Case No 240/91

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

THE MINISTER OF JUSTICE — Appellant

and

WILLIAM A HOFMEYR — Respondent

CORAM: HOEXTER, SMALBERGER, F H GROSSKOPF, GOLDSTONE JJA et NICHOLAS, AJA

HEARD: 15 February 1993

DELIVERED: 26 March 1993

J U D G M E N T

HOEXTER, JA
....

HOEXTER, JA

The appellant is the Minister of Justice. In

the Cape of Good Hope Provincial Division the respondent instituted an action for damages in the sum of R100 000 against the appellant as the first defendant. Considering that the Minister of Law and Order had an interest in the action the respondent joined him as the second defendant. When the matter proceeded to trial the second defendant was unrepresented and the action was resisted only by the appellant. In what follows reference will be made to the respondent as "the plaintiff" and to the appellant as. "the defendant". The plaintiff succeeded in his action against the defendant. The trial judge (King J) ordered the defendant to pay damages in the sum of R50 000, interest thereon, and costs. No costs were ordered against the Minister of Law and Order. With leave of the court a

quo the defendant appeals against the whole of the judgment of King J.

The judgment of the court below, has been reported sub nom Hofmeyr v Minister of Justice and Another 1992(3) SA 108(C). In what follows recourse will be had to the judgment as reported when reference is made to the trial court's findings of fact and law. In the judgment the evidence adduced at the trial is explored at some length. For present purposes a summary of the material facts of the matter will suffice.

At the beginning of the 1988 academic year the plaintiff, who was then a man in his mid-thirties, was a final-year LL.B student at the University of Cape Town. On 22 April 1988 he was arrested in terms of reg 3 of the Emergency Regulations (see Proc R96 of 11 June 1987) promulgated under the Public Safety Act 3 of 1953. For

some days thereafter he was held in the police cells at Caledon Square. From 3 May to 6 October 1988 the plaintiff was detained at Pollsmoor Prison ("the prison"). The said regulations expired on 10 June 1988 whereafter the plaintiff's detention was in terms of reg 3 of the Security Emergency Regulations (see Proc R97 of 10 June 1988). It is to the period of his detention at the prison, which lasted some five months, that the plaintiff's action relates.

The legality of his arrest and his detention thereafter is not in issue. What is in issue is the propriety or otherwise of the conditions in which he was held at the prison. The plaintiff's case was that the manner in which he was treated involved an aggression upon his person and an unlawful infraction of his fundamental personality rights.

The plaintiff's chief complaint was that, save

for two brief periods (being respectively from 12 to 20 July and 29 September to 6 October 1988) he was unlawfully segregated from all other prisoners at the prison in circumstances amounting to effective solitary confinement. In addition thereto the plaintiff complained that during his detention he had been subjected to unlawful treatment in a number of other ways ("the ancillary complaints"). The ancillary complaints were that the prison authorities (1) had failed to allow the plaintiff to exercise indoors when the weather did not permit outdoor exercise; (2) had failed to allow plaintiff access to books and magazines (other than study material) from outside the prison; (3) had failed to allow the plaintiff to receive regular newspapers and foodstuffs from outside the prison; (4) had failed to allow the plaintiff to write and receive more than two letters per week until 28 September,

whereafter the plaintiff was allowed to write and receive four letters per week; (5) had failed to allow the plaintiff access to the centrally broadcast radio system, save for the last three weeks when he was hospitalised, or, alternatively, had failed to allow the plaintiff to have and use an FM radio; (6) had failed to allow the plaintiff reasonable access to a television set or to video screenings.

Preparatory to a consideration of the plaintiff's aforementioned complaints in the court below the trial judge affirmed as a general principle (at 115C-D) applicable to the case before him -

> "...that a person incarcerated in prison retains all such freedoms, rights and liberties as have not been lawfully taken away from him."

In regard to the position of prisoners in a gaol the learned judge then proceeded to quote (at 115D-J) what he described as "two classic statements" taken from

earlier decisions of this court. Each of the two judicial utterances is well-known and oft-quoted in this branch of our law. They are, in my view, of such cardinal importance that it is useful to repeat them in this judgment. To appreciate their proper significance it is necessary to see in what particular context each was made.

The first statement cited by King J comes from the decision in Whittaker v Roos and Bateman; Morant v Roos and Bateman 1912 AD 92 ("the Whittaker case"). The decision was unanimous but of the five judges of appeal who sat, three (Lord de Villiers CJ, Innes J, and Solomon J) each delivered a separate judgment. Whittaker was an awaiting-trial prisoner unable to raise the bail to which he had been admitted. During his detention he was segregated from other awaiting-trial prisoners and kept in solitary confinement. He

maintained that in various ways he had been subjected to improper treatment. Morant's case was broadly similar. They instituted an action for damages against the governor of the Johannesburg Prison and the Director of Prisons. The judgment in their favour by the trial court was upheld by this court. The ratio decidendi was that the object of the detention of an awaiting-trial prisoner is to secure his appearance at his trial; that there had been a differentiation between the treatment accorded to the plaintiffs and that accorded to other awaiting-trial prisoners which was neither warranted by the prison regulations nor required by the necessities of prison discipline; and that the exceptional severity involved in such discrimination, particularly in the case of Whittaker, had been tantamount to a substantial punishment. The citation by King J is from portion of the judgment of Innes J. Hereunder I shall slightly

shorten the excerpt, and to the quotation thus abridged

I shall refer as "the Innes dictum". The Innes dictum

is couched in the following words (at 122-3):-

> "True, the plaintiffs' freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. Mr Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration."

