(87/4)

4.

9th January, 1987

IN THE COURT OF APPEAL

ON APPEAL FROM THE ROYAL COURT

SAMEDI DIVISION

B E T W E E N :

BARRIE RAYMOND COOPER

Plaintiff (Appellant)

- and -

THE PRISON BOARD OF THE STATES

Defendant (Respondent)

Draft/JUDGMENT

The judgement which I am about to read is the judgement of the Court.

This is an appeal by the plaintiff, Barrie Raymond Cooper from the judgment of the Royal Court (Samedi Division) dismissing his action against the Prison Board of the States. In the action the Appellant complains of a number of matters which are said to have occurred during his detention at Her Majesty's Prison, La Moye, St Brelade, between 31st August and 7th September 1978. It is common ground that the Respondent was at all material times responsible for the administration of the prison and, as the employer of the medical officers, hospital officers and other prison officers at the prison, would be vicariously liable for acts done and defaults committed by them in the course of their employment.

The circumstances in which the Appellant came to be admitted to the prison on 31st August 1978 are set out in the judgment of the Royal Court and it is unnecessary for us to rehearse them in this

judgment. It is, however, convenient to summarise the main events which occurred following the Appellant's reception at the prison at 5.50 pm on that Thursday afternoon.

On arrival the Appellant was received by Prison Officer Heys, who was the officer on duty. There was no evidence at the trial to suggest that the normal reception procedures were not followed. There was no medical examination of the Appellant at that stage, but the proviso to Rule 8 of the Prison (Jersey) Rules 1957 clearly permitted such an examination to be deferred until the following morning. Neither Mr Heys, nor Police Constable Bertram - who had escorted the Appellant to the prison - formed any impression that he was disturbed or agitated or in any way ill, at the time of his arrival.

After the reception procedures had been completed, the Appellant was assigned to cell No. 4 in the remand wing. Later that evening Senior Prison Officer Malloret became concerned at the Appellant's behaviour. He called Hospital Prison Officer Neate, who was off duty at the time. Mr Neate arrived at the prison at about 8.40 pm and went to cell No. 4. He observed the Appellant's behaviour through the observation panel and thought that he seemed highly agitated. He went up to the hospital wing, telephoned the duty medical oficer, Dr J. M. Osmont (Dr Osmont Jr.), described the Appellant's behavour and asked for instructions.

Dr Osmont Jr. gave instructions that the Appellant be offered sedation in the form of Largactil syrup. He further instructed Mr Neate that if Appellant would not accept the sedation offered, or if the sedation did not have the effect of calming the Appellant,

then if Mr Neate thought that the Appellant was likely to injure himself he could be removed to the protective cell for his own safety.

Following his telephone conversation with Dr Osmont Jr., Mr Neate poured a dose of Largactil syrup into a hospital beaker and went back to the Appellant's cell. On this occasion he was accompanied by Mr Heys. He found the Appellant still to be in a state of agitation. Mr Neate went into the cell, sat on the bed and talked to the Appellant. This had the effect of calming the Appellant who was then offered the beaker of Largactil syrup. Mr Neate and Mr Heys both gave evidence to the effect that the Appellant declined to take the Largactil syrup, and that Mr Neate left the cell without any sedative having been administered. Mr Neate was satisfied that the Plaintiff was calm and that it was not necessary to remove him to the protective cell. Mr Neate reported what had happened, including the instructions which he had received from Dr Osmont Jr., to Mr Maloret.

The Appellant caused further disturbance during the night, and was visited in his cell by Mr Maloret at about 4.30 am. No decision to move the Appellant to the protective cell was taken at that stage. He remained in cell No. 4 throughout the night.

Assistant Chief Officer Burt came on duty at 7.00 am on the morning of lst September. He found that the bell from Cell No. 4 was ringing continuously and he enquired of Mr Maloret why it was not being answered. He was told of the disturbance which had been caused by the Appellant during the night. He was also told of the instructions given to Mr Neate by Dr Osmont Jr. Mr Burt went to

cell No. 4 and tried to speak to the Appellant. He formed the view that the Appellant was not in control of himself and he took the decision to remove the Appellant to the protective cell.

