular lines of the one that occurred, the plaintiff will be forced to impugn more generic security arrangements.[16] Naturally, the extent of the defendant's knowledge may be the subject of considerable evidentiary controversy.[17]

Secondly, the prison authority may cast doubt on the practical worth of particular precautionary measures proposed by the plaintiff. Where a precautionary measure would have been of dubious efficacy, a court is unlikely to hold that a reasonable prison authority would have adopted it.[18] Of course, where it is more likely than not that the precautionary measure would have failed to prevent the particular injury suffered by the plaintiff, a defendant may also be able to resist liability on the basis that causation has not been established.[19]

Thirdly, the prison authority may raise the resourcing implications of a proposed measure. It is important to note that a plaintiff cannot attack 'the general allocation of [a public authority's] resources',[20] although the distinction between a general allocation of resources and a specific allocation may be difficult to draw.[21] In any event, a court is obliged to take account of the fact that prison authorities operate under budgetary constraints,[22] and while '[t]here is no simple formula for the economics of providing reasonable care',[23] it is unlikely to hold that negligence is established on the basis that an authority failed to adopt a precautionary measure that would have involved significant costs.[24] Thus, the courts have traditionally tended to baulk at suggestions that a prison authority should have hired additional personnel, or carried out extensive modifications to existing buildings. In accounting for the significance of cost, it may be necessary to consider the expense that would have been involved in extending a proposed measure throughout relevantly similar facilities operated by the defendant.[25] The defendant may also argue that the adoption of a particular measure would have been unduly burdensome in some non-monetary respect.

Fourthly, the defendant may argue that the adoption of a measure urged by the plaintiff would have impinged upon, or entailed the abandonment

of, a practice which has considerable 'social utility'. The courts are cognisant of the fact that prison authorities have a variety of potentially antagonistic responsibilities.[26] In some cases, authorities may be justified in subordinating prisoner safety to, for example, the demands of order and discipline, or the desire to maintain humane conditions. This latter concern tends to militate against any suggestion that prisoners should have been subjected to something approaching routine total surveillance: the value in maintaining a prison system free of such a draconian element outweighs any benefit that might be derived in terms of prisoner safety.[27]

BREACH OF DUTY: THREE CASE STUDIES

Determinations on breach of duty are necessarily case-specific. It is thus worthwhile to review some recent decisions with a view to highlighting the factors that have been decisive in grounding or excluding a finding of negligence.

In *New South Wales v Bujdoso*,[28] the plaintiff suffered head injuries after a number of balaclava-clad intruders broke into his room at Silverwater Correctional Centre and attacked him with iron bars. The plaintiff had, at the time, been accommodated within a compound reserved for prisoners participating in a work release programme. The compound was the subject of 'somewhat perfunctory'[29] official supervision. This was said to be justified because prisoners were not admitted to the work release programme unless they had reached a classification level consistent with a negligible threat of violence.

The plaintiff had been imprisoned for sexual offences involving minors, and on that account had been repeatedly subjected to vilification and intimidation while in custody. The evidence demonstrated that the defendant's officials were aware of this: they were on notice of a particular threat to the plaintiff's physical safety. In the circumstances, it was held that continued reliance on a rather passive security regime within the compound had involved a failure to take due care for his wellbeing. The plaintiff was able to point to several relatively simple measures that could have been taken for his protection: the defendant could have upgraded the lock on his door, which was 'flimsy and out of date';[30] it could have ensured that the area of the plaintiff's room was more effectively monitored, including by acceding to his request for a room near the compound's guard station;[31] and it could have taken steps to minimise the risk that other prisoners would be able to use weapons within the compound. The defendant failed to demonstrate that the adoption of such measures would have been impracticable or unduly costly, or that they were otherwise unreasonable.

By contrast, in *Jiao v New South Wales*,[32] which also concerned an incident at Silverwater, the plaintiff failed to show any default on the defendant's part. There, the plaintiff was attacked by another prisoner while talking to his wife in one of the prison's visiting rooms. The room comprised an open space, allowing 'contact visits'. Prisoners and their visitors were free to move around. The plaintiff was seated at a table when his assailant suddenly landed at least one blow to the side of his face. He suffered an eye injury that ultimately meant that the damaged eye had to be removed.