The second classic statement selected by King

J comes from the dissenting judgment by Corbett JA in

Goldberg and Others v Minister of Prisons and Others

1979(1) SA 14(A)(to which reference will hereafter be made as "the Goldberg case"). Goldberg and his fellow appellants were serving long sentences for contraventions of the General Law Amendment Act 1964, the Suppression of Communism Act 1950 and the Terrorism Act 1967. They and other long-term prisoners similarly convicted were held in a special section of the prison set aside for white prisoners sentenced under the security laws. From the court of first instance they unsuccessfully sought a ruling that the Commissioner of Prisons ("the commissioner") had wrongly exercised his discretion in denying them access to radio news and reading matter on current events. By a majority of four to one this court rejected an appeal against the order of the court below. At the hearing of the appeal the relief claimed was restricted, in the main to

'(a) a declaration that appellants are entitled to receive books and

> periodicals of their choice, subject to any rules and conditions which may be prescribed under reg 109(4) of the Prison Regulations.'

During the course of argument appellants' counsel conceded that a prisoner was not entitled as of right under the common law to receive books and periodicals of his choice, and that such right had to be sought in the Prisons Act and prison regulations (at 23H), specifically in the provisions of reg 109(4) (at 28H). The question for decision on appeal was therefore a narrow one. The court was not concerned with the wider question whether or not the Act and the regulations generally confer any rights upon prisoners which are enforceable by proceedings instituted in a court of law (at 27D). It was held (at 30E) that there were no indications in reg 109(4) that it was intended that prisoners would be entitled as a matter of right to receive books and papers from outside sources.

Notwithstanding the circumscribed nature of the issue, Wessels ACJ, who delivered the majority judgment, embarked upon a fairly wide-ranging discussion of the "rights" of prisoners. He held that the power of the commissioner to determine the manner in which prisoners were to be treated necessarily included the power to make separate determinations in respect of categories of prisoners or individual prisoners; and that provided the commissioner's decision was not inconsistent with the Prisons Act 8 of 1959, the Prison Regulations, or a judicial order, a court could not review his decision. The learned Acting Chief Justice decided that, as the appellants had not established on the part of the commissioner a failure to apply his mind to the matter or to exercise his discretion at all, that there was no basis for any finding that the provisions of the Prisons Act or the Regulations had been disregarded.

In the course of his judgment Wessels ACJ referred (at 26F-G) to the earlier decision by this court in Rossouw v Sachs 1964(2) 551(A), a case dealing with the rights of a prisoner detained under sec 17 of Act 37 of 1963 ("the Rossouw case"). In delivering the judgment of the court in the Rossouw case Ogilvie Thompson JA remarked (at 562A) that it was "questionable whether prison regulations confer legal rights upon prisoners"; and (at 564 in fin - 565) that, although in certain respect it might be vague, the distinction between "necessities" and "comforts" was a valid one, and "that the detainee is entitled to the former as a matter of right but to the latter only as a matter of grace." Wessels ACJ (at 30 in fin-31) did not find it necessary to deal with the distinction "between necessaries or basic rights, on the one hand, and privileges or comforts, on the other hand." At 31A-B

Wessels ACJ remarked:-

> "Such basic rights or necessaries as, eg. food, clothing, accommodation and medical aid, are dealt with in the regulations. The fact that these regulations deal with facilities generally regarded as basic to the maintenance of a reasonably civilised minimum standard of living may no doubt be relevant to the question whether it was intended to confer rights of the kind referred to above. In my opinion, access to the publications mentioned in reg 109(4) and to sources of news of current events cannot be regarded as being basic to maintaining the minimum standard of living."

The dissenting judgment of Corbett JA begins at 38 in fin. The learned judge of appeal pointed out (at 39A-C) that although counsel for the appellants in presenting his case to the court had disavowed reliance upon the common law, the common law position of a sentenced prisoner and the general effect thereon of the Prisons Act and the prison regulations had been debated to some . extent at the Bar; and that he was therefore minded to make "some tentative observations in this connection".

Following immediately thereon Corbett JA made the remarks quoted by King J as the second classic statement. I shall refer to what Corbett JA said in the passage concerned as "the residuum principle". At 39C-E the following observations were made:-

> "It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily make upon a person's personal rights and liberties (for sake of brevity I shall henceforth speak merely of 'rights') are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal

redress." In support of the approach reflected in the residuum principle Corbett JA (at 39H-40) cited a passage from the judgment of Innes J in the Whittaker case (at 122-3) which included the Innes dictum. The Innes dictum had also been quoted by Ogilvie Thompson JA in the Rossouw case (at 560F-G), the learned judge of appeal pointing out (at 560G) that the Whittaker case had involved "detention in a wrong place, in a manifestly unauthorised manner, and plainly inconsistent with the status of the plaintiffs as awaiting-trial prisoners." In the Rossouw case Ogilvie Thompson JA further expressed the view (at 564 C) that "a detainee cannot ... rightly be equated with an unconvicted prisoner."