This was done with the assistance of other officers. The Appellant's clothes, other than his underpants, were removed from him. From the evidence given at the trial the transfer of the Appellant to the protective cell must have occurred shortly after 7.00 am on that Friday morning.

The protective cell is in the hospital wing of the prison. Senior Hospital Officer De La Haye came on duty at about 8.00 am on Friday 1st September. He went immediately to the protective cell, where he found the Appellant in a state which he described as "childish". He was not agitated or aggressive and Mr De La Haye was content to keep him under observation until the medical officer made his routine visit later that day.

The duty medical officer on Friday 1st September was Dr R.L. Osmant (Dr Osmont Sr.). He attended at the prison, in the ordinary course of his duties, at about 9.30 am. He spoke to Mr De La Haye and was told of the events of the previous night. He went to the protective cell, where he found the Appellant to be calm. He asked the Appellant a series of questions, in the course of which the Appellant appeared to him to become disorientated and to exhibit hallucinatory symptoms. Dr Osmont Sr. carried out a physical examination and found no abnormality in the Appellant's heart or lungs, but he considered that the Appellant needed treatment for the hallucinatory symptoms, and so he prescribed an intra-muscular injection of 50 milligrammes of

Largactil. Mr De La Haye was present throughout the examination. After Dr Osmont Sr. had left, Mr De La Haye, together with another officer, took the Appellant to the hospital bathroom, bathed and shaved him, and administered the injection which had been prescribed. The Appellant did not resist. He was then returned to the protective cell, in accordance with the instructions which Dr. Osmont Sr. had given, and kept under observation. He remained there until 7.00 am on the following day, Saturday 2nd September, when he was transferred to a bed in the prison hospital. He stayed in the prison hospital under treatment (which included the administration of Largactil) until 7th September 1978. On that day he attended Court and was released on bail.

The matters of complaint on which the Appellant relied at the trial are set out at paragraphs 9 to 31 of the Order of Justice. The Appellant alleged, in paragraph 33, that, by reason of those matters . . . "the said Medical Officers and other Prison Officers acted in breach of The Prison (Jersey) Rules 1957 as mentioned and/or acted negligently . . . " There follow, in that paragraph, particulars of the alleged breaches of the Prison Rules and particulars of the alleged negligence. The matters of complaint may be summarised as follows:

(i) That the duty medical officer (Dr Osmont Jr.) was in breach of Rule 76(1) and was negligent in failing to attend at once at the prison on learning from Mr Neate, on the evening of Thursday 31st August, that the Appellant was ill.

(ii) That Dr Osmont Jr. was negligent in directing the administration of Largactil in the course of his telephone conversation with Mr Neate on that evening.

(iii) That Mr Neate was negligent in administering 50 millilitres of Largactil syrup (the equivalent of 250 milligrammes) - rather than 50 milligrammes as prescribed by Dr Osmont Jr. - on the evening of 31st Augus evening of 31st August.

(iv) That Dr Osmont Jr. and Mr Burt were in breach of Rule 36(1) and were negligent in causing the Appellant to be placed in the protective cell; this being neither medically necessary nor advisable.

(v) That Dr Osmont Sr. was in breach of Rule 36(1) and was negligent in failing to ascertain the cause of the Appellant's illness on the morning of Friday 1st September and in authorising his continued confinement in the protective cell.

(vi) That Dr Osmont Sr. was negligent in prescribing Largactil both on the 1st of September and thereafter without having first thoroughly examined the Appellant.

The Appellant also relied in his pleading on a breach of Prison Rule 8; but this was clearly not capable of being sustained, having regard to the proviso to that Rule, unless it could be established that the examination by Dr Osmont Sr. on the morning of Friday 1st September was not a sufficient examination for the purposes of that Rule.

The Royal Court found as a fact that:

> . . . "Throughout his stay at the La Moye Prison the [Appellant] was dealt with in a responsible and humane manner by the prison officers and doctors; this means that the

> allegations made in the Order of Justice as to intimidation, forcible injection, threats, failing to attend upon him, neglect of complaints and the like are totally negated" . . .