The primary judge, Hislop J, made several important findings of fact about the nature of the assault. First, '[t]here was no evidence that the defendant was, or ought to have been, on notice of any animosity between the plaintiff and the assailant'.[33] Secondly, the assailant's conduct prior to the attack had not suggested impending violence. Thirdly, '[t]he attack occurred in a split second and there was no opportunity for intervention by any person'.[34] Thus, the attack was abrupt, and – at least from the defendant's perspective – essentially random.

While it was clearly foreseeable that an attack of such a nature might occur, neither Hislop J nor the NSWCA accepted that the defendant had neglected to take precautionary steps that ought to have been taken. Two measures pressed by the plaintiff >>

on appeal – relating to improved electronic surveillance and staff deployment in the visiting area – fell away, primarily because there was no real chance that their adoption would have avoided the attack that actually occurred: the circumstances were such that '[t]he [plaintiff's] injury could only have been prevented if an officer was standing between the plaintiff and his assailant'.[35]

A third measure proposed by the plaintiff concerned the system by which prison visits were facilitated. The plaintiff suggested that the visiting area could have been physically reconfigured to enable each and every visit to take place in a separate cubicle, or 'box'. This would certainly have precluded the attack that occurred. However, the plaintiff was unable to demonstrate that the defendant had acted unreasonably in failing to adopt such a practice. No evidence was adduced as to its cost, let alone the cost of extending it throughout the defendant's correctional facilities. Moreover, both Hislop J and the NSWCA were influenced by a senior prison official's assertion that '[w]ithout contact visits one of the most significant methods for control and good management of the gaol would be lost'.[36] Contact visits were used to reward good prisoner behaviour, with prisoners ordinarily only relegated to 'box visits' for disciplinary reasons. This was said to demonstrate that 'there was considerable social utility in the activity that allegedly created the risk of harm'.[37] Given that outbreaks of violence during contact visits had been extremely rare, there had been no compelling reason to do away with them.

Moving beyond the assault scenario, it is clear that the ability of prison authorities to regulate the prison environment also informs judgments on negligence in respect of injuries inflicted accidentally.

The recent decision in *Price v New South Wales*[38] is illustrative. There, the plaintiff was sitting some eight metres behind the baseline of a tennis court at Parramatta Correctional Centre while four other prisoners played tennis. He was hit in the eye by a stray ball, suffering an injury that resulted in a substantial impairment of his vision. The tennis court was in the middle of a square and was surrounded by seating for some 78 inmates. There was no physical barrier separating the court from the seating areas. Two prison officers were responsible for supervising the square. The key issue was whether their failure to direct the plaintiff to move to a position of greater safety had involved negligence.

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The primary judge observed that 'the tennis match was being played properly', and noted that no other injury had been occasioned by the playing of tennis in the square 'before or after the incident involving the plaintiff'. He considered that 'the possibility of the risk of serious injury [was] remote'. On that basis, he concluded that the defendant had not breached the duty of care it owed to the plaintiff.[39]

On appeal, Allsop P (with whom Beazley and Giles JJA agreed) held that the primary judge had failed to adequately address the elements of the negligence calculus. The plaintiff had been exposed to a clear risk of injury simply by virtue of his proximity to a game of tennis in which the ball was being hit with some force, and the defendant was not entitled to disregard that risk merely because the game was being played responsibly. Moreover, it was readily foreseeable that any injury inflicted by a loose ball might be serious, particularly if it hit a vulnerable part of a bystander's body. Self-evidently, directing the plaintiff to move away from the source of danger would have involved no real difficulty for the defendant. Importantly, it was in a position to issue such a direction: 'The evidence was that [the plaintiff] would have complied – he had no alternative but to do so'.[40] The outcome was that the defendant was liable for the consequences of the plaintiff's injury, subject to a reduction for contributory negligence.[41]

OFFENDER DAMAGES LEGISLATION

The topic of prisoner claims cannot now be discussed without making mention of the 'offender damages' schemes that have been introduced by statute in some Australian jurisdictions.[42] These schemes do not affect the merits of a prisoner's negligence claim, but may very substantially affect the claim's viability,[43] or at least the extent to which its pursuit is realistically worthwhile. In NSW, the relevant provisions are contained in Part 2A of the *Civil Liability Act* 2002 (NSW) (CLA), which will be sketched by way of illustration.[44] Part 2A is directed to claims in tort made by 'offenders in custody' (offenders) against 'protected defendants' (including government departments and their staff).[45]

