HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

STATE OF NEW SOUTH WALES APPELLANT

AND

PETER ANDREW BUJDOSO RESPONDENT

New South Wales v Bujdoso [2005] HCA 76
8 December 2005
S289/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

M G Sexton SC, Solicitor-General for the State of New South Wales with P R Sternberg for the appellant (instructed by Crown Solicitor for New South Wales)

J J Graves SC with R J de Meyrick for the respondent (instructed by T D Kelly & Co)

CATCHWORDS

New South Wales v Bujdoso

Negligence – Breach of duty of care – Prison authorities – Respondent was a prisoner admitted to minimal supervision Work Release Programme – Respondent had been threatened by other prisoners – Appellant knew of threats – Respondent assaulted by a group of prisoners – Scope of duty of prison authorities to protect the safety of prisoners under its control – Whether the appellant breached its duty of care to the respondent – Whether effective measures were adopted to prevent a foreseeable risk of injury to the respondent.

GLEESON CJ, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ.

The issue

1 Silverwater Prison is a prison in and conducted by the State of New South Wales. The issue in the appeal is whether the State was in breach of its duty of care to the respondent when he was assaulted during his imprisonment there.

The facts

2 On 16 February 1990, the respondent was convicted in the District Court of New South Wales, on his own plea of guilty, of three counts of sexual assaults on male persons under the age of 18 years. He was sentenced to a minimum term of two years and six months' imprisonment, and an additional term of ten months' imprisonment. The minimum term was due to expire on 15 August 1992.

3 By September 1991, the respondent had been admitted to a prison Work Release Programme ("the Programme"). He accordingly left the prison each working day to undertake paid employment. On his return, he occupied a room in one of a group of buildings known as "the Units" located within a fenced area in the grounds of the prison.

4 On the evening of 21 September 1991, two or more assailants wearing balaclavas, who also were prisoners, entered the respondent's room, and attacked him with iron bars. He suffered serious injuries.

5 In 1991, there were relevantly three main classifications of prisoners[1]: A, B and C. Category C, which was the "lowest" category, was divided into further sub-categories. Prisoners classified as C1 were kept behind a secured fence with minimal supervision. Prisoners classified as C2 were kept in an open institutional environment with minimum security, and prisoners with a C3 classification were permitted to leave the prison on work release, and could be granted weekend, day and education leave. These last were prisoners who in the opinion of the Director-General did not need to be confined by a physical barrier at all times and who did not require close supervision.

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1 Reg 8 of the Prisons (General) Regulation 1989 (NSW) made under the *Correctional Centres Act* 1952 (NSW). See now Crimes (Administration of Sentences) Regulation 2001, Reg 22.

6 The respondent was first imprisoned in Parramatta Gaol, and then, after July 1990, in Bathurst Gaol. By 26 July 1990 he had been classified as Level B. He was soon granted a C1 classification. In November 1990 he was given a C2 classification and was transferred to the Oberon prison farm. There he was taunted by other prisoners and called a "rock spider". The Deputy Superintendent recommended that the respondent be transferred from Oberon to the Kirkconnell Afforestation Camp for his own safety.

7 The respondent made several applications to be included in the Programme which was conducted from Silverwater. In the meantime, at Kirkconnell, he had been assaulted but had not complained. He did not wish to be branded a "dog". In May 1991, he was transferred to Silverwater, and two months later a psychologist, Mr Edwards, recommended that he be accepted for the Programme.

8 In late July 1991 the respondent received an obscene and threatening letter of which the prison officers became aware.

9 At Silverwater the respondent was at first placed in the dormitories. At meal times, he was taunted by being called a "rock spider".

10 The Deputy Superintendent of Silverwater made a note in his journal on 8 August 1991:

> "Reported by Officer J Kirby (SLEF) the finding of two metal knuckle dusters.
>
> All SLEF workers to be searched at 12.15 pm on leaving the SLEF area. Institution to purchase one metal detector for use when prisoners return from work at SLEF."

11 (SLEF is the Silverwater Light Engineering Factory which was fenced off from the Units in which the respondent was assaulted.)