In particular the Royal Court made a finding of fact that no dose of Largactil was taken by or administered to the Appellant in the prison either by Mr Neate on the 31st August or at any time before the intra-muscular injection was given by Mr De La Haye on the instructions of Dr Osmont on the morning of Friday 1st September.

The Appellant has appealed on the grounds that the decision of the Royal Court was against the weight of the evidence. In opening his appeal - which he conducted before us in person - the Appellant asked leave to call further evidence, pursuant to Rule 12 of the Court of Appeal (Civil) Rules 1964, to explain alterations and alleged discrepancies in the prison hospital records relating to the dispensation of Largactil. We examined the records to which the Appellant referred us. These did show material alterations: for example in the medical records in respect of the Appellant for 1st September 1978 the phrase "Injection Largactil 50 ml given" has been altered to read "Injection Largactil 50 mg given". There are other alterations to the dosage of Largactil in the medical records of other prisoners which were shown to us. While it is readily understandable that confusion between millilitres and milligrammes could have arisen in the course of making an entry, and could have been corrected informally and at once by the officer making the entry, it is clear that it is undesirable that alterations of this nature should be made without some form of authentication.

Nevertheless it appeared to us that the Appellant, through his counsel, had had sufficient opportunity to examine these records before the trial, and that the matter could have been raised with the hospital officers in the course of cross-examination had it been thought to be material. For this reason we decided not to call for further evidence on this matter.

We have reviewed the evidence which was given before the Royal Court, as it appears from the transcripts and other documents with which we were provided. In our judgement there was ample material upon which the Royal Court could hold that the first dose of Largactil administered to the Appellant was given by way of intra-muscular injection as a result of the instruction given by Dr Osmont Sr. on the morning of Friday 1st September 1978. Indeed, the Appellant appeared to concede this in the course of his submissions before us. The difficulty which the Appellant had to face was that, on his own evidence, the Appellant was in a confused state of mind at the relevant time and had little memory of events. We think that the Royal Court was correct to approach the matter on the basis that where the Appellant's evidence was in conflict with evidence given by others, there was no alternative but to reject the Appellant's version of the facts.

This finding, that no dose of Largactil was administered to the Appellant on 31st August, makes it impossible for the Appellant to succeed on his appeal in relation to the matters which we have described under (iii) above and - as the Royal Court pointed out - makes any issue under (ii) above academic.

Further, the finding of the Royal Court that before the injection was administered on the morning of Friday 1st September, "Dr Osmont examined the [Appellant] thoroughly and took every precaution" is not open to challenge on the evidence that was before it, and the appeal must fail also insofar as it seeks to challenge the rejection of the Appellant's claims in respect of (v) and (vi) above.

That, however, leaves two matters which do require further consideration. They are each matters on which the relevant facts are not seriously in dispute, and (importantly) did not depend on evidence given by the Appellant.

The first of these matters is the allegation that the duty medical officer, Dr Osmont Jr., was in breach of Rule 76 (1) of the Prison Rules, in failing to attend at once at the prison on learning from Mr Neate on the evening of Thursday 31st August that the Appellant was ill. We leave aside the alternative allegation of negligence. We accept, as the Royal Court appears to have accepted, that - under general law - the question whether a medical practitioner should attend in person and at once on receiving information of the illness of a patient under his care must depend largely on his judgement of the position on the basis of the information given to him and the other circumstances affecting the patient. In the present case we think that the Royal Court was entitled to reject the allegation of negligence against Dr Osmont Jr. But the duties owed by a medical officer appointed for the purposes of the Prison (Jersey) Rules 1957 in relation to those detained in the prison under his charge are not governed solely by the general law: his duties include those

specifically imposed by the Rules.

The relevant rules affecting the medical officer for the purposes of the issues which we have to consider are these -

Rule 75 The Medical Officer shall the have the care of the mental and physical health of the prisoners and shall every day visit every sick prisoner, every prisoner who complains of illness, and every other prisoner to whom his attention is specially directed.

