NEGLIGENCE TOWARDS PRISONERS
MORGAN v. ATTORNEY-GENERAL [1965] N.Z.L.R. 134

If anyone imagines that prisoners leave their civil rights behind when they don prison uniform he will be disabused by a reading of *Morgan* v. *Attorney-General* [1965] N.Z.L.R. 134. The plaintiff was serving a sentence of nine months' imprisonment in Mount Crawford Gaol for car conversion. He volunteered for outside work and was allotted the task of splitting felled pine logs for firewood with a fellow prisoner named Birse. Despite his protests and contrary to prison instructions he was issued with smooth-soled boots without studs. A fortnight later, on a Sunday when work by prisoners was not compulsory but on which he had elected to work, he slipped while standing on the slope above a log on which he and Birse were working. He came to rest against the log and Birse's axe severed four toes of his right foot.

He sued the Crown in negligence and the action came on for trial before Tompkins J. and a jury. The issues put to the jury were as follows:

> Were the injuries of the plaintiff caused wholly or in part by failure of the prison officers to exercise reasonable care for the safety of the plaintiff in –
> (a) Requiring him to work while wearing boots without studs or other suitable means for preventing him from slipping?
> (b) Failing to give the plaintiff any adequate instructions for the performance of the work?

The jury found for the plaintiff on both issues, negatived contributory negligence, and awarded him damages.

Counsel for the Crown then moved for a nonsuit or for judgment *non obstante* on the ground that there was no evidence to go to the jury of the defendant's negligence. The learned judge considered that the only basis upon which the plaintiff sould sue was under s. 6(1)(a) of the Crown Proceedings Act 1950, which, so far as relevant, provides:

> (1) Subject to the provisions of this Act and any other Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject –
> (a) In respect of torts committed by its servants or agents ....
> Provided that no proceedings shall lie against the Crown by virtue

> of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.

Tompkins J. found that a duty of care to prisoners was owed by prison staff subordinate in rank to the Superintendent in charge of the Prison whose agents they were and that the extent of this duty was to take reasonable care not to allot the prisoner to work and not to give him orders which they could reasonably foresee would cause harm to him. Since the plaintiff, when he was issued with working boots, was in the company of a warder who refused to accede to the plaintiff's request that the smooth-soled boots be exchanged for others with studs, the learned judge held that the jury could reasonably infer that the warder knew the plaintiff was to engage in outside work for which hob-nailed boots were required by prison instructions, and could reasonably find that the failure to supply him with such boots was a breach of his duty of care to the plaintiff. Thus, although it was felt that the case for the plaintiff was not a strong one on the first issue, it had been properly left to the jury. On the second issue, that of failing adequately to instruct the plaintiff in his work, the learned Judge had no difficulty in rejecting this as imposing too high a standard of care on the prison authorities; nor was there any evidence that the failure had any causative effect upon the accident. But, since there was sufficient evidence to go to the jury on the first issue, the plaintiff held his judgment.

Prison officers have been held liable in tort to prisoners from an early date. The nature of the liability was fully discussed by Smith J. in his judgment in *Quinn* v. *Hill* [1957] V.R. 439 where he referred to a line of cases commencing with *Aaron* v. *Alexander* (1811) 3 Camp. 35. That there may be liability has been recognised in a considerable number of cases. Tompkins J. referred to *Ellis* v. *Home Office* [1953] 2 All E.R. 149 where Jenkins L.J. is reported as saying at page 160:

> (... it was not in dispute) that the common law duty owed by the prison authorities to the plaintiff as an inmate of Winchester Prison was to take reasonable care for the safety of the plaintiff as a person in the custody of the prison authorities.