12 On 9 August 1991, Mr Lewis, the Acting Superintendent, sent this memorandum to the Superintendent:

> "Today 9/8/91, I was approached by the Welfare Officer Mrs Torda, in relation to prisoner Peter Andrew Bujdoso. I then spoke to Bujdoso in company with Mrs Torda.

> Bujdoso told me that [another prisoner] was moved into this [an apparent error for 'his'] cell last night, and since that time was causing trouble by turning other prisoners against him. He requested that I move him to another section of the gaol.
>
> The SAU being fully occupied, I arranged for him to be accommodated in Unicom House.
>
> S P O R Brown at 2.15 pm informed me that he has been told by a prisoner that Bujdoso would not be safe in Unicom House.
>
> I have instructed Mr Brown to immediately submit a report on this matter."

Unicom House was an area within the Silverwater complex in which drug and alcohol treatment was provided. It was also known as the D & A Unit.

13 On the same day, Mr Brown, an official based in that unit, reported to the Superintendent in these terms:

> "On commencing duties as SPO in the D & A unit I was informed by Mr Lehn [a prison officer] that inmate Bujdoso 186369 was moved into the unit on Mr Lewis's instructions. I have also been informed that the inmate was moved into the D & A because his cell mate had threatened him. I was also told that Bujdoso was a rock spider and that some of the inmates were going to flog him if he is not moved out of the D & A Unit. I have conveyed this message to Mr Lewis who has stated that Bujdoso is 'there and is stopping there.' I wish it known that the onus is now on Mr Lewis should anything happen to this inmate. Furthermore Bujdoso is here even though he has not got a drug or alcohol problem so he will not be attending the classes which is part of the criteria to be moved into the D & A unit."

14 The respondent said in his evidence at the trial that he was taunted in the dormitory and the lunch room and called a "rock spider". He was told by other prisoners that he should not even be at Silverwater. It was for this reason that he asked to be moved to the work release area. It was when that request was refused that he was located in Unicom House.

15 On his location at Unicom House, he spoke to the Deputy Superintendent, Mr Rochford, and Mr Lewis. They asked him if he wished to go back to Kirkconnell or to stay at Silverwater. He replied that he felt that he would be

safest on work release. His reason was that employment out of the prison from about 5.30 am until 6.30 to 7.00 pm would remove him from the attention of other prisoners for a substantial part of the day: and, that the psychologist had told him that at Silverwater he would be in much less danger in the work release section than elsewhere, because the inmates there had all worked so hard to reach the stage of being on the Programme. He was then asked to write out a statement to that or a similar effect. This is what he wrote and signed:

> "I Peter Bujdoso, feel that I am in no danger. I feel that other inmates will throw verbal abuse at me but I am firmly convinced that is as far as it will go, I wish to remain at Silverwater."

16 The accommodation for prisoners on the Programme comprised four demountable units with two on one side of a walkway, and two on the other. Adjacent to one set of two was the administration block which accommodated the prison officer on duty. Each of the four accommodation units had a central corridor and approximately nine rooms for prisoners on each side. At each end of the corridor was a door which was left open. The units were fenced off from the balance of the Silverwater complex by means of a chain wire fence, the gate to which was locked at night. Within that fence was Silverwater House which also contained prisoners who were participating in the Programme. There were between 80 and 100 such work release prisoners in the area at the time.

17 The respondent was allocated a room at the end of a unit furthest from the walkway. It was also furthest from the administration block. The shower and lavatories were adjacent to it. Each prisoner's room was entered by a door in which there was a small window. Each was fitted with a night latch lock which could be opened from the inside by turning a knob, but from the outside only by a key. Each inmate was given a key to his room which would open only that room. The prison officer on duty had a master key which could open all of the rooms.

18 On 21 September 1991, the respondent returned from work. At about 11.00 pm he saw a face looking through the window in his door. He arose from his bed to see that the door was being pushed open. He went to it and put his shoulder against it but it was forced open. Two to four, he could not be sure of the number, balaclava-clad men burst into the room and immediately began to strike him with iron bars. The respondent huddled in a corner so that only one or two of them could get to him at a time. He was being hit hard on the head. He said that his brain felt like jelly: he was "swimming around in his head" and he lost consciousness. He was also struck on his arm and thumb as he tried to

protect his head. His right knee and back were struck as well but most blows were to his head. His next recollection is of waking up and crossing to a room on the other side of the corridor to ask its occupant to call the prison officer. His injuries included a fracture of the skull.