Rule 76(1) The Medical Officer shall attend at once on receiving information of the illness of a prisoner.

Rule 81 The Medical Officer shall keep under special observation every prisoner whose mental condition appears to require it, and shall take such steps as he considers proper for the segregation of the prisoner.

In our judgement it is clear (a) that the medical officer has no authority to give instructions in relation to prisoners otherwise than for the purposes of "the care of [their] mental and physical health", (b) that "illness" for the purposes of Rule 76(1) must include mental illness as well as physical illness and (c) that the medical officer is only empowered to give directions for the confinement of a prisoner to the protective cell under rule 81 if he is satisfied, after "special observation", that the mental condition of that prisoner requires it.

By its answer in the Order of Justice, at paragraph 5, the Respondent Board asserted that "the duty Medical Officer did not receive information of any illness of the [Appellant]". If this

were the case, there would be a complete defence to the allegation of breach of duty under rule 76(1). But we do not think that this answer can be sustained. We accept that, on the evidence, the Royal Court was entitled to find that the Appellant made no complaint of physical illness - and, in particular, had not complained of stomach pains; and that, accordingly, it was also entitled to find that no such complaint was mentioned to Dr Osmont Jr. But we are left with the undisputed facts (i) that Mr Neate, a hospital officer, was called to see the Appellant, (ii) that Mr Neate thought it necessary to refer the matter to the duty medical officer, (iii) that the medical officer thought it right to prescribe a sedative drug and (iv) that the medical officer gave instructions relating to the segregation of the Appellant and his confinement in the protective cell. It seems to us that these facts are only explicable on the basis that those concerned - and, in particular, Mr Neate and Dr Osmont Jr. - thought that the mental condition of the Appellant required some form of medical treatment: for we are unable to believe that the medical officer would prescribe drugs, or order confinement to the protective cell, for purposes which were not connected with, and in the course of, the carrying out of his duty to care for the mental and physical health of the prisoner. In our judgement the facts which we have described point to only one conclusion: that Dr Osmont Jr. did receive from Mr Neate information of the illness (in the sense of mental ill health) of the Appellant. This being so, did Dr Osmont Jr. "attend at once" within the meaning to be given to that expression for the purposes of Rule 76(1)? In our judgement he did not do so. We are not persauded that the Royal

Court was correct in holding that "to attend" in this context is not synonomous with "to be in the presence of the patient at the prison". We think that Rule 76(1) does require the Medical Officer to visit the prisoner in person. We accept that the phrase "at once" cannot be construed in such a way as to require the Medical Officer to disregard his duty to other patients; but it is a phrase which imputes urgency, and we think that proper effect is not given to that phrase by treating ~~section~~ Rule 76(1) as imposing nothing more than an obligation to see the patient at the next routine daily visit. It is, in our judgement, important to bear in mind that the position of a sick prisoner in prison is very different from that of a sick patient in his own home. The prisoner cannot communicate directly with his own doctor to explain his symptoms; he has no access to the telephone; he cannot take himself to the out-patients department of his local hospital; he cannot summons an ambulance. The prisoner is wholly dependent upon the prison and hospital officers as a means of communication with the medical practitioner. If those officers think the position sufficiently serious to inform a medical officer, then, as it seems to us, the prisoner ought to be put in the position as soon as possible where he can tell the medical officer personally what are the symptoms of which he complains. This can only be achieved if the medical officer calls at the prison and visits the prisoner.

The second matter which requires further consideration is the allegation that Dr Osmont Jr. and Mr Burt were in breach of the Prison Rules in causing the Appellant to be placed in the protective cell. The foundation for this allegation is pleaded in paragraphs 23 and 24 of the Order of Justice:

"23. That at 7.10 am on the same day a number of warders removed the [Appellant] from his cell in the remand block, marched him along many corridors and pushed him into the isolation cell, which was a cell with padded walls and with a foam pad on the floor.