Pullin v. *Prison Commissioners* [1957] 1 W.L.R. 1186 and *Hall* v. *Whatmore* [1961] V.R. 225 are to the same effect and the principle is now firmly established. [1]

Its development has not, however, gone without challenge on the ground of public policy. In an Australian case *Gibson* v. *Young* (1899) 21 L.R. (N.S.W.) 7 it was held that rights of action in tort which might otherwise exist should not be extended to persons serving a term of imprisonment in a goal where an act or omission of an officer of the penal administration in the general performance of his duties was alleged. The reasons for the decision were first, that a great number of actions

1. Cf. also *McKenzie* v. *Chilliwack Corporation* [1912] A.C. 888 and *Howard* v. *Jarvis* (1958) 98 C.L.R. 177.

would be brought by prisoners based upon frivolous objections to their treatment in gaol, supported by false evidence, and heard before partial juries; second, that the management of gaols would thereby be transferred from skilled prison officers to juries; third, that fear of being sued would prevent prison officers from carrying out their duties properly and prison discipline would be undermined; and lastly that there would be no substantial risk of injustice arising from the denial of legal remedies to prisoners because gaols are managed upon humane principles; *ex gratia* compensation would be paid if justice ever called for this to be done.

The attitude of the Court was well expressed by Cohen J. at page 18:

> Once let disaffection, or defiance born of the knowledge that a prisoner can bring an action – whether well or ill-founded – against a gaol official or the Government, get a foothold, and the firm control so vitally essential in prison life will be lost, and the prisons will be ruled by the prisoners quite as much as, if not more than, by the duly appointed authorities, with a disastrous result that can be too easily imagined.

This robust approach was firmly rejected some sixty years later. Smith J. in *Quinn* v. *Hill (supra)* examined the reasons for the decision in *Gibson* v. *Young* and felt that circumstances had so altered since the earlier case was decided that they no longer appeared compelling:

> In my view [these reasons] rest upon fears and hopes which are unfounded. Lawyers are commonly disinclined to take up cases of a frivolous character .... Moreover, juries are not composed of enemies of society but of ordinary members of it .... They may occasionally be misled into stretching the law when their feelings are aroused; but the likelihood of their doing so in favour of a plaintiff with a criminal record does not seem very great. [2]

The modern view was succinctly expressed by Barry J. in *D'arcy* v. *Prison Commissioners* (reported in *The Times* of 17 November 1955 [3]).

> A prisoner is deprived of his liberties and is subject to earnest discipline but he is not divested of his rights as a citizen.

In the earlier cases the acts and omissions giving rise to civil liability were either grave physical assaults or such maltreatment by deprivation of food, water or adequate accommodation as would injure the prisoner's health. Cohen J., the judge in *Gibson* v. *Young* would probably have regarded the decision in *Morgan's* case with more than faint astonishment for it shows not only the improved status of the modern prisoner but also the considerable development in the law of negligence under the influence of the neighbour principle enunciated by Lord Atkin in *Donoghue* v.

2. [1957] V.R. 439, 448-9. Cf. *Hall* v. *Whatmore* [1961] V.R. 225, 234.

3. See also (1956) Crim. Law Rev., 56.

Stevenson [1932] A.C. 562.

Granted that prison officers owe prisoners a duty of care, what is its scope? In *Quinn* v. *Hill* [1957] V.R. 439 a Full Supreme Court of Victoria (Herring C.J., Gavan Duffy and Smith JJ.) upheld the appeal of a prison wardress from a finding of negligence against her. The respondent was a frail and elderly woman prisoner. While working with the appellant in the prison laundry she caught her arm in a mangle. Herring C.J. and Gavan Duffy J. held that the duties imposed upon the wardress by the Gaols Act 1928 (Vict.) and the Gaols Regulations 1931 (Vict.) were owed by her to her employers and not to the prisoner so as to give the latter a right of action on proof of a breach of those duties. Nor could the respondent succeed in negligence at common law since there was no duty on a person to warn another against a danger created by the other's own action. They cited a passage from Lord Atkin's speech in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580:

> Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and extent of the remedy.

Smith J. disagreed on this point, holding that the wardress in the instant case was under a duty to take reasonable care since she was engaged on the same work as the respondent. The learned judge at page 452 drew a parallel with the duty existing between fellow employees in a common undertaking:

> The two of them were in the same premises ... the circumstances were such that from time to time the safety of each must in the ordinary and natural course of things depend on the care and skill shown by the other in carrying out of her duties. The situation, therefore, was closely analogous to that which arises in ordinary commercial undertakings when the circumstances are such that the doctrine of common employment would be applicable if it had not been repealed.

