HE SHOULD HAVE BEEN IN PRISON!

When do parole authorities owe a duty of care to those injured by prisoners on parole?

By Martin Cuerden

The responsibility of parole authorities for offences committed by those on parole is a topical issue. Parole authorities have responsibility for supervising prisoners released on parole. They are required to take into account competing considerations. One is the need to promote the rehabilitation of offenders through re-integration into the community. Another is to protect the public against offences committed by persons on parole.

Parolees will commit offences while on parole, despite the best attempts of the parole authority. It may also happen as the result of the carelessness of the parole authority in supervising those on parole. That carelessness may consist of a failure to properly supervise the parolee and ensure that s/he complies with the conditions of parole. It may consist of a failure to take steps to have the parolee returned to prison, or some other omission. Or to warn persons of a particular risk posed by the parolee. This article's title is misleading insofar as it suggests that imprisonment is the only alternative, which is likely to be the response of the victim and almost certainly that of the tabloid editor.

It is not surprising that the victim of a person injured or killed by a prisoner on parole, or his or her family, should look to the parole authority for compensation.

This article considers the circumstances in which the parole authority owes the victim, or his or her family, a duty of care.

DUTY TO CONTROL THE ACTIONS OF THIRD PARTIES

As a general rule, and in the absence of some special relationship, the law does not impose a duty on persons to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.[1] It is clear that there must be more than mere foreseeability of harm to give rise to a duty of care. The relationship between the plaintiff and the defendant must be 'exceptional' or 'special'.[2]

Hill v Chief Constable of West Yorkshire[3]

In this well-known case, the House of Lords considered whether the police owed a duty of care to the parents of the young female victim of a serial rapist who was murdered as a result of their failure to apprehend the rapist. It was held they did not.

It was held that the police did not owe a general duty of care to identify or apprehend an unknown criminal. Nor did they owe a duty of care to individual members of the public who might by harmed by the criminal, save where their failure to apprehend the criminal had created an exceptional added risk – different from the general risk to the public at large – so as to establish a special relationship between the police and the victim. The relevant class of which the victim was a member – young females – was too large to place her at special risk different from that to the public at large. The fact that it was foreseeable that the victim, as a young woman, might be at risk, was not in itself sufficient to give rise to a duty of care.

In *Hill's* case, the criminal was unidentified. In the case of parole authorities, they will (or ought to) know the identity of the parolee, and will either know or be able to find out his or her address. The absence of control on the part of a defendant, which is often a relevant factor in refusing to impose a duty of care to prevent criminal activity of third parties, is probably less significant in the case of parole authorities, which do have such control. Of more significance in the case of parole authorities is the problem of indeterminate liability.

The reference in *Hill's* case to the size of the class of potential victims reflects a well-established reluctance to avoid imposing a duty of care that may result in indeterminate liability, to an indeterminate number of people, for an indeterminate period of time.

