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PRISON LITIGATION: BARRIERS TO JUSTICE

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Getting justice – or even just enforcing the rule of law – in a prison context is extraordinarily difficult. There are numerous barriers to justice, but also various strategies to overcome them.

On 19 November 1999, a forced cell extraction was conducted at Port Phillip Prison, a 700-bed, high-security private prison on the outskirts of Melbourne, operated by GSL Custodial Services Pty Ltd (under contract with the Victorian government). The extraction was conducted by the prison's Tactical Operations Group (TOG), a specialist paramilitary prison officer team.

A prisoner was stabbed at around 7pm in Swallow Unit, a mainstream unit at the prison. The 60 or so other prisoners in the unit were immediately locked in their cells. Police attended the scene and then left after conducting their initial investigation. A prison manager then identified five suspects to be 'extracted' and relocated by the TOG to Charlotte Unit, the prison's high-security unit.

Cell extraction involves moving prisoners from one unit in a prison to another. Officers are required to offer prisoners the opportunity to move cells without the use of force: usually this involves prisoners placing their hands through the 'trap' in the cell door, being handcuffed, retreating with their hands handcuffed and still in the trap as the door is opened, and then being walked to the new unit. If prisoners reject the chance to relocate without force, minimal force can be authorised to move them. Any planned use of force should be videotaped with a hand-held camera.

The TOG arrived in Swallow Unit several hours after the stabbing and donned body armour, helmets and shields in view of many of the prisoners. The group posed for a photograph (it was the first time it had been deployed) and then commenced the forced cell extraction of the five prisoners. Force was used as a first resort. The prisoners were not provided with an opportunity to place their hands through the trap for handcuffing. The extractions were not videotaped.

In statements released under the *Freedom of Information Act* 1982 (Vic), the prisoners alleged that they were brutally assaulted during the course of the cell extraction and relocation. Each extraction differed, but in general the prisoners alleged that the TOG squad ran in behind a riot shield, pinned them to the wall and then punched, kicked and trod on them before pulling their hands behind their backs and restraining them with plastic restraints. One prisoner, who was taking sleeping medication, alleges that he was asleep when the officers ran in. He woke to being picked up off his bed and thrown on to the floor of his cell. Another prisoner reported having his head grabbed and bashed against the concrete floor of his cell until he lost consciousness. Another alleged that officers deliberately bashed his head against the metal window frame in his cell.

The statement from one prisoner, an indigenous man, states:

> 'they just ran at me, and smashed me up against the wall and started punching into me…they were punching me everywhere…I was bleeding and all and then they slammed me to the ground and kicked me in the guts, and kicked me in the face, kicked me in the head, jumped on my head, they broke my nose a little bit more…and broke something on my cheek…they knocked me out unconscious…now I've got a little broken bone in my wrist…and they go "If you bleed, if your blood is on my shoe, you're fucked, you little black dog".'

The indigenous prisoner admitted that he threw a television at the TOG when they entered his cell. The other prisoners stated that they did not fight back. The officers' statements allege that the extraction was conducted using approved control and restraint mechanisms and that the prisoners received either 'minor abrasions' or no injuries. They denied assaulting the prisoners in the way described by the prisoners.

Other prisoners who witnessed or heard the extractions in the unit made corroborating statements, saying that they saw prisoners being dragged from their cells bloodied or unconscious.

THE LITIGATION

In response to the unrest in the unit following the incident, GSL engaged a former police officer, who ran a security business, to investigate and report on the incident. Victoria Police interviewed some of the prisoners about the alleged assaults, but took no further action.

One of the prisoners sought advice about a possible civil claim against the prison. The matter was eventually referred to the Brimbank Melton Community Legal Centre (Brimbank).

Through their lawyers, the prisoners lodged freedom of information applications seeking the investigation reports, various statements and other documents. Corrections Victoria refused the bulk of the request, but released extracts of some of the documents. These included parts of a 'Final Report' into the incident. The 'Final Report' notes the denials of the officers, notes that the police were not taking any action against the officers and makes some minor recommendations about improvements to procedures.