Hall v. *Whatmore* [1961] V.R. 225 is an instructive case in which s. 23 (1)(b) of the Crown Proceedings Act 1958 (Vict.), which corresponds to s. 6 (1) (a) of the Crown Proceedings Act 1950 (N.Z.), was considered. The plaintiff's left arm was caught in the moving parts of a machine in Pentridge Gaol's wire-netting machine shop where he had been assigned to work. He sued the Inspector General of Penal Establishments. A number of questions of law were argued before the Full Court (Herring C.J., Dean and Hudson JJ.). Herring C.J. and Dean J. in their joint judgment emphasised that before the Crown could be held liable it must appear that some servant of the Crown was himself liable in tort, and this meant that when negligence was alleged there must have been a breach by a Crown servant of a duty owed by that servant to the plaintiff.

They declined, in the absence of evidence, to answer all the questions set down. Hudson J. did so, however, and at page 229 held *inter alia:*

(1) There was no liability for tort except under the Crown Proceedings Act 1958, s. 23 (1) (b) and that this Act did not impose on the Crown the same duties as those imposed upon a subject in like circumstances. The liability of the Crown was vicarious. "It will not avail the plaintiff to establish some act or omission on the part of the Crown which in the case of a subject would constitute a breach by the latter of some duty resting upon him arising out of the ownership of premises or chattels alleged to be dangerous."

(2) The Inspector-General of Penal Establishments was, in the circumstances, not in such a relationship to the plaintiff as would give rise to a duty care. He was not vicariously responsible for the negligence or other wrongful acts of officers at the gaol since these were fellow employees with him of the Crown and not his servants or agents. He owed no statutory duty of care under the Gaols Act 1958 (Vict.) for the personal safety of prisoners; he was not liable as an occupier to persons on the premises, or as the owner of machinery or equipment dangerous or otherwise; and he did not stand towards the prisoners in the relationship of an ordinary employer. All that remained was the general principle of negligence arising out of *Donoghue* v. *Stevenson.*

(3) Since the plaintiff was not an employee the duty of employees to the Crown concerned with his imprisonment did not extend to ensuring that the machine on which the plaintiff was working was made safe by the placing of guards thereon or otherwise. At page 233 Hudson J. says: "Whatmore was not, nor were any other of the employees at the gaol, under any duty to warn the plaintiff of the dangers of the machine or to prevent him from voluntarily exposing himself to the dangers of operating it".

Finally, in *Keatings* v. *Secretary of State for Scotland,* 1961 S.C. 63 the pursuer, a prisoner in Saughton Prison, fell from a painting scaffold when it was shaken by the descent of a fellow prisoner working with him. He sued for damages for the resulting injury and in the Sheriff Substitute's Court relied on the negligent acts of the fellow prisoner. It was successfully argued for the defender that the fellow prisoner was not a servant or agent of the defender so as to impose liability vicariously on him under the Crown Proceedings Act 1947 (U.K.). The prisoner appealed to the Sheriff's Court, adding the further ground that the defender was in breach of the common law duty to take reasonable care of prisoners in custody by providing defective and unsuitable scaffolding. The Sheriff upheld the judgment of the Sheriff Substitute and went on to hold that the prisoner could not succeed under

the fresh ground put forward by him because:

(a) he was not a servant of the Crown so as to hold the Crown liable for providing defective plant and equipment as he might do under an employer / employee relationship,

and (b) he had not alleged negligence against the prison governor, officers or warders and, even if he had, he would have had to go further and show knowledge by them of the defective condition of the plant.