19 On about 2 October 1991, after receiving remedial treatment, the respondent wrote an application for return to Silverwater so that he could continue with his work. In that letter he said:

> "I accept that the prison officials do not want to accept responsibility for my safety. I take that responsibility on myself."

He also said:

> "The problem at Silverwater is the attitude of certain inmates. They are violent to the core and there is some lapse in the system allowing them to achieve a C3 classification. I am willing to allow myself to be locked in separation to the majority of prisoners with the aim of achieving my stage 2 where I can be reunited with my family."

20 On 7 October 1991, another named prisoner made a statement saying that he was in the toilets when he heard a conversation about a "rock spider" who had been attacked a few weeks before and had returned to the Units. He heard four or five men speaking of giving him another "going over". Following this, the respondent was returned, against his wishes, to Kirkconnell where he served the remainder of his sentence.

21 On the evening of the assault, as was the current practice, one prison officer, Mr Lehn came on duty on the B watch at Silverwater House and the Units at 10.30 pm and remained on duty until 6.00 am the next day. His first task was to check the fence line by walking around its perimeter for some 10 or 15 minutes. Thereafter, he would be joined temporarily by another officer from another unit to make a head count of the prisoners in the Units. They would shine a torch through the window in the door of each room, satisfying themselves that each was occupied, and confirm that the numbers counted coincided with the correct complement of persons. Having completed this head count the two of them would leave the Units and go across to the other units and Silverwater House to conduct a similar head count there: after that they would separate. In consequence there were some periods when there was no officer at the Units at all, and when there was, only one.

The trial

22 The respondent sued the appellant for damages for personal injuries in negligence in the District Court of New South Wales. The action was heard by Cooper DCJ, sitting without a jury.

23 Mr Mercer, who became the Governor of the Mid North Coast Correctional Centre, and was an Assistant Superintendent at Silverwater between 1989 and 1992, gave evidence. He explained that until 1990, there had been two officers working on the B watch, one at Silverwater House and one in the Units. In late 1990, the number of officers in those sections was reduced to one. The main role of the officer on duty on the B watch was "accountability", that is apparently ensuring that all prisoners were present on random checking. Because the majority of the inmates there were out in the community for most of the day, and some for most of the night, Mr Mercer believed that there were no "custodial issues" with them. If one did arise with a particular inmate he would have been removed from the work release area.

24 Mr Edwards, the prison psychologist, had worked at the Silverwater complex for four years by 1991. It was one of his duties to assist in the assessment of the suitability of an inmate for the Programme. He also provided psychological services as required, not only in preparation for an inmate's inclusion in the Programme but also in preparation for his release into the community.

25 Mr Edwards could recall the respondent for two reasons. The first was his willingness to confront and deal with his criminal tendencies. The second was the fact of the assault itself.

26 Mr Edwards said that the incidence of violence within the Units was very low, lower than in other sections within the Silverwater complex which itself had a lower incidence of violence than other institutions. He did concede however that if there were a risk to a particular prisoner it could be reduced if he were given a room next to the warder's station.

27 Mr Mercer explained that not all inmates who came to the Silverwater complex were considered suitable for a C3 classification. If unsuitable, they were returned to the gaol from which they had been sent. An inmate who fought, or failed to follow instructions, would be unlikely to be allowed to undertake the Programme.

28 Mr Mercer's evidence was that inmates who had been convicted of sexual offences against children were at times placed in mainstream prisons in association with other inmates who had not committed offences of those kinds. They would be counselled to redress the cause of their imprisonment. Inmates convicted of sexual offences against children generally preferred not to be housed with other such inmates. In the case of the respondent, a plan would have been made to deal with his offending behaviour, part of which was his release to work.