THE PRISON CASES

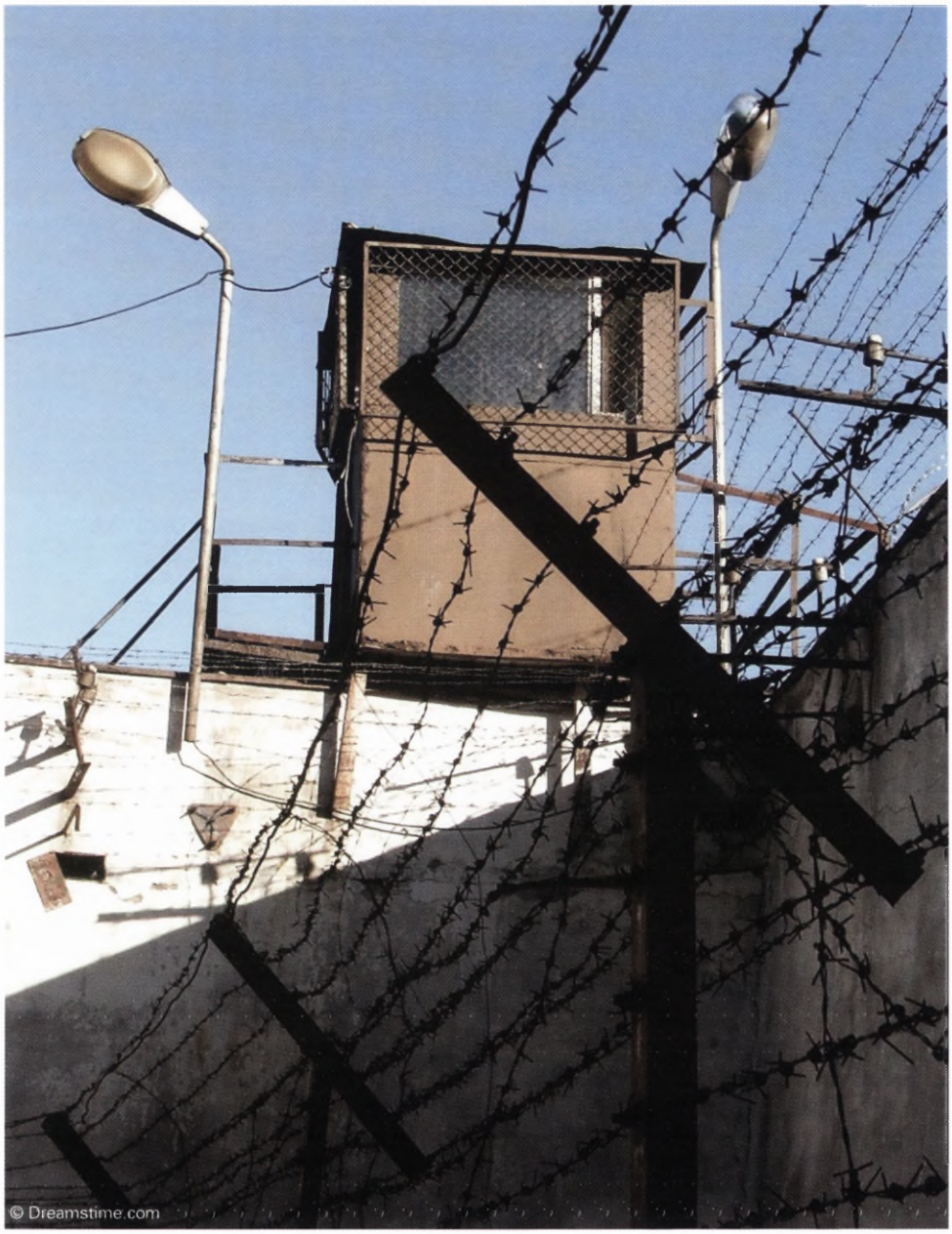
Before considering the cases concerning parole authorities, it is useful to consider cases concerning the liability of prison authorities for harm caused by escapees.

Thorne v Western Australia[4]

In this case, the prisoner escaped and injured his estranged wife. It was assumed that if the prison authority had knowledge of the prisoner's threats to escape and attack his wife, and sufficient knowledge of his background to indicate a need to take the threats seriously, then it would have owed the prisoner's wife a duty of care to prevent the prisoner's escape. It was held that in fact the defendant did not have knowledge of those matters, and thus no duty of care was owed to his wife.

Dorset Yacht Co Ltd v The Home Office[5]

In this well-known case, the House of Lords held that the defendant authority, which was responsible for the custody of 'Borstal boys' on an island, owed a duty of care to the plaintiff whose yacht was damaged by the detainees in the >>



course of escaping from the defendant's custody. It was held that there was a special relationship between the defendant and the plaintiff which exposed the plaintiff to a particular risk of damage over and above that shared by the public at large. That was because the plaintiff was a member of a specific class, namely yacht-owners in the immediate vicinity of the island where the detainees were detained, whose property was highly likely to be stolen as part of an attempt to escape and not at some later point in time while the escapees were at large.

State of New South Wales v Godfrey[6]

In this more recent case, the NSW Court of Appeal held that the defendant prison authority did not owe a duty of care to the victim of an escaped prisoner. She suffered injuries in the course of an armed robbery committed by the prisoner while at large, and not during the course of escape. Pregnant, she suffered injuries associated with her pregnancy resulting from shock caused by the armed robbery.

The Court, having found that there was no established category of duty of care owed by a prison authority to the victim of a crime committed by an escaped prisoner far removed from the immediate vicinity of the escape, went on to consider whether it should recognise such a duty of care. It held that it should not. Two matters of particular relevance were the potentially indeterminate nature and extent of liability that might arise were the prison authority to be held liable with respect to crimes committed by the escapee, and the fact that the plaintiff was not within any class of persons at particular risk of injury by the prisoner. If a duty of care were owed, it would be a duty owed to the entire public. Also relevant was a tension between any duty of care owed to the plaintiff, and the prison authority's statutory obligation to classify prisoners, which is a process that affects security and therefore escape opportunities for prisoners.