The authorities discussed make it clear that the courts will not add to potential liability for common law negligence the further burden of compliance with factory or building regulations, nor will they regard the prison officer / prisoner relationship as analogous to a contract of service. *Morgan's* case is authority for saying in New Zealand that notwithstanding the Penal Institutions Act 1954[4] and the Penal Institutions Regulations 1961, the payment of "prison wages" and other indicia of a contract of service, a prisoner who is directed to work or who elects to work is not an employee of the Prisons Department which accordingly is under no duty to him to provide safe equipment or a safe system of work. It follows, if a prisoner is not a servant or agent of the Crown, that the Crown cannot be held vicariously liable for negligence to one prisoner by a fellow prisoner. This is a point which it was unnecessary to decide in *Morgan's* case as there was no allegation there that in wielding the axe Birse was negligent. But it is a necessary corollary of Tompkins J.'s judgment, and is directly supported by *Hall* v. *Whatmore* and *Keating's* case *(supra).*

It is submitted that the limitation of liability produced by refusing to regard prison officers as employers will prove illusory if the courts, basing themselves on *Donoghue* v. *Stevenson,* prove willing to treat prison officers **as though** they were employers. "*Donoghue* v. *Stevenson* liability" as such does not apply to the employer/ employee relationship because employers' duties have become crystallized by a separate line of cases in which the leading authority is *Wilson & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57. Does Lord Atkin's neighbour principle nevertheless control actions of negligence brought by prisoners and, if it does, is it very meaningful to insist on the non-equation of prison officers and employers ? Suppose a prisoner is ordered by a prison officer to work on a machine which the officer ought reasonably to know is dangerous and liable to cause injury. If the prisoner suffers an injury he will not succeed in an action for negligence if he alleges a breach of duty in failing to provide safe equipment since this is a duty owed by an employer; but he may well succeed if he alleges a breach of the ordinary duty to take reasonable care for his safety. A remark made at page 233 by Hudson J. in *Hall* v. *Whatmore* is suggestive.

> The fault ... of the gaol employees is in ordering the plaintiff to work on the machine and the manner in which he was attired may be relevant ... to negligence.

4. Especially s.20 which speaks of "work", of "earnings" at a rate approved by the Minister, and of the "inmate" being "employed".

It would seem there is the possibility that the employer's duty may be removed in this type of case only to be replaced by another duty, differently labelled but otherwise indistinguishable, the reasoning being that a prisoner is an Atkinian "neighbour" of his warder whenever the circumstances are such that the warder should reasonably have had him in contemplation as likely to be affected by his acts or omissions.

It may be unimportant whether or not the courts move in this direction, provided that they do not pitch the standard of care too high. The cases reveal occasional acknowledgment of the difficult and multifarious nature of prison guard duty but it is an open question whether juries will show the same solicitude for prison staff when the matter is left to them.

Flynn v. *The King* (1949) 79 C.L.R. 1 was cited in *Quinn* v. *Hill (supra)* as authority for the proposition that duties imposed on prison officers by statutory regulations relating to care and welfare of prisoners were duties owed to their superior officers as a matter of administration and not to prisoners so as to enlarge the rights of the latter. In *Morgan's* case there was evidence of a long standing instruction that all outside parties were to be issued with studded boots. This was a mere internal prison regulation, a kind of standing order. An argument which might have been addressed to the court, but apparently was not, is that the duty under this instruction was owed by the warder accompanying Morgan to the boot store not to Morgan but to his own superior officer.

Tompkins J. said at page 142:

> While the issue of smooth-soled boots instead of boots with nails may seem to be a precaution trifling in itself, I think the circumstances here show that it was a precaution regarding which the prison authorities themselves thought it necessary to have a special instruction, so I do not think it can be considered to be trifling here. I do not think it is applying too high a standard of care for a jury to hold that the prison authorities should have carried out that instruction.

This seems to mean that internal prison regulations may in some circumstances have the effect of enlarging prisoners' rights and encouraging allegations of negligence. If so, the prison administration is placed in a dilemma. The more whole-hearted the attempt to raise prisoners' living and working conditions and the more onerous the duties placed in this regard on prison officers the greater scope for allegations of negligence when the standards laid down by internal regulations are not met. Yet can it be supposed that it would be better to avoid any standards and to send prisoners out to work without any boots?