In the course of his dissenting judgment in the Goldberg case Corbett JA (at 40D-F) discussed the Rossouw case but remarked (at 40F-H) that he did not

read the judgment in that case -

> "....as indicating or implying that the general approach adopted in Whittaker's case (as expounded by Innes JA) is not relevant to the case of a sentenced prisoner, due allowance being made for the essential differences that exist between his position and that of an awaiting-trial prisoner. It is also of considerable interest to note that in the United States of America the same approach is adopted in regard to sentenced prisoners. According to American Jurisprudence 2nd ed vol 60 at 846:
>
> > 'A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.'
>
> (See also Coffin v Reichard 155 ALR 143.)
> Furthermore, a convicted prisoner's entitlement as a citizen to certain basic rights and to their enforcement by a court of law, where necessary, was asserted in this country in the case of Hassim v Officer Commanding, Prison Command, Robben Island 1973(3) SA 462(C), correctly in my view."

In Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others 1982(2) SA 547(C) the court had to examine the rights of detainees under sec

10(1) (a) bis of the Internal Security Act 44 of 1950.

In the course of his judgment (at 551C-E) E M Grosskopf J cited the Innes dictum and observed that it was unnecessary for him to consider whether the approach therein reflected should be adopted in determining the rights of convicted prisoners or of detainees held under other legislation. However the learned judge proceeded to state (at 551F-G):-

> "In respect of awaiting-trial prisoners, the correctness of the approach stated by Innes J as far back as 1912 has to my knowledge never been questioned."

E M Grosskopf J found that detainees held under the said section of Act 44 of 1950 (see now sec 29 of Act 74 of 1982) have the same rights as awaiting-trial prisoners except where such rights have been explicitly or implicitly changed by regulation in terms of the relevant legislation.

Since prisons are intended primarily as places

of punishment and rehabilitation of criminals it is inevitable, even in a comparatively enlightened era, that the pattern of existence for the inmates of a prison will largely be bleak, cheerless and uncomfortable. It is true that prison conditions have much improved since the age when the lot of the average prisoner was one of deliberate maltreatment and degradation. But while in general social changes have ameliorated conditions of detention one fundamental feature of prison life persists. The prisoner is still very largely at the mercy of his gaolers. It is this fact which in the development of our law lends particular significance to the decision in the Whittaker case.

The Innes dictum serves to negate the parsimonious and misconceived notion that upon his admission to a gaol a prisoner is stripped, as it were,

of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. The Innes dictum is a salutary reminder that in truth the prisoner retains all his personal rights save those abridged or proscribed by law. The root meaning of the Innes dictum is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common law rights.

It is self-evident that the extent to which imprisonment will make necessary inroads upon a particular prisoner's personal rights will depend upon the reason for his detention and the legislation applicable to him. Making full allowance therefor, it

seems to me nevertheless that although the Whittaker case was concerned with the plight of awaiting-trial prisoners the Innes dictum is one of general application. As a matter of logic and legal principle I am unable to see why it should not apply to every prisoner in a gaol irrespective of the reason for his detention. As to principle, subsequent to the Goldberg case the following general proposition was stated by Jansen JA in delivering the judgment of this court in Mandela v Minister of Prisons 1983(1) SA 938(A) (at 957E-F).

> "On principle a basic right must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration."

For these reasons I would respectfully express my agreement with the general approach reflected in the residuum principle enunciated by Corbett JA in the

Goldberg case. Moreover, in seeking to identify or to circumscribe basic rights I would approve the critical approach adopted by Corbett JA in the Goldberg case in regard to the efficacy or otherwise of a test based upon the distinction between comforts" on the one hand and "necessities" on the other hand. In this field of inquiry, so I consider, the line of demarcation between the two concepts is so blurred and so acutely dependent upon the particular circumstances of the case that the distinction provides a criterion of little value. An ordinary amenity of life the enjoyment of which may in one situation afford no more than comfort or diversion may in a different situation represent the direst necessity. Indeed, in the latter case, to put the matter starkly, enjoyment of the amenity may be a lifeline making the difference between physical fitness and debility; and likewise the difference between

mental stability and derangement. I therefore also respectfully endorse the following remarks (at 41F-H) in the dissenting judgment in the Goldberg case:-

> "It is said that a prisoner has no right to study or to access to. libraries or to receive books; that these facilities are privileges not rights, comforts not necessities. To my mind, this is an over-simplification. To test the position, suppose that an intellectual, a university graduate, were sentenced to life imprisonment and while in gaol was absolutely denied access to reading material - books, periodicals, magazines, newspapers, everything; and suppose further that there was no indication that this deprivation was in any way related to the requirements of prison discipline, or security, or the maintenance of law and order within the prison and that, despite his protests to the gaol authorities, he continued to be thus denied access to reading material. Could it be correctly asserted that in these circumstances he would be remediless? That all he could do was to fret for the comforts which he was denied?"

In this appeal we have had the benefit of full and able argument on both sides. At the trial it was argued on behalf of the defendant that the jurisdiction

of the court below to determine the issue before it had been ousted by the regulations. (See the judgment of the trial court (at 110G-113F). The objection was dismissed as unsound (at 113F-G) by King J. Before us Mr Le Roux, who appeared for the defendant, wisely abandoned the objection.