The prisoners reviewed the decision to refuse the release of the bulk of the documents in the Victorian Civil and Administrative Tribunal (VCAT) In 2004, they successfully obtained essentially all of the documents sought, with the exception of the names of the officers involved (many involved in the incident could not be identified by the prisoners because of their visored helmets and the lack of any name badges).[1]

The documents released by the VCAT order revealed that there was another 'Final Report' that was prepared by the investigator before the 'Final Report' that was initially released under FOI. The other 'Final Report' was far more critical of the failures of the prison. It notes that the five prisoners had nothing to do with the initial stabbing incident and questions the basis for identifying them as suspects for extraction. It notes that they 'did receive injuries' and lists as a 'matter for concern' that the injuries were not photographed and the prisoners were not examined by medical staff. It also notes an 'apparent lack of control of officers' and states that procedures to offer relocation without force to the prisoners and to video the forced cell extractions were not followed. It states that officers lied about whether they had taken a photo of themselves before conducting the extraction.

The existence of the two 'Final Reports' strongly supports the conclusion that after receiving the far more critical 'Final Report', the prison told the investigator to prepare a watered-down second version (which then formed the basis for monitoring reports within the Department of Justice).

Brimbank helped four of the prisoners to sue GSL and others for compensation. The *Herald Sun* ran an article in January 2004 about the case and several others under the headline 'Crims in Compo Rush'.[2] The article highlighted the crimes that put the prisoners in jail and noted Brimbank's taxpayer funding.

Slater & Gordon then agreed to take on the case. In 2006, the claims of two of the prisoners were confidentially settled just before trial. Two of the men by then had died, and Brimbank had lost contact with another on his release from prison.

BARRIERS TO JUSTICE

Many of the numerous barriers to obtaining justice in prison litigation are highlighted by this case study.

For a prisoner, complaining about a prison incident creates a significant risk of victimisation. The minutiae of prisoners' daily lives are controlled by the prison authorities. Prisoners who complain often report retribution in the form of violence and threats, as well as lesser but still insidious retribution such as suffering more restrictive regimes (locked in cells 23 hours a day), being charged with prison offences, being denied access to work and education, having everyday requests refused or delayed, being subjected, if non-smokers, to incarceration in a cell with smokers, and so on. Prison culture, with its 'code of silence', also militates against speaking up.

The prisoners who do complain tend to be those who have suffered great injustice or who have the least to lose or fear. Many prisoners are in and out of prison within a relatively short period. The easiest and quickest way to progress through the system is to shut up and put up with any injustice. Good relations with prison staff promote an easier prison stay, quicker progression to lower security environments and faster parole. Prisoners who complain are often those serving long sentences. Consequently, they are often those who have committed the most horrific crimes and who generate the least sympathy from the public, the politicians and the judiciary. Yet the cases brought by these prisoners frequently deal with important issues

affecting the general prison population, including enforcing the rule of law and fundamental human rights protections.

The attitude of the Australian judiciary to prison cases often compounds the difficulties of prison litigation. In prison administrative law, judges subscribe to the principle of judicial deference to prison administrators, and repeatedly highlight the difficulties involved in managing prisoners, stating that the courts should be reluctant to intervene.[3]

Communicating prison complaints to the outside world is difficult. It takes around 3 to 10 days for a lawyer to be put on a prisoner's phone list, enabling the prisoner to call the lawyer. Prisoners have to pay for their phonecalls (as well as canteen items, toiletries, stationery, photocopying, etc). Given the basic prison 'wage' of around $13 a week for a non-working prisoner, combined with the fact that prisons are often in rural locations, this cost is significant. Lawyers cannot call prisoners directly, although it is possible to organise legal calls with advance notice.

Face-to-face communication is vital in building trust and rapport with prisoners, yet prison visits are often difficult and time-consuming. Lawyers sometimes wait up to an hour to pass through security to get to the visit centre. Often, contact visits are not permitted, so a perspex barrier separates lawyer and client. Documents then have to be handed to an officer and on to the prisoner (in Port Phillip Prison, even exchanging documents is not permitted – they must be left for the prisoner at reception). Visits often take place within hearing of the prison officers.