In *Godfrey*, the plaintiff attempted to avoid the indeterminate nature of liability that might arise under the alleged duty of care by limiting it to the area in question. The Court rejected that attempt.[7] The Court also observed that the issue of the class of potential victims was not separate and distinct from the scope of potential liability.[8]

THE PAROLE CASES

Swan v State of South Australia[9]

As far as I can ascertain, the issue of the duty of care of a parole authority to the victim of criminal acts committed by a prisoner while on parole was first considered in this decision of the South Australian Full Court.

The prisoner was a convicted paedophile who had been released on parole and was being supervised by the

Department of Correctional Services. The department became aware that he was associating with children under 14 years of age other than in the presence of another adult – a breach of his conditions of parole.

Despite this information, the department did not institute any surveillance program, and accepted the prisoner's denial without further investigation. The plaintiff, one of the children concerned, was sexually assaulted by the prisoner. The plaintiff sued the state in negligence. The state sought to strike out the claim as disclosing no cause of action. Thus, the case turned on a pleading point.

The Court held, consistent with the authorities, that the department did not owe a general duty of care to members of the public at large to supervise the conduct of released criminals.[10] However, it was held that where information has become available that reveals a potential breach of a parole condition, which is reasonably foreseeable by the department as being likely to cause harm to a particular person or persons, the department owed (or arguably owed) a duty of care towards the person or persons likely to be injured.[11] Accordingly, it was held that the facts disclosed a duty (or an arguable duty) of care on the department.

It is important to emphasise that the duty of care in *Swan's* case was owed to the plaintiff because he was a member of the limited class of persons known to be at risk, that is, a 'foreseen victim'.[12] The limited number of persons to whom the department might have owed a duty of care were the children staying in the house occupied by the prisoner.

Hobson v Attorney-General[13]

In this case, a decision of the High Court of New Zealand, the plaintiff's wife was killed in a 'truly appalling' attack by the offender, Bell. Bell had been convicted of aggravated robbery, for the armed robbery of a service station. He was released on parole, and was subject to conditions restricting certain behaviour and requiring attendance at a drug and alcohol assessment centre. He failed to comply.

Without the permission of his probation officer (but to the officer's knowledge), the prisoner attended a liquor licensing course. As part of that course, he was assigned to work at an RSA club. Bell burgled the club. In the course of doing so, he bludgeoned four of his co-workers. Three died, including the wife of the plaintiff. The plaintiff sued the Attorney-General, on behalf of the relevant parole authority.

On an application by the defendant to strike out the plaintiff's statement of claim, Heath J held there was no duty of care and the statement of claim should be struck out. His Honour obviously resolved the issue on the basis of the approach prevailing in New Zealand for ascertaining the existence of a duty of care. That is not necessarily the same approach that currently prevails in Australia. However, it is unlikely that difference in approach had any, or any significant, effect on Heath J's decision.

Heath J observed that the issue was whether the probation officer recognised, or ought to have recognised, that Bell posed a 'particular threat' to particular individuals or a small group of individuals.[14]

His Honour held that the class of persons to whom Bell posed a particular threat, and within which the victims fell, was not small enough to impose a duty of care. Heath J said that there was no logical basis on which to distinguish workers at the RSA Club from others living or working in the vicinity of the club. Further, his Honour asked, if a duty to warn existed, where and how would one draw the line between those required to be warned and those not?[15] In that case, his Honour concluded that it was not possible to differentiate logically between those who were working at the place where the plaintiff's wife was killed from those living or working in the vicinity of those premises.[16] He therefore observed that any attempt to reduce the scope of the duty for the purpose of defining a sufficiently small group of persons was artificial.[17]

Heath J also referred to the likelihood of the parolee causing harm of the particular type that eventuated as a relevant factor to determining whether there was a duty of care.[18] That is, relevant to properly defining the class of persons at risk (in *Swan's* case, for example, persons at risk from paedophiliac behaviour). Heath J suggested that the victim of the actions of a burglar or armed robber with a standard modus operandi limiting the circumstances in which re-offending is likely, might be within a sufficiently narrow class of persons at risk. In other words, the best way to predict the future is to look at the past.[19]

Having regard to Bell's conviction for armed robbery, Heath J thought that there was nothing to suggest that he posed any >>

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greater risk to those with whom he worked at the RSA Club than to other members of society.[20]

Finally, Heath J referred to the possibility that an action for misfeasance in public office could, in a proper case, be pursued.[21] However, it is difficult to conceive that such a case could be established in any but the most unusual of circumstances.[22]

X v State of South Australia[23]

In this case, the plaintiff was sexually abused by a notorious paedophile who was on licence in the community. The plaintiff alleged that the Parole Board was negligent in allowing the paedophile to remain on licence when it had received information concerning the possibility of his being involved with children, contrary to conditions of his licence. Again, the State disputed that the Parole Board (for whom it was liable) owed the plaintiff a duty of care.