I turn to the merits of the appeal. The head of the prison in which the plaintiff spent his detention was Major Geldenhuys. The officer in command of the entire prison complex, which is a large one, was Brigadier Munro. During the time of the plaintiff's detention sustained and strenuous efforts were made on his behalf from outside the prison in the hope of securing for him a less isolated form of incarceration. Of particular importance in the case are two letters, respectively dated 3 August and 25 August, 1988 by Mr Hardcastle, on behalf of the plaintiff's attorneys, to

Munro. A copy of the former was sent to Geldenhuys. Both letters are quoted in full in the judgment of the court below - the former at 118I-121C and the latter at 121E-122D. In both letters the situation of the plaintiff is described as "effective solitary confinement". In a telefax sent to the plaintiff's attorneys on 1 September 1988 Munro stated that the plaintiff was "not being held in isolation". In the plaintiff's particulars of claim the main complaint is that the plaintiff was held "in conditions amounting to solitary confinement." The defendant's plea denies this allegation.

The plaintiff's circumstances in the prison are largely common cause, and they are accurately recounted in the judgment of King J (at 113G-114D) in the following words:-

> "Plaintiff was held alone in a small single cell in a group of eight cells, with the other

cells being unoccupied. For the first two months of his detention and until the arrival of another detainee, Shapiro, the metal grille and metal door of plaintiff's cell remained closed almost all the time. The group of eight cells in which plaintiff was held was separated from the rest of the section by a wooden door which remained closed throughout plaintiff's detention there, except when access to or from the group of cells was required.

Plaintiff was guarded by a warder throughout his detention. For about the first two months plaintiff was subject to a 24-hour guard but thereafter he was so guarded only during the day. Whenever plaintiff moved out of his cell he was accompanied by a warder. Plaintiff was not permitted to talk to other prisoners. He exercised alone until 3 August 1988, whereafter he was allowed to exercise with the awaiting trial prisoners and he was not prevented from talking to them. Apart from this the only other real contact plaintiff had with other people was on the occasions he had visits (from his parents and his attorneys), when he visited the library and the sickbay and when he attended video screenings as well as when he visited the hospital outside the prison. When plaintiff was moved to the hospital section of the prison on 20 September 1988 and in the period prior to the arrival there of another detainee, Harvey, plaintiff was even more

> isolated in the sense that he was further removed from the communal cells adjoining the group of single cells in which he had been held.
>
> An assessment of the isolated nature of plaintiff's detention would not be complete without reference to certain other conditions of his detention. The central radio broadcast system was out of order in plaintiff's cell during the entire period of his presence there and plaintiff was not permitted access to a portable radio. His access to books, magazines and newspapers was limited. Although he received a large number of postcards he was limited as to the number of letters he could write and receive."

The segregation of the plaintiff, so concluded the trial

judge (at 114D-E) resulted in his -

> "....effective isolation....from the rest of the inmates of the prison, which resulted in deprivation of ordinary human contact and communication considerably in excess of that applicable to awaiting trial and convicted prisoners at the prison."

At the trial a large body of evidence was

adduced on behalf of the plaintiff as to the effects

upon his health, both physical and mental, of the

conditions in which he was held. This evidence was given by the plaintiff himself, his father who visited him in the prison, and two of his legal representatives who consulted with him at the prison during his detention. The nature of this testimony is comprehensively reviewed by King J (at 133A-135B). It was not challenged during cross-examination and no evidence was led on behalf of the defendant to counter it. As to the resultant deterioration in the health of the plaintiff there is no good reason to differ from the trial judge's acceptance of the evidence in question and his findings based theron. In the course of his judgment the learned judge said:-

> "The effects on plaintiff were devastating. He is a frail young man who was not in good health when he commenced his detention, but he has an inner strength and resolution which kept him from 'cracking-up' altogether. He testified to progressively worsening depression, an inability to concentrate and to study for long periods, rapidly fluctuating

> changes of mood, a tendency to bouts of anger and irritation and difficulty in sleeping. Some of these symptoms were still present at the time of the trial - plaintiff testified that he was still experiencing difficulty in concentrating, became easily irritated and had become obsessive about the need to be in the company of others." (at 132H-J)

And later in the judgment (at 135C-E):-

> "It is evident from letters written, from personal approaches made and from assistance solicited from others (a member of Parliament, a group of academics and a minister of religion all made representations on plaintiff's behalf) that plaintiff's parents and his attorneys were continuously concerned for plaintiff's health and welfare throughout the period of his detention. This concern reflects the seriousness of the problems relating to plaintiff's health, physical and psychological. I am satisfied on the undisputed evidence that plaintiff suffered very severely during the lengthy period of his detention. This must have been aggravated by plaintiff's knowledge that he was not a convicted prisoner nor awaiting trial."

Mention has already been made of the fact that

in its plea the defendant denied that the plaintiff had

been held "in conditions amounting to solitary

confinement." The defendant's plea went on to aver that the plaintiff's detention at the prison from 3 May to 6 October 1988:-

> "....was lawful in all respects throughout the whole period."