Mail between lawyers and prisoners is supposed to be confidential but, in practice, it is often opened. When the subject of the legal communication involves questions of illegality on the part of the prison, this practice is particularly disturbing, especially given the risk of victimisation against the prisoner. In commercial litigation, this would be equivalent to the defendant being able to review the plaintiff's legally privileged communications. Yet, when prisoners take legal action about the fact that their confidential legal mail is being opened in clear breach of the *Corrections Act* 1986 (Vic),[4] they are told by the courts that they are 'nit-picking'.[5]

Prisoners generally have lower levels of education and far higher rates of substance abuse and mental illness than the general population. It takes time and effort for lawyers to build client trust. There are also significant credibility hurdles when prisoner evidence contradicts that of prison officers.

It is difficult for prisoners to get legal assistance for cases concerning the conditions of their imprisonment (as opposed to criminal cases). The scarcity of legal resources puts prisoners bringing prison litigation in a position of considerable disadvantage, compared with the prison authorities they are suing. Most prisoners cannot afford to pay for a lawyer or disbursements like medical reports. Legal aid is generally not available for civil matters. Corporate firms are less likely to offer pro bono assistance because of the subject matter of the cases and the potential for conflict of interest if they act for government or private prison operators. Plaintiff firms are reluctant to take the cases on a 'no-win, no-charge' basis because the cases are difficult to run and the damages payouts tend to be modest.[6] Cases often end up with poorly resourced community legal centres. Queensland is the only Australian jurisdiction with a specialist community legal centre for prisoners.[7]

In cases like the Port Phillip matter, involving the police creates the façade of an official investigation into an incident. In reality, police are often reluctant to spend time investigating prison incidents, partly because of the criminality of the victims, and partly because it is unlikely that the matters will ever be successfully prosecuted.[8]

OVERCOMING THE BARRIERS TO JUSTICE

While the barriers to justice in prison litigation are significant, they are not insurmountable.

Associate Professor Brian Martin, an academic at the University of Wollongong, has developed an excellent framework called the 'backfire model' to analyse methods used to inhibit outrage over injustice and the means that can be employed to expose the injustice and create a 'backfire effect'.[9] In a prison context, the framework can suggest strategies to overcome barriers to justice.

The framework identifies five methods for inhibiting outrage and five corresponding methods to expose injustice and increase outrage. The table below sets out these five methods and applies them with examples from a prison litigation context, drawing on the Port Phillip matter and other prison cases.

BACKFIRE FRAMEWORK DEVELOPED BY BRIAN MARTIN	
Methods to inhibit outrage over injustice	**Methods to increase outrage over injustice**
Cover up the action • Fail to follow procedures to video assaults. • Fail to have injured prisoners assessed by medical staff. • Prevent the identification of officers by wearing visored helmets and not wearing name badges. • Refuse to release names. • Water down monitoring reports. • Resist the release of damaging documents.	**Expose the action** • Use Freedom of Information laws to obtain as much relevant information as possible. • Critically evaluate refusals to provide information. • Take photos of the action if possible. • Speak to witnesses. • Take statements. • Get injuries assessed and documented, independently if possible. • Act quickly.
Devalue the target • Label the prisoners as criminals. • Undermine credibility by referring to their crimes. • Use sympathetic law and order media.	**Validate the target** • Label prisoners as human beings. • Highlight the impact on their families, etc. • Use informed media.
Reinterpret what occurred • Describe actions as 'minimal use of approved control and restraint tactics'. • Describe injuries as minimal and acceptable. • Highlight training of officers. • Blame prisoners and charge them with assaulting officers.	**Emphasise injustice** • Highlight injuries and their impact. • Defend counter-allegations. Highlight breaches of fundamental rights. • Emphasise the impact of violence by officers against prisoners; for example, the importance to community safety for prisoners to be treated fairly and get a proper chance to rehabilitate.
Use ineffective official channels to give the appearance of appropriate action • Arrange investigation by 'independent' investigator. • Refer to police (knowing it is extremely unlikely that prosecution will occur). • Highlight the existence of monitoring processes (which are often ineffective, especially when the prison controls the release of information about the incident).	**Mobilise public support – use alternative channels** • Take action in the courts. • Use the Ombudsman and other investigation bodies. • Use the media if it is possible to get informed coverage. • If possible, try to get 'whistleblower' evidence.
Pressure the target to stop the action by intimidation, bribes, confidential settlement offers, etc • Victimise and threaten complainants. • Delay as long as possible to increase the pressure on the complainants and the likelihood that they will go away. • Insist that the terms of settlement remain confidential.	**Resist pressure to stop the action** • Build rapport and trust with clients. • Develop and use support mechanisms for clients (family, friends, etc). • Try and expedite the action. • Use counter-pressure (media, freedom of information, commercial or political sensitivity, etc).