Anderson J rejected an argument that the Parole Board was a judicial or quasi-judicial body, and therefore held that it did not have a judicial immunity from liability.[24]

On the question of the existence of a duty of care, Anderson J conducted an extensive review of the relevant authorities. He held, consistent with *Swan's* case and the other relevant authorities on the existence of a duty to control third parties, that the Board owed no general duty of care to supervise prisoners who had been released on parole.[25]

Anderson J found that the Parole Board had actual knowledge that there was a specific class of persons, namely children in the particular neighbourhood centre's childcare program, who could be at risk from the offender.[26] Nevertheless, it was held the Parole Board did not owe a duty of care to the plaintiff arising out of that specific knowledge.

Anderson J found that the existence of a duty of care on the Board in those terms would conflict with the Board's obligation to facilitate the rehabilitation or prisoners and their return to the community.[27] He also found that the potential for such a duty to give rise to a flood of claims weighed strongly against the recognition of a duty of care in those circumstances.[28] In that respect, Anderson J held that even if the class of persons was limited to those attending the neighbourhood centre, it would still include any child who might be brought to the centre at any time by an adult attending one of the classes conducted at the centre.[29] Thus, it was held that the relevant class of persons was not small enough. In considering the size of the relevant class of persons at risk, Anderson J was influenced by the decision in *Godfrey's* case.[30]

Anderson J's decision that the Board owed no duty of care to the public at large was clearly in accordance with well-established principle and authorities.

On the other hand, whether his Honour was correct in finding that no duty of care was owed even to the limited class of persons in that case is, in my view, at least open to debate. That is particularly so given what was a relatively well-defined and narrow class of persons, and the particular nature of the risk, namely paedophiliac behaviour.

CONCLUSION

There is no reported case in Australia – nor, as far as I am aware, in any other common law jurisdiction – in which a plaintiff has established liability against a parole authority with respect to injuries sustained as a result of an offence committed by a prisoner while on parole.[31] The stumbling block is establishing the existence of a duty of care.

To establish a duty of care, a plaintiff will need to be able to show that he or she was a member of a specific class of persons who were exposed to a particular risk by the parolee, over and above the risk to the public generally.

The courts are careful – in this area as in others – not to allow that class to be defined after the event, with the benefit of hindsight.

It is also relevant to have regard to the nature and likelihood of the risk posed to that particular class of persons.

Whether the relevant class of persons in any particular case will be narrow enough to give rise to a duty of care will depend on the facts of each case. However, decisions to date suggest that the courts are likely to require that class to be very narrowly defined before a duty of care will be held to exist. In my view, the conclusion reached in *Hobson v Attorney-General* was, with respect, correct. On the other hand, I would tend to think it is arguable that in *X v State of South Australia*, the court took too narrow a view of what was required to establish a duty of care. ■

Notes: **1** *Smith v Leurs* (1945) 70 CLR 256 at 261-262; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254. **2** *Modbury Triangle* (supra) at [20]-[21], [26], [30], [43], [117], [137], [146], [147]. **3** [1989] AC 53. **4** [1964] WAR 147. **5** [1970] AC 1004. **6** [2004] NSWCA 113. **7** See at [54]-[65]. **8** See at [66]-[70]. **9** (1994) 62 SASR 532. **10** See at 542, 548, 551. **11** See at 542, 548-550, 551-552. **12** See at 542, and see at 548-549. **13** [2005] 2 NZLR 220. **14** At 232 [47]. **15** At 235 [62]. **16** At 237 [71]. **17** At 237 [72]. **18** At 237-240 [74]-[85]. **19** At 237-238 [[75]. **20** At 240 [83]-[85]. **21** At 243-252, [103]-[144]. **22** See *Hobson v Attorney-General* at 251 [141], [142]. **23** (2005) 91 SASR 258. **24** At 271 [64]. **25** At 288 [136]. **26** At 296, 297 [187] [189]. **27** At 297 [190]. **28** At 297 [190]. **29** At 295 [183]. **30** See at 284-285 [122]-[126]. **31** *Swan's* case turned on a pleading point.

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