So far as damages are concerned, Part 2A has two key aspects. First, it imports certain restrictions on the award of damages from the workers' compensation context. Significantly, no damages whatsoever may be awarded to an offender unless he or she has been left with 'permanent impairment' in the order of at least 15 per cent.[46] The process by which impairment is assessed[47] has been heavily criticised.[48] Even where the 15 per cent threshold is surpassed, damages for non-economic loss and loss of earning capacity are specially capped.[49]

The second major way in which 'offender damages' are affected by Part 2A is that any such damages are now required to be paid into a 'victim trust fund'.[50] Persons injured as a result of

any criminal conduct by the offender then have 12 months to commence a 'victim claim', which if successful may be satisfied from the fund. Potential claimants are required to be actively sought out,[51] and the CLA nullifies any limitation problems that may have arisen.[52] Moreover, 'victim claims' may now be determined entirely on the papers.[53] The residue of the fund, if any, is paid to the offender only once any 'victim claims' have been finally determined.

Part 2A has also recently been extended beyond the realm of damages to place certain obligations on any offender who may have a personal injury claim against a 'protected defendant'. Section 26BA now requires such an offender to provide the defendant with notice that a claim may be forthcoming within six months of the incident concerned. Under s26BB, the offender 'must comply with any reasonable request by the protected defendant to furnish specified information, or to produce specified documents or records' so as to enable the defendant to assess the potential claim prior to the commencement of court proceedings. If an offender fails to comply with either s26BA or s26BB, but commences proceedings anyway, the protected defendant may seek to have the proceedings dismissed, and the court must accede if the offender is unable to explain satisfactorily his or her default.[54] There is obvious potential for Part 2A to operate to the disadvantage of an offender, not least because it makes no explicit allowance for the difficulties that many prisoners are likely to have in accessing legal information and obtaining timely advice.[55]

It is difficult to read Part 2A as anything other than an expression of legislative hostility to prisoner claims generally, particularly if its history is reviewed.[56] Its implications will obviously vary from case to case, but the effect of the scheme – surely intended – is that no effective redress will be available in respect of many prison injuries that would otherwise have been readily actionable. Notwithstanding that successful prisoner claims play badly in certain sections of the media, it is important to bear in mind that prisoners are far from a one-dimensional class of people, and in many respects comprise a vulnerable population.[57] Moreover, to the extent that the threat of tort liability encourages prudent governmental behaviour, discouraging prisoners from taking action in respect of government default seems a retrograde step. ■