29 Mr Mercer could recall only one other serious assault upon an inmate on the Programme and in the Units. The victim had been fire bombed, not because he was a sexual offender against children, but because he had given information at Long Bay Prison about the presence of a hand gun at the Central Industrial Prison. There was one other significant piece of evidence given by Mr Mercer. He said that it had been the practice of some prisoners to absent themselves from the Units at night in order to visit the nearby Silverwater Speedboat Club where they drank alcohol and generally behaved as if they were not prisoners. Better surveillance in the form of random checks had instantly stopped these abscondings.

30 The primary judge said that it was clear from the evidence that the prison authorities believed that those within the fence that housed the work release inmates could be trusted, and had proved themselves worthy of that trust. Accordingly, no special measures were necessary to ensure their safety.

31 In dismissing the respondent's action, the trial judge was critical of some of the expert evidence called by the respondent:

> "There was tendered in the [respondent's] case a report from Mr Ryan, a consultant who has had some experience, albeit limited, in the correctional services industry. Notwithstanding this, he does make some points which are worthy of consideration. In his report of 14 November 2002 ... he sets out the history of what he had been informed were threats made to the [respondent]. In particular he referred to the [respondent's] movements from Oberon to Kirkconnell and from the dorms into Unicom House due to threats made against him.
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> He also points out that there always exists in the prison community a definite hierarchy or pecking order and sex offenders are of the lowest stratum. To quote from his report:

> 'Once prisoners make it through to something like a work release program, there is an inferred expectation that they require minimal supervision and maintenance. After all they are free in the wider community for much of the time so their propensity for errant or illegal behaviour is deemed to be at a minimum. That does not take into account however, that there will always be present in even the most open of correctional setting a hard core, recidivist element. Such individuals are most often long term and institutionalised offenders who tread a very fine line but who often fall back easily into criminal ways.'

He goes on to say that placement on the work release program subjected the [respondent] to further exposure because he was in a setting where there was almost no direct supervision or monitoring for lengthy periods during the night. Moving him into Unicom House drew even more attention to him and would have attracted even more adverse interest because of the fact that he was a non participant in the drug and alcohol treatment program. The cell/room in which he lived was fundamentally insecure, the size of the work release unit, its layout and the absence of a prison officer made it a most dangerous environment in which to place someone of [the respondent's] circumstances.

Mr Ryan postulates that while it is generally advantageous for any prisoner to make his way through the various levels of security to the point where he can participate in a work release program there are some cases where the contrary is indicated. The [respondent's] was one such case. He concludes:

> 'In summary, despite [the respondent's] insistence that he participate in the works release program, proper consideration of the case would have dictated a refusal of that request. In the alternative, further security should have been provided for [the respondent] given his special circumstances and the well documented knowledge of the concerns about him.'

There are significant inaccuracies in the statement of facts upon which Mr Ryan based his opinion. The first was that there were records of minor assaults perpetrated upon the [respondent].

Whilst the [respondent] gave evidence of one previous minor assault in March 1991 at Kirkconnell, he did not report it and I am

satisfied on the probabilities that it was never recorded and so never came to the notice of the prison authorities.

The second inaccuracy is the statement that '[the respondent] was placed in an environment where there had been recorded weapons findings.' In support of this he relied upon exhibit B. That document, however, refers to knuckle dusters being located within the SLEF area. That area was fenced off and quite separate from the work release units."

32 The appellant had not at the trial disputed that a duty was owed. That no doubt was because of what was said by Dixon CJ, Fullagar and Taylor JJ in *Howard v Jarvis*[2]. This was applied as the settled law in *Cekan v Haines*[3]. More recently, in *State of New South Wales v Napier*, Mason P had said[4]:

"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 the primary judge's opinion however that the appellant had not been in breach of the duty of care which it owed to the respondent in this case. The primary judge said this:

"The [appellant] concedes that the supervision was minimal but says that it was appropriate in the light of the fact that the inmates in the units and Silverwater House had all passed through various tests and observations to the extent that they were trusted to go out into the community on works release and/or day leave. Accordingly they could be trusted not to inflict an assault upon a fellow inmate. In my view this is a reasonable conclusion for the authorities in charge of that prison to have reached."