24. That the incarceration of the [Appellant] was not medically justified nor desirable and served only to aggravate the [Appellant's] condition as he is subject to claustrophobia and the said isolation cell caused physical and sensory deprivation, to the physical and mental detriment of the [Appellant]"

Those paragraphs were relied upon in support of an allegation that there had been a breach of the Prison Jersey Rules, and, in particular of Rule 38(3) - although in his reply, the Appellant amended the allegation to rely on Rule 36(1).

It is clear that neither Rule 38(3) nor Rule 36(1) can have application to the circumstances alleged by the Appellant in his pleading, or to the facts as found by the Royal Court. Rule 36(1) requires (so far as material) that "Cellular confinement shall in no case be awarded unless the Medical Officer has certified that the prisoner is in a fit condition of health to sustain it". The Rule is directed to a case in which cellular confinement has been awarded as a punishment under Rule 32(2)(f) - following investigation by the Governor of an alleged offence against discipline. That is not this case. Further, as we understand it, an award of cellular confinement under Rule 32(2)(f) would not be implemented by a confinement in the protective cell. It is recorded in the penultimate paragraph of the judgement of the Royal Court, that reliance on Rule 36(1) was abandoned in the course of the trial.

The abandonment of reliance on Rule 36(1) does not, however, dispose of the matter. The circumstances in which a prisoner may

be confined in the protective cell are prescribed by the Prison (Jersey) Rules 1957; and, in our judgement, once such confinement has been alleged and established, it is for the Prison Board to show that it was authorised. The protective cell, again as we understand it, is a special cell "provided for the temporary confinement of refractory or violent prisoners" pursuant to Article 11(5) of the Prison (Jersey) Law 1957. Confinement in the protective cell, and the removal of the prisoner's clothes which is a usual element in such confinement, appears to us to represent a serious interference with such liberty and rights as a prisoner is, generally, entitled to enjoy under the Rules; and, if it is to take place, then it must be established that the conditions which justify this exceptional form of confinement under the Rules are satisfied.

The Respondent appears to have recognised the need to show that the special circumstances justifying confinement in the protective cell did exist. In paragraph 8 of its defence, it asserted that . . . "Assistant Chief Officer Burt observed the [Appellant] and, in the light of the instruction from the Duty Medical Officer, ordered the [Appellant's] removal to the protective cell". By its rejoinder, filed with the leave of the Royal Court, the Respondent pleaded . . . "The [Appellant] was not confined to the protective cell pursuant to Rule 36(1) but was confined pursuant to Rule 81 on the instructions of the Medical Officer".

In these circumstances it is unnecessary for us to consider whether or not the power to order a refractory or violent

prisoner to be temporarily confined in a special cell, which is undoubtedly vested in the Governor by Rule 39, was or was capable of being exercised by Mr Burt pursuant to Rule 20. It is not contended by the Respondent that the confinement of the Appellant to the protective cell in the present case was, or could have been, authorised by any provision of the Rules other than Rule 81.

We have set out the provisions of Rule 81 earlier in this judgement. We accept that a medical officer could, in appropriate circumstances, take the view that confinement to the protective cell was a proper step to take for the segregation of a prisoner whose mental condition appeared to require it. We accept that Dr Osmont Sr. was entitled to, and did, take that view when, following his examination on the morning of Friday 1st September, he directed that the Appellant should remain in the protective cell for a further 24 hours. But we are unable to see how it could have been a proper exercise of his powers under Rule 81 for Dr Osmont Jr. to direct that a prisoner whom he had never examined should at some future time at the discretion of a third party (Mr Neate) be subjected to this form of confinement. Even if, which we doubt, the duty medical officer is entitled to rely on the report of a prison hospital officer in deciding whether it is necessary to segregate the prisoner under Rule 81, if he decides, on hearing that report that confinement is not required, and that the prisoner's condition can be treated, for example, by the administration of a sedative, it cannot be proper for the medical officer to delegate to the hospital officer the responsibility of deciding, in the future, that confinement is, after all, required.

A fortiori, the power cannot be delegated further by the hospital officer to some other prison officer who may happen to be on duty at some time in the future.