Particulars for trial having been sought by the plaintiff and furnished by the defendant, it emerged that in support of its plea that the conditions of the plaintiff's detention had been lawful the defendant would at the trial invoke the defence of statutory justification. In its response to the plaintiff's request for particulars for trial the defendant stated:

> "First Defendant admits that Plaintiff was caused or allowed to be held segregated from all other prisoners save for the period 1 2 July to 20 July 1988, the reason being that save for the said period he was the only white male detainee held under the Emergency Regulations at the prison...."

and later in the same reply:-

> "Insofar as Defendants aver that any conduct

on the part of the employees of First Defendant was lawful, such conduct was empowered by and took place in terms of and pursuant to the relevant and applicable provisions of the following enactments:-
(i) the Prisons Act, No 8 of 1959 (as amended; (ii) the Prisons Regulations promulgated under Government Notice No R2080 of 31 December 1965 (as amended from time to time) pursuant to and in terms of the provisions of Section 94 of the Prisons Act; (iii) Regulation R106 published in Government Gazette No 10805 of 26 June 1987; (iv) the Prison Emergency Regulations published in Government Gazette No 11341 of 10 June 1 988 under Regulation R98."

The way has now been cleared for a consideration of the questions (J) whether the conditions under which the plaintiff was held amounted to an infraction of the plaintiff's basic rights, and, if so (2) whether the defence of statutory justification was established.

Black's Law Dictionary 5 ed. at 1249 gives

the following definition of "Solitary confinement":-

> "In a general sense, the separate confinement of a prisoner, with only occasional access of any other person, and that only at the discretion of the jailer. In a stricter sense, the complete isolation of a prisoner from all human society, and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction."

Solitary confinement in the stricter sense indicated in the above definition is recognised in various provisions of the Correctional Services Act 8 of 1959 and the Prisons Regulations, but it is invariably made subject to very careful limits particularly in regard to the duration thereof, and the necessity for safeguarding the prisoner's health is emphasised. A prisoner found guilty by a commissioned officer of a contravention of the prison regulations is liable to any of the four different forms of punishment prescribed in paragraphs (a) and (c) to (e) of sec 54(2) of the Act.

Paragraph (e) provides for solitary confinement in an isolation cell, with full diet, for a period not exceeding thirty days. Prison Regulation 101(2) provides that a prisoner shall not be subjected to solitary confinement if the medical officer certifies that it will be detrimental to the prisoner's physical or mental health. In terms of sec 78 the Commissioner may in respect of convicted prisoners order their complete segregation (not deemed to be solitary confinement imposed as a punishment) in certain defined circumstances; but in terms of sec 78(3) such complete segregation shall not be ordered or enforced if the medical officer certifies that it "would be or is dangerous to the prisoner's physical or mental health." In terms of sec 80(1) a person who displays tendencies towards violence or escape may be confined in an isolation cell as often "and as long as it is urgently

and absolutely necessary to secure or restrain him." (Emphasis added.) Sec 80(5) provides that if it is considered "absolutely necessary" to continue such confinement in an isolation cell for longer than one month the head of the prison shall report accordingly to the Commissioner who may thereafter order an extension for two additional months; but no such confinement shall exceed three months without an order under the hand of the Minister. See further the provisions of Prison Regulation 118.

In the instant case there was not complete isolation of the plaintiff from all human society. He was permitted occasional and limited access to other persons. The plaintiff was nevertheless subjected over many months to a substantial degree of isolation. Having regard to the evidence already outlined there can be no quarrel with the description of the plaintiff's

situation (in the aforementioned letters by Hardcastle to Munro) as being one of "effective solitary confinement". In response to a question from this court during argument counsel for the defendant had difficulty in suggesting any more accurate characterisation of the constraints under which the plaintiff was held.

Man is by nature a social animal whose well-being depends upon his association with others. Recluses who voluntarily seek seclusion are known, but they are the exception to the rule. In most people the gregarious instinct is strongly implanted; and to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. It cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence. This fact has been recognised since the beginning of time, and it is

mirrored in the Correctional Services Act and the Regulations thereunder.

One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in corpus, but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element. For present purposes a convenient summary of the position is to be found in W A Joubert's Grondslae van die Persoonlikheidsreg (1953) at 131:-

> "(1) Die reg op fisiese integriteit
> Die geobjektiveerde regsgoed is hier nie die liggaam in die gewone konkrete sin van die woord nie, maar die hele fisies-psigiese kant van die persoonlikheid. Die mens het onder hierdie hoof 'n persoonlikheidsreg t a v :
>
> die liggaam, waardeur hy beskerm word teen enige fisiese aantasting

> daarvan, hetsy deur gewelddadige besering, hetsy op meer indirekte wyse soos deur die toediening van gif, die veroorsaking van fisiese skokke, ens.;
>
> onafskeibaar van die voorgaande, die gesondheid in volle omvang, insluitende die verstandelike welstand;
>
> die liggaamlike vryheid, sodat hy beskerm word nie net teen gevangehouding nie maar ook teen enige belemmering van die bewegings-en handelingsvryheid;...."

In my view the evidence to which reference has earlier been made amply demonstrates that the detention to which the plaintiff was subjected during his detention constituted an infraction of his basic rights. Such segregation involved an aggression upon his absolute right to bodily integrity; and in particular it represented a trespass upon and violation of the plaintiff's right to mental and intellectual well-being - the right to which, in the quotation above, Joubert

refers as "die verstandelike welstand." It remains to consider whether in terms of the relevant penal enactments the prison authorities were entitled so to treat the plaintiff.