One finding of the primary judge which the Court of Appeal thought important was that the history of the respondent, as known to the appellant, "was one where

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2 (1958) 98 CLR 177 at 183. *Howard v Jarvis* was followed in *Morgan v Attorney-General* [1965] NZLR 134 at 138-139.

3 (1990) 21 NSWLR 296 at 308, 310.

4 [2002] NSWCA 402 at [75].

there was a potential that the [respondent] could be subjected to physical violence".

The Court of Appeal

33 The respondent successfully appealed to the Court of Appeal of New South Wales (Sheller, Ipp and McColl JJA)[5]. Ipp JA, with whom Sheller and McColl JJA agreed, said[6]:

> "Prisoners convicted of sexual assaults on minors are known in prison as 'rock spiders'. They are regarded with contempt by other prisoners and are often subjected to verbal and physical abuse by them. For this reason sexual offenders are sometimes placed in protective custody. The [respondent] did not wish to be placed under protection and attempted, while in gaol, to stay away from other paedophiles. He also attempted to keep secret the offences of which he had been convicted. He was, however, unsuccessful."

34 His Honour was influenced by the appellant's reduction in the number of supervising officers at Silverwater and said this[7]:

> "In late 1990, the system was changed by reducing the number of officers in Silverwater House and the Units to one. The second officer was moved to a different section of the Silverwater complex. Mr Mercer, who at the relevant time was an assistant superintendent at Silverwater, testified that the officers were reduced from two to one 'because of the lack of custodial issues and the administrative and accountability role that they played'. It is apparent from other evidence given by Mr Mercer that, by 'custodial issues' he meant issues involving the potential escape of the prisoners. 'Accountability' involved head counting. It does not seem from Mr Mercer's testimony that any thought was given to the personal safety of the prisoners residing in the Units.

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5 *Bujdoso v New South Wales* (2004) 151 A Crim R 235.

6 (2004) 151 A Crim R 235 at 237 [9].

7 (2004) 151 A Crim R 235 at 240 [32]-[34].

The effect of the reduction in officers meant that for substantial periods within every two hours there was no officer at the Units and the prisoners were left entirely alone there.

The lock on the [respondent's] room door was flimsy and out of date. It could be forced open fairly easily. Its purpose was merely to give privacy to the inmates. As the trial judge found, 'it was never intended to keep out a person or persons who might be striving to enter the room with felonious intent'."

35 His Honour thought these matters of particular relevance[8]:

"At Silverwater [the respondent] had received the anonymous threatening letter and had been called a rock spider. In a report dated 26 September 1991, Mr Edwards stated that the [respondent] had 'often reported incidents in which he had been threatened, vilified or humiliated'. Mr Edwards testified:

> 'Those issues came up in ongoing discussions about whether or not [the respondent] could be maintained safely at Silverwater.'

He said that that information 'was related to other staff in case discussions, direct discussions of how well he could be managed.'

The fact that the [respondent] signed a document stating that he did not fear for his safety does not detract from the actual knowledge of those in control of the Units that his safety was at risk. Indeed, the fact that Mr Rochford and Mr Lewis asked him to make a statement to that effect indicates that they appreciated that he was at risk and did not want to be blamed should the risk materialise."

36 His Honour's conclusion appears in the following paragraph[9]:

"... I consider that the [appellant] did breach the duty of care it owed the [respondent] and the judge erred in finding to the contrary. The system of trusting the C3 prisoners had not always worked, there had been a serious

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8 (2004) 151 A Crim R 235 at 243 [60]-[61].

9 (2004) 151 A Crim R 235 at 243-244 [63].

> assault in the past and virtually continuous minor infractions. The [appellant] had reduced to one the number of guards on duty at the Units for reasons unrelated to prisoner safety. Importantly, the [appellant] had actual knowledge that the [respondent] was at risk. Nevertheless, it took no additional steps to protect him. Those in control and who knew that the [respondent] had been threatened did not even inform the guard at the Units (Mr Lehn) of this fact, and did not even provide the [respondent] with a more secure lock on his door. Nothing was done. In my view that was negligent."