CONCLUSIONS

Litigation is only one of the methods of exposing injustice in prison. It is a difficult and imperfect mechanism. Yet it can be successful if used effectively and in the right context.

The keys to success include proper resourcing of the case, expertise in prison law, clients with patience and determination, lawyer-client trust and rapport, good corroborating evidence and a fair judiciary.

If the goal of prison litigation is not only to obtain redress for the individuals involved, but also to change practices to prevent further injustice, it has to be used in conjunction with other strategies. Informed media plays an important role in prison accountability,[10] as do investigations by Ombudsmen[11] and other agencies. Developing international human rights jurisprudence around prison issues will become increasingly relevant in Australia, with the introduction of human rights legislation in Victoria and the ACT and the greater use of international mechanisms.[12]

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[1] *Musso v Department of Justice* [2004] VCAT 1268.
[2] 'Crims in Compo Rush', *Herald Sun,* 5 January 2004.
[3] R Edney, 'Judicial deference to the expertise of correctional administrators: the implications for prisoners rights', *Australian Journal of Human Rights,* 2001, Vol 7(1) 91-133.
[4] *Corrections Act* 1986 (Vic), s47(1)(m).
[5] *Knight v Minister for Corrections and others* [2003] VSC 412.
[6] I am not aware of any reported Australian decision where a prisoner has successfully sued for assault by prison officers. Claims for economic loss in prison litigation tend to be small or non-existent. Claims for aggravated or exemplary damages are liable to suffer from the criminality of the plaintiffs. The High Court, however, has confirmed that prison authorities owe prisoners a duty of care; NSW v Bujdoso [2005] HCA 76, where the plaintiff prisoner was assaulted by other prisoners. The Court found that the prison breached its duty to the plaintiff and he was reportedly awarded $175,000 in damages. See also 'The Duty of Care to Prisoners', by Andrew Morrison SC, in this edition of *Precedent*, pXYZ.
[7] Brimbank Melton Community Legal Centre in Melbourne's west has received philanthropic funding to explore setting up a specialist centre in Victoria.
[8] For example, *DPP v Federico* [2005] VSC 470. This case involved the fatal shooting by a prison guard of an escaping prisoner. The officer was charged with murder. Despite a damning coronial finding, the Supreme Court found that there was insufficient evidence on which a reasonable jury could convict, and directed the jury to acquit the officer.
[9] See B Martin, 'The Beating of Rodney King: the Dynamics of Backfire', *Critical Criminology* (2005) 13: 307-26, or www.uow.edu.au/arts/sts/bmartin/pubs/backfire.html.
[10] For example, P Heinrichs, 'Prison officers sacked over "Sausagegate"', *The Age,* 19 March 2006.
[11] 'Conditions for persons in custody', Report of Ombudsman Victoria and Office of Police Integrity, July 2006.
[12] *Brough v Australia,* Communication No.1184/2003, where the UN Human Rights Committee found that Australia breached its obligations under Article 10(1) of the International Covenant on Civil and Political Rights in respect of the conditions of imprisonment of a young mentally ill indigenous man. The Australian and NSW Governments have rejected the finding.