Accordingly, we reach the conclusion that the confinement of the Appellant to the protective cell at or about 7.00 am on the morning of Friday 1st September was not authorised by, and was a breach of, the Prison (Jersey) Rules 1957. We think that the confinement resulted from a misunderstanding by Dr Osmont Jr. of his duties under Rule 76(1), and a misunderstanding by him, and by Mr Burt, of the medical officer's powers under Rule 81.

It was submitted to us on behalf of the Respondent that we ought not to allow the appeals on this ground; and that we ought not to go on to consider whether or not we should exercise the power, conferred on us by Rule 12(2) of the Court of Appeal (Civil) (Jersey) Rules 1964, to award such damages as the Royal Court could have awarded if it had found for the Appellant at the trial. We were referred to the treatise by Le Gros (1943) and, in particular, to the Chapter entitled "De L'Ordre De Justice et de la Remontrance". It was submitted to us that the Court must pronounce, and pronounce only, on "les fins" as they appear from the Order of Justice; and that, in the present case, "les fins" were confined to the matters alleged in paragraph 34 of the Order of Justice. We regret that we were unable to accept this submission. Whatever the position may have been before 1948, it appears to us that matters of pleading and procedure must now be governed by Rules of Court made under Article 11 of the Royal Court (Jersey) Law 1948. Under those Rules the plaintiff is required to

state, in a summary form, the facts upon which his claim is based - see, now, Rule 6/8 of the Royal Court Rules 1982. In our view the Appellant has complied with that requirement. It is clear from paragraphs 23 and 24 of the Order of Justice that the Appellant was claiming in his action that he was confined to the protective cell without justification, and that that confinement caused him detriment. We do not think that he is required to do more by the Rules of Court.

The damage of which the Appellant complains in paragraph 34 of the Order of Justice is loss of earnings resulting from the aggravation of a stomach disorder. We are satisfied that there was no evidence upon which the Royal Court could have held that confinement of the Appellant to the protective cell, or the subsequent administration of Largactil by way of treatment of his hallucinatory symptoms, contributed to any aggravation of a stomach disorder. Accordingly, in our judgement, the Appellant did not make out a case for damages under this head. Nevertheless, the Appellant did allege, in paragraph 24 of the Order of Justice, that his confinement to the protective cell caused him physical and sensory deprivation. We are satisfied that this claim is supported by the evidence. Mr Burt took the decision to transfer the Appellant, shortly after 7.00 am on the morning of 1st September, because he thought that the Appellant "was not in control of himself": but he did not describe any symptoms of disorientation or hallucination. When Mr De La Haye came on duty at 8.00 am he found the Appellant to be in a state of disorientation. Mr De La Haye gave evidence that that state was still present at the time of the Appellant's examination

by Dr Osmont Sr. He said, again, that the Appellant "was behaving like a child". This appears to us not inconsistent with the evidence of Dr Osmont Sr. to which we have already referred. It must be remembered that Dr. Osmont Sr. had not seen the Appellant before his examination, and it may be expected that it took a few minutes before he appreciated that the Appellant was hallucinating. In our judgement, therefore, it was established at the trial that the confinement of the Appellant to the protective cell on the morning of Friday 1st September was detrimental to his health; and that the confinement led to, or (at the least) aggravated, the need for the course of treatment which Dr Osmont Sr. prescribed.

This confinement, and its consequences, were caused by the breaches of the Rules made under the Prison (Jersey) Law 1957 which we have held to have been established. It was conceded on behalf of the Respondents that such breaches found an action in tort by the individual prisoner affected by them. It follows that the Appellant is entitled to damages. We have considered whether the matter should be remitted to the Royal Court for damages to be assessed, but we have formed the view that no further or additional material would be likely to be available on such a remission. It seems to us that the material upon which damages have to be assessed in this case is already before us, in the form of transcripts, and that no useful purpose would be served by a further hearing by the Royal Court. We consider that the Appellant will receive proper compensation for the wrong done to him if he is awarded damages in the sum of £250.

Accordingly, we allow the appeal and order that the Respondent pay to the Appellant the sum of £250 in the way of damages.