The appeal to this Court

37 The appellant's principal submission in this Court is in substance that it had implemented at Silverwater Prison a reasonable system of incarceration which balanced two, sometimes competing objects, an enlightened approach to rehabilitation, and the security of the institution as a prison. The appellant argued that the means chosen of achieving these objects, the classification of prisoners, and the supervision of them according to that classification were reasonable, and had in practice operated satisfactorily. In particular, it was said, experience had shown that prisoners such as the respondent and those surrounding him in Silverwater, required little supervision and had not previously been responsible for assaults.

38 The appellant pointed out that prisoners who were classified as C3 were permitted to take weekend, day and education leave. They could also work in the general community during the daytime. Silverwater was the only prison in New South Wales where Work Release Programmes were available. Such a programme was especially important to the respondent because he had mortgage payments to meet. And as he was keen to obtain treatment for paedophilia as soon as possible, the Programme offered him a further opportunity to obtain this.

39 This last matter, and the references by the appellant to the documents that the respondent signed expressing his wish to stay at Silverwater and to participate in the Programme, carried an implication that in some way the respondent, rather than the appellant, was responsible for the injuries caused to him. Such submissions are not to be accepted. This is not a case to which the maxim of volenti non fit injuria is applicable. The respondent's apparently sincere desire for rehabilitation, and his application to be imprisoned at the only place where that desire could be achieved, could not relieve the appellant of the duty of care it owed to him. The respondent was not required to make a choice between rehabilitation and personal safety. It was the duty of the appellant to

take reasonable care for the respondent whether he was participating in the Programme or was a differently classified prisoner.

40 As to the minimal nature of the supervision of inmates housed in the Units at Silverwater, the appellant submitted that it was appropriate having regard to the C3 classification of all those living there. It had, the appellant submitted, been well established that they were persons who could be trusted. The appellant accepted, indeed contended, that enlightened modern penology requires that emphasis be placed upon rehabilitation and that it should not be, as a decision against it here would, penalized for seeking to achieve that end.

41 The appellant submitted that Ipp JA in the Court of Appeal misused the existence, or knowledge, of risk as the basis for a finding that the appellant had a positive duty to take "additional steps" to alleviate it. In doing so, it was argued, his Honour did not indicate what additional steps should have been taken by the appellant, or evaluate whether any such additional steps were reasonably required in the circumstances. In so doing, the appellant contended, Ipp JA fell into an error of the kind which Gummow and Hayne JJ identified in *Graham Barclay Oysters Pty Ltd v Ryan*[10], of formulating a duty of care retrospectively as an obligation purely to avoid the particular act or omission said to have caused loss[11]. Reliance was also placed upon what Gaudron J said in *Bennett v Minister of Community Welfare*[12] that "a precaution is not classified as 'reasonable' unless it can be said that its performance would, in the ordinary course of events, avert the risk that called it into existence."[13]

42 The appellant then sought to emphasize that the primary judge had held at first instance that the assailants were "desperate" to make an attack upon the respondent. They carefully planned and executed it, without warning, concealing their identity in doing so, having earlier secreted iron and steel bars, and contravened the conditions of their curfew, all of which constituted breaches of prison rules. Each of the assailants therefore risked losing his own classification. Accordingly, it was argued, the measures in respect of which the appellant was

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10 (2002) 211 CLR 540.

11 (2002) 211 CLR 540 at 611-612 [191]-[192].

12 (1992) 176 CLR 408.

13 (1992) 176 CLR 408 at 422.

found to be deficient by Ipp JA, of increased supervision and a secure lock on the respondent's door, would not, in any event, have prevented the attack on the respondent. Even the presence of more prison officers in the Units would not have been effective. There would still have been periods when the respondent was left unsupervised. Furthermore, the appellant submitted, even if the measures might have been effective, it would not have been reasonable to impose them upon it, having regard to the evidence of Mr Edwards, who had said this:

> "Once people move into unit accommodation and work release that sort of oversight and surveillance was absolutely minimal and it was usually because these people had passed through every possible check ... that we could come up with to determine that they were about as low risk of committing further offences in or out of gaol as we could estimate."