The plaintiff was neither a convicted nor an awaiting-trial prisoner. He had been detained in terms of the relevant emergency regulations which provided for detention where it was considered necessary for the safety of the public, or for the safety of the detainee, or for the termination of the state of emergency.

In regard to the plaintiff's main complaint (effective solitary confinement) the defence of justification raised by the defendant hinged on the provisions of Prison Emergency Regulation 3, ("PE reg 3") which reads as follows:-

> "3. As far as it is practicable in the opinion of the head of a prison (with due regard to any disciplinary, control, security and other measures taken for the effective administration of the prison) detainees shall be segregated from sentenced and other categories of unsentenced prisoners in the prison."

The plaintiff's case was that in causing the plaintiff to be isolated as aforementioned Geldenhuys, as head of the prison, failed properly to exercise the discretion entrusted to him and that he did not apply his mind to those matters proper for his consideration. The gist

of the plaintiff's case was summed up thus by the trial

judge (at 117B-E):-

> "In effect plaintiff contends that the prison officials, particularly Geldenhuys, abdicated their discretion in favour of the security branch of the South African Police who were allowed to dictate the conditions of plaintiff's detention; the discretionary powers conferred upon the head of the prison were in substance exercised by the security branch; the head of the prison did not merely consult the security branch but acted obediently to the directions of the security branch without exercising his own discretion. Further, so it was contended, the prison officials failed to apply their minds to the matter by adopting rigid policy considerations which they blindly followed, particularly with regard to what was meant by segregation in the context and to whether in plaintiff's case segregation was practicable or not.
>
> It was also submitted that plaintiff was held in isolation in breach of a fundamental right where this was not authorised by legislation and that the isolated manner of plaintiff's incarceration was so grossly unreasonable as to be indicative of a failure by Geldenhuys and the other officials to apply their minds to the matter."

In support of the plaintiff's case as outlined

above there testified the plaintiff himself, his father and two representatives from the firm of attorneys representing him. In the course of the evidence on both sides there was explored in detail the correspondence which had passed between the plaintiff's attorneys and the security branch; between the plaintiff's attorneys and the prison officials; and, last but not least, between the prison officials and the security branch.

The case so advanced by the plaintiff was disputed by the defendant whose main witnesses were Brigadier Munro, Major Crous, Major Voigt and Major Geldenhuys. In the oral evidence it was sought to establish that the isolation of the plaintiff followed upon a decision properly taken by Geldenhuys, as head of the prison, under PE reg 3. The plaintiff's assertions that the prison officials had simply obeyed the

instructions of the security branch were warmly repudiated by the defendant's witnesses.

The trial judge formed a favourable impression of the testimony on behalf of the plaintiff, which he found was supported by the correspondence put in at the trial. In this regard the learned judge recorded (at 131D-E) the following findings:-

> "I find the veracity of plaintiff and those who testified on his behalf, namely his father - and the two legal representatives, Corbett and Hardcastle, to be unimpeachable. In any event much of what they testified to is supported by contemporaneous documentation. Where there is a conflict between the evidence adduced on behalf of plaintiff and that adduced on behalf of first defendant, I prefer the former."

In my judgment nothing has been shown which would entitle this court to doubt or distrust the correctness of the trial court's credibility findings. Indeed, a perusal of the record satisfies me that the learned judge's assessment of the witnesses and their

reliability was sound. Here I should mention that in regard to various crucial issues the version given by the plaintiff's witnesses was not challenged in cross-examination. A single but striking illustration will here suffice. On 3 August 1988 Hardcastle wrote to Munro seeking permission for the plaintiff to be held together "with other de facto political security prisoners in the prison". On 16 August 1988 a meeting between Munro and Hardcastle took place. According to Hardcastle's testimony he was on this occasion told by Munro that the latter was personally sympathetic to the application for such permission, but that he was bound by the attitude of the security police. In his letter of 25 August to Munro Hardcastle was at pains to record precise details of the earlier discussion between him and Munro. The letter stated, inter alia:-

> "We confirm and record that you said that although you were in favour of the application

> you could not accede to the requests .... because of the attitude of the security police. You added that .... the decision with regard to our client's request was effectively in the hands of the security police. The writer then put it to you that it was his view that the security police were effectively exercising a power of veto with regard to your discretion. During the course of the meeting you agreed that this in fact was the situation, and that, although you did not feel comfortable about this, your hands were tied by what you described as the policy of the Prisons Department in this regard."

Hardcastle concluded his letter with the statement that "unless appropriate steps are taken to rectify the unlawful exercise of your discretion within five days" legal steps would be taken against him.

The only written response by Munro to the very pointed recriminations set forth in Hardcastle's letter was a denial that the plaintiff was being held in isolation. Counsel for the defendant pressed on us an argument that since Hardcastle had threatened legal

action, further written comment by Munro at that stage would have been superfluous. The argument is untenable. Munro was a high-ranking officer in the Prison Service. In any circumstances, so I consider, Hardcastle's letter called for a proper and full reply. The fact of the threat of legal action heightened the need - if Hardcastle's letter contained substantially untrue allegations - for the prison authorities to set the record straight. Despite the fact that ' Hardcastle's evidence as to what Munro had told him on 16 August 1988 was left unchallenged in cross-examination, when Munro came to testify he denied having said what Hardcastle had attributed to him. In these circumstances it is clear that King J (at 122E) rightly rejected Munro's denial.