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Notes: 1 *Howard v Jarvis* (1958) 98 CLR 177 (*Howard*); *New South Wales v Bujdoso* (2005) 227 CLR 1 (*Bujdoso*). **2** Cf *Adams v New South Wales* [2008] NSWSC 1257, [106]. **3** There is, for example, no distinct duty in relation to the performance of work by prisoners: see, for example, *New South Wales v Watzinger* [2005] NSWCA 329; *Haseldine v South Australia* (2007) 96 SASR 530. **4** See, for example *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217, 262 [217] (*S*); cf *Prisoners A to XX v New South Wales* (1994) 75 A Crim R 205, 212-213. **5** See, for example, *Bujdoso* (2005) 227 CLR 1. **6** See, for example, *Cekan v Haines* (1990) 21 NSWLR 296 (*Cekan*). **7** *S* (2005) 143 FCR 217, 262 [216]. **8** *Price v New South Wales* [2011] NSWCA 341, [35]. **9** Cf *S* (2005) 143 FCR 217, 261-262 [213]-[215]. **10** See, for example, *Howard* (1958) 98 CLR 177, 185; *Cekan* (1990) 21 NSWLR 296, 308; *Jiao v New South Wales* [2010] NSWSC 172, [52] (*Jiao*). **11** *Wyong Shire Council v Shirt* (1980) 146 CLR 40; cf *Civil Liability Act* 2002 (NSW), s5B. Breach of duty is the subject of substantially similar statutory provisions in most Australian jurisdictions. For the sake of simplicity, this article will refer primarily to the statutory scheme of NSW. However, insofar as reference is made below to s5B of the CLA (NSW), cf *Civil Law (Wrongs) Act* 2002 (ACT), s43; *Civil Liability Act* 2003 (Qld), s9; *Civil Liability Act* 1936 (SA), s32; *Civil Liability Act* 2002 (Tas), s11; *Wrongs Act* 1958 (Vic), s48; *Civil Liability Act* 2002 (WA), s5B. In so far as reference is made to s42 of the CLA (NSW), cf *Civil Law (Wrongs) Act* 2002 (ACT), s110; *Civil Liability Act* 2003 (Qld), s35; *Civil Liability Act* 2002 (Tas), s38; *Wrongs Act* 1958 (Vic), s83; *Civil Liability Act* 2002 (WA), s5W. **12** Note the effect of CLA (NSW), s42(d). **13** *Mastronardi v New South Wales* [2007] NSWCA 54, [3]; see also *Bujdoso* (2005) 227 CLR 1, 15 [47]. **14** See, for example, *Dixon v Western Australia* [1974] WAR 65; *L v Commonwealth of Australia* (1976) 10 ALR 269. **15** See, for example, *Bujdoso* (2005) 227 CLR 1, 13-14 [44]. **16** See, for example, *Jiao* [2010] NSWSC 172, [23]; cf *Zreika v New South Wales* [2006] NSWCA 272, [17]. **17** See, for example, *Mastronardi v New South Wales* [2009] NSWCA 270. **18** See, for example, *Cekan* (1990) 21 NSWLR 296, 308-309; cf *Bujdoso* (2005) 227 CLR 1, 17 [51]. **19** Cf *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420. **20** CLA (NSW), s42(b). **21** See, for example, *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360, 440 [398]. **22** See CLA (NSW), s42(a). **23** *Cekan* (1990) 21 NSWLR 296, 306. **24** CLA (NSW), s5B(2)(c). **25** *Jiao* [2010] NSWSC 172, [46]; cf *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 480-1 [129]; CLA (NSW), s5C(a). **26** Cf *Juric v Victoria* [2011] VSCA 419, [35]. **27** See, for example, *Cekan* (1990) 21 NSWLR 296, 305-6. **28** (2005) 227 CLR 1. **29** (2005) 227 CLR 1, 15-16 [48]. **30** (2005) 227 CLR 1, 10 [34]. **31** In fact, prison officials had not even taken steps to ensure that the guard responsible for patrolling the compound at the time of the attack was aware of the plaintiff's status as a potential target: see (2005) 227 CLR 1, 11 [36]. **32** [2010] NSWSC 172; [2011] NSWCA 232. **33** [2010] NSWSC 172, [13]. **34** [2010] NSWSC 172, [23]. **35** [2011] NSWCA 232, [11]. **36** See [2010] NSWSC 172, [50]-[53]; [2011] NSWCA 232, [15], [18]-[19]. **37** [2011] NSWCA 232, [19] referring to s5B(2)(d) of the CLA (NSW). **38** [2011] NSWCA 341. **39** See [2011] NSWCA 341, [28]. **40** [2011] NSWCA 341, [44]. **41** See [2011] NSWCA 341, [51]-[58]. **42** CLA (NSW), pt 2A; *Corrective Services Act* 2006 (Qld), ch 6 pt 12B; *Corrections Act* 1986 (Vic), pt 9C. **43** Cf *Hiron v New South Wales* [2007] NSWDC 195. **44** Limitations of space preclude a comprehensive examination of the relevant provisions. For a more expansive discussion, see Grant Scott Watson, 'Civil Claims and Civil Death: "Offender Damages" and the *Civil Liability Act* 2002 (NSW)' (2008) 16 *Torts Law Journal* 81. **45** See CLA (NSW), ss26A-26B. **46** CLA (NSW), 26C. **47** See CLA (NSW), s26D. See also *Michael v New South Wales* [2011] NSWSC 231. **48** See, for example, Andrew Morrison, 'The Duty of Care to Prisoners' (2007) 81 *Precedent* 8, 11. **49** See CLA (NSW), pt 2A, Div 3-4. **50** See also CLA (NSW), s26J. **51** CLA (NSW), s26N. **52** CLA (NSW), s26P. **53** CLA (NSW), s26QA. **54** CLA (NSW), s26BD. Some allowance is made for what the legislation describes as 'vulnerable offenders': see CLA (NSW), s26BC. **55** See, for example, Anne Grunseit, Suzie Forell and Emily McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of New South Wales, 2008). **56** See Watson, above note 44. **57** Cf *Bujdoso v New South Wales* [2006] NSWSC 896, [47].

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