43 The appellant's submissions continued, that as the respondent himself recognized, the appellant would have had to deny him a C3 classification and exclude him from the Programme in order to eliminate the risk. Action of this nature would have significant implications for the system of classification generally and especially for prisoners in some categories of which paedophiles formed one.

The disposition of the appeal

44 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 at which they generally lawfully conduct themselves[14]. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates[15]. Many of the people in prisons are there precisely because they present a danger, often a physical danger, to the community. It is also notorious that without close supervision some of the

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14 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

15 The seriousness of risk of injury to prisoners and its consequences for criminal justice and the penal system appear from *York v The Queen* (2005) 79 ALJR 1919.

prisoners would do grave physical injury to other prisoners. The respondent here did not simply rely upon the notorious fact that prisoners convicted of sexual offences against minors are at greater risk than other offenders: he proved that the appellant knew that he had been threatened and taunted by other prisoners, on that account, albeit to a somewhat lesser extent at Silverwater Prison than he might have been in the other institutions in which he had been imprisoned.

45 In the United States, the common law, federal constitutional considerations apart[16], has long recognized the special situation of prisoners and the obligations of those having their custody. In a leading text on the law of torts it is said, with ample citation of authority[17]:

> "An affirmative obligation to use care to control the conduct of others may also be raised by a special relationship between the actor and the person injured. Thus where one stands in loco parentis, or is put in charge of persons under circumstances that deprive them of normal means of self-protection (eg, prisoners), he must use care to restrain the foreseeable dangerous conduct of third persons that unreasonably threatens his wards."

In §320 of the *Restatement of Torts*, the reporter for which was Professor Prosser, it is said, with reference to a range of persons, including gaolers[18]:

> "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
>
> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

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16 See *Logan v United States* 144 US 263 at 285 (1892).

17 Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 3, §18.7.

18 2d, vol 2, Div 2, "Negligence", Ch 12, "General Principles", (1965).

(b) knows or should know of the necessity and opportunity for exercising such control."

46 The position in England is well summarized in *Halsbury's Laws of England*[19]:

> "The duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, including the prisoners[20]. Actions will lie, for example, where a prisoner sustains injury as a result of the negligence of prison staff[21]; or at the hands of another prisoner in consequence of the negligent supervision of the prison authorities[22], with greater care and supervision, to the extent that is

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19 4th ed reissue, vol 36(2), par 565.

20 *Ellis v Home Office* [1953] 2 QB 135, [1953] 2 All ER 149 at 154, CA; *Palmer v Home Office* (1988) Guardian, 31 March, CA.

21 See, however, *Knight v Home Office* [1990] 3 All ER 237, 4 BMLR 85, in which Pill J held that the standard of care provided for a mentally ill prisoner detained in a prison hospital was not required to be as high as the standard of care provided in a psychiatric hospital outside prison since psychiatric and prison hospitals performed different functions and the duty of care had to be tailored to the act and function to be performed. See also *Brooks v Home Office* [1999] 2 FLR 33, QBD.

As to the liability of the Home Office where a prisoner is held in intolerable conditions of confinement see *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL. See also *Toumia v Evans* (1999) Times, 1 April, CA.

22 *Ellis v Home Office* [1953] 2 QB 135, [1953] 2 All ER 149, CA. There are a number of examples of cases where prisoners have sought (with greater or lesser success) to fix the prison authorities with liability in negligence in relation to injury caused by the violent acts of other prisoners: see eg *D'Arcy v Prison Comrs* [1956] Crim LR 56; *Anderson v Home Office* (1965) Times, 8 October; *Egerton v Home Office* [1978] Crim LR 494; *Porterfield v Home Office* (1988) Times, 9 March, Independent, 9 March; *Palmer v Home Office* (1988) Guardian, 31 March, CA; *Steele v Northern Ireland Office* [1988] 12 NIJB 1; *H v Secretary of State for the Home Department* (1992) Times, 7 May, 136 SJ 140, CA. See also *Hartshorn v Home Office* (21 January 1999, unreported), CA, in which liability in negligence was established were prison staff failed to take reasonable care to ensure that a non-

(Footnote continues on next page)

reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other prisoners[23]; or if negligently put to work in conditions damaging to health[24]; or if inadequately instructed in the use of machinery[25]; or if injured as a result of defective premises[26].