Upon a consideration of all the evidence, but more particularly the correspondence between the prison

officials and the security branch, the trial court found (at 123B-C):-

> "....that it was the security police who were taking the decisions with regard to whether or not plaintiff was to be held in isolation."

Paying due regard to the forcible argument presented by counsel for the defendant on this part of the case I am not persuaded that the court below erred in so finding. Indeed, it appears to me that the finding was correct.

- The tenor and drift of the correspondence is revealing. In response to a letter on behalf of Geldenhuys in which the security branch was invited to state its views concerning the request that the plaintiff should be held with others there came, in a letter dated 5 September 1988, the curt response that the provisions of P E reg 3 are peremptory ("gebiedend") and:

> "....hierdie kantoor is derhalwe nie by magte om enige wysiging daarvan toe te laat nie en die aangehoudene moet dienooreenkomstig ingelig word."

(See the judgment at 122F-J). No less significant (see the judgment at 123A-B) is the document indicating that Munro reported to the staff-officer of the Commissioner of Prisons that "Navraag is gedoen by die SAP (VP) of aangehoudene Hofmeyr saam met ander ongevonniste gevangenes aangehou mag word." (Emphasis supplied.)

The matter does not end with what King J accurately described (at 123C) as an "attitude of subservience to the dictates of the security police." Geldenhuys testified that he and he alone took the decision to keep the plaintiff segregated as he was. To the extent that Geldenhuys may himself have so decided it is necessary to consider in how far, if at all, he acted in pursuance of P E reg 3. A perusal of the evidence of this witness in my view clearly establishes (as the trial judge found at 123G) that Geldenhuys failed to apply his mind to the matters which, in terms

of P E reg 3, he was legally obliged to direct his mind. In fact it is obvious (as the trial court further found at 124H) that Geldenhuys had no real inkling of the nature of the discretion thus entrusted to him.

Before examining the effect of his evidence it is necessary to say something of Geldenhuys's qualities as a witness. In the course of his judgment King J (at 125E) described him as having been "hesitant and diffident and uncomfortable in the witness box." A reading of the record of his evidence shows, in my opinion, that Geldenhuys was an unsatisfactory and evasive witness whose recollection of the leading events was poor and patchy. His reluctance to answer his cross-examiner and his imperfect memory are illustrated by the following two extracts taken from his evidence. On 27 June 1988 the plaintiff had applied in writing to the prison officials for permission to have a radio in

his cell. On 14 July 1988 the plaintiff's application was forwarded to the security branch "vir u aanbeveling en bevordering indien nodig." By letter dated 5 September 1988 (see the judgment at 123C-E) Geldenhuys was informed by the security branch that the plaintiff's application "is met Veiligheidshoofkantoor bevorder en is afgekeur .... Geliewe die aangehoudene dienooreenkomstig in te lig. " On 15 September 1988 Geldenhuys duly informed the plaintiff that his application to have a radio had not been approved. In this connection I quote from his cross-examination the following question and answer:-

> "U wou wag totdat u 'n antwoord kry van die Veiligheidstak voordat u vir horn gese het ....dat die versoek afgekeur iSy nie waar nie?
> ---- Nee, ek glo nie, maar dit kan ook moontlik wees, ek weet nie. Ek kan nie meer onthou nie."

On 15 September 1988 Geldenhuys also complied with the request of the security branch (conveyed to him in

another letter also dated 5 September 1988, to which reference has already been made) that the plaintiff should be informed of the outcome of his application to be held with others. In this connection I quote from his cross-examination the following questions and answers:-

> "Maar u getuienis was dat u het voor ontvangs van hierdie brief [van 5 September] die besluit gemaak in verband met die afsondering?--- Dit is korrek, ek het so getuig, ja.
>
> Nou moet die vraag ontstaan waarom u dit nodig geag het om die eiser op hierdie datum, die 15de September, in kennis te stel in verband met die afsondering? --- Nee, U Edele, ek kan nie meer onthou nie.
>
> U sien, die afleiding wat ek maak .... is, dat u gewag het vir die ontvangs van hierdie antwoord van die Veiligheidspolisie en na ontvangs van hierdie brief was die posisie vir u duidelik en u het derhalwe vir die eiser in kennis gestel?---Nee, U Edele, ek glo nie dit was my bedoeling gewees nie.
>
> Maar u kan nie dink hoekom u die eiser in kennis gestel het op hierdie datum? --- Nee,

ek kan nie onthou nie."

In regard to the provisions of P E reg 3 the testimony of Geldenhuys may be reduced to the following: (1) the word "segregated" to him signified "completely segregated"; (2) he had regard only and exclusively to the concluding words "detainees shall be segregated from sentenced and other categories of unsentenced prisoners in the prison"; and (3) he did not consider at all the feasibility of segregating the plaintiff "with due regard to the various measures taken for the effective administration of the prison." Geldenhuys was constrained to confess his total inability to envisage any sort of situation in which the segregation would not have been practicable. He went further. He said that he would have segregated the plaintiff even if he had not considered it practicable.