The prison authorities also owe a duty of care to members of the public, and an action will lie where property is damaged by prisoners which results from negligence on the part of the authorities, but a wide latitude will be allowed the authorities in determining proper ways of dealing with inmates before liability is imposed[27]."

47 As the respondent was a known likely target of other prisoners, the appellant was under a duty to adopt measures to reduce the risk of harm to the respondent.

48 What measures did the appellant in fact adopt? Towards or for the protection of the respondent, the answer is, effectively, none. It simply relied on its system of classification, effectively treating it as a virtually infallible solution to such problems as might arise, and a somewhat perfunctory personal oversight effectively by one warder, only, during the night, of all of the prisoners in the Units. That the appellant solicited from the respondent a signed document in the nature of, but not effectual as, a release, or an acceptance of responsibility for his own safety and welfare at Silverwater, cannot avail the appellant. The contrary is

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statutory rule, designed to limit the opportunity for prisoners to assault other prisoners, was obeyed.

23 *Egerton v Home Office* [1978] Crim LR 494.

24 *Pullen v Prison Comrs* [1957] 3 All ER 470, [1957] 1 WLR 1186. ...

25 *Ferguson v Home Office* (1977) Times, 8 October, where damages were awarded in respect of injuries to a prisoner's hand. The duty applies even if the machine was not at the time being used in the interests of the prison authorities: *Ferguson v Home Office* supra.

26 *Christofi v Home Office* (1975) Times, 31 July, where a prisoner was awarded damages for injuries received as a result of a fall on a broken step.

27 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL.

the case. The fact that the appellant invited the respondent to sign such a document shows that the appellant must have been aware that the respondent was, despite the classification of the other prisoners as relatively trustworthy, at greater risk than the others.

49 This was not a case in which it was proved, or even contended that measures to ensure closer supervision of prisoners, were costly or so much more costly as not reasonably to be affordable[28]. Nor was it suggested that secure doors and locks could not have been provided. No reason was advanced why the respondent was allocated a room furthest away from the prison officer's station, an allocation which self-evidently, and as a matter of actual evidence from the psychologist Mr Edwards, increased the risk which the respondent ran. It is of relevance also that although the respondent had specifically requested a room close to the warder's station, no explanation was offered by the appellant as to how the request was dealt with and why such a room was not provided. And again, the appellant did not say how it was that the assailants were able to obtain, conceal and use the iron bars that they used to injure the respondent. It is clear that the appellant did truly place almost all of its trust in the system of classification, and what it hoped would flow from that.

50 The Court of Appeal was right to hold that the appellant failed in its duty to the respondent. There was more than a mere foreseeable risk of injury to the respondent. There was a risk that had actually been expressly threatened. The risk, if it were to be, as it was, realized, was of considerable physical injury to the respondent. Such a risk, once known, called for the adoption of measures to prevent it. All of this is well established[29]. No *effective* measures were adopted.

51 The respondent did actually point to measures which could reasonably have been undertaken but were not: closer and more frequent checking of prisoners; better and stronger locks and doors; checking for weapons; and, relocation of the respondent within the Units. The case was not one therefore of the kind which the appellant submitted it to be, of the recognition, but only retrospectively, of dangers not reasonably foreseeable and not capable of avoidance at the time. Nor was it a case in which the Court of Appeal failed to identify the measures which could and should have been taken to minimize the

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28 *Cekan v Haines* (1990) 21 NSWLR 296 at 306-307, 314.

29 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

risk to the respondent. Indeed, one of the appellant's witnesses had effectively identified one of the measures available, the one which had stopped the visits to the Silverwater Speedboat Club, that is, of better surveillance. That and the other measures identified by the Court of Appeal would have been likely in fact to obviate the risk to the respondent. There was no obligation upon the respondent to prove, as the appellant contended he should, that they would have *guaranteed* his safety. Reasonable care was enough. And that was missing, as the Court of Appeal rightly found.

52 We would dismiss the appeal with costs.