It need hardly be said that in the effective

administration of a South African prison the health of the prisoners is a matter of the highest importance. Munro readily and properly conceded that it was the duty of the prison to ensure that there should be no deterioration in the health of a prisoner during his detention; and that the plaintiff's psychological and physical well-being related directly to effective prison administration. In this connection King J (at 124G-H) recorded as his finding that Geldenhuys

> "....did not apply his mind to the question whether, having regard to the plaintiff's status as a detainee and having regard to plaintiff's health and to the undesirability of total segregation, some form of segregation less than complete segregation should have been implemented in due conformity with reg 3."

In my view the evidence amply supports the above finding. I would also express my agreement with the way in which the learned judge summed up (at 125B-D) the essential facts on this part of the case. He said:-

> "It is in my view clear that Geldenhuys adopted an inflexible approach that where it was practicable (as he understood the term) detainees were to be totally isolated from other prisoners, regardless of the particular circumstances of the individual, having regard to his health and welfare and also regardless of the fact that where fortuitously there was at any time only one detainee of a particular gender and ethnic group, his segregation would amount in effect to solitary confinement.... he regarded his hands as being tied by the regulation. It seems clear that he did not properly or indeed at all exercise a discretion, as he should have done."

The uncompromising stance adopted by Geldenhuys probably stemmed from a belief on his part that the segregation of detainees in P T reg 3 had a punitive purpose. Such a belief seems to me to be groundless. Reg 3 of the Emergency Regulations promulgated under the Public Safety Act 3 of 1953 provided for preventive arrest and detention. P E reg 3 must be regarded, so I consider, as having been enacted primarily in the interests of the detainees

themselves. Its object was to protect detainees from unwholesome exposure to, and enforced association with inmates of the prison whose criminal character was either known (sentenced prisoners) or suspected (awaiting-trial prisoners.)

Both in the court below and on appeal counsel for the defendant sought to underpin the defence of statutory justification by reference to two enactments which Geldenhuys himself had neither considered nor invoked. These are respectively Security Emergency Regulation 3(8) and Prison Regulation 132(2). In his judgment King J set forth the terms of the former at 125G-H, and of the latter at 126D. In my view neither enactment can be used to bolster up the plea of justification. The object of Security Emergency Regulation 3(8) was plainly to insulate a detainee from the outside world. I agree with the conclusion of the

court below (at 125J - 126A) that it governs the matter of access to a detainee by persons from outside a prison; and that it has nothing to do with the segregation of detainees within a prison. I would respectfully disagree with the contrary views (summarised by King J at 127B-C) which were expressed by Preiss J in Molobe v Minister of Law and Order in an unreported judgment delivered in the Witwatersrand Local Division on 17 February 1988. Prison Regulation 132(2) is discussed by King J at 126D - 127E of his judgment. For the reasons stated by the learned judge I agree that it has no relevance at all to the present case.

The plaintiff's six ancillary complaints have been listed earlier in this judgment. The third of these (the failure to allow the plaintiff regular newspapers and foodstuffs from outside the prison) and

the sixth (the failure to allow the plaintiff reasonable access to a television set or to video screenings) were held by the court below (see 129E; 130I) not to involve unlawful conduct on the part of the prison officials concerned. In the case of the fourth ancillary complaint (the failure to allow the plaintiff to write and receive more than two letters per week) the learned judge held (at 129I) that inasmuch as the plaintiff's written application for an increase in the number of letters was granted, the basis of the complaint was removed. It follows that nothing more need here be said of the third, fourth and sixth ancillary complaints.

I proceed to deal briefly with the remaining three complaints, each of which was carefully examined by King J in the course of his comprehensive judgment. The first ancillary complaint (the failure to allow the

plaintiff to exercise indoors when the weather did not permit outdoor exercise) was based upon non-compliance with Prison Emergency Regulation 6. It is dealt with at 127F - 128E in the judgment of the court below. For the reasons there set forth I find myself in agreement with the following conclusion (at 128 D-E) to which the trial judge was driven:-

> "It is quite clear that Major Voigt did not have regard to the provisions of Prison [Emergency] Regulation 6 but rigidly applied a prison policy without regard to plaintiff's particular circumstances.
>
> The failure to afford plaintiff a proper opportunity to exercise indoors either outside his cell and/or in the gymnasium was in my view wrongful and unlawful."

The second ancillary complaint (the failure to allow the plaintiff books and magazines, other than study materials, from outside the prison) was considered by the court a quo at 128 E-J. Pointing out that this privation had to a limited extent been allayed by the

fact that the plaintiff was allowed use of the prison library, the learned judge nevertheless held (at 128J) that the total ban on books and magazines from outside the prison was unlawful. For the reasons advanced by him I agree with his conclusion.

The fifth ancillary complaint was based (a) on the fact that, except for the last few weeks when he was in the prison hospital, the plaintiff had no access to the centrally broadcast system; or alternatively (b) on the refusal to allow the plaintiff to have an FM radio in his cell. As already mentioned, the centrally broadcast system was out of order in the plaintiff's cell during the entire period of his occupancy of it. The evidence points to no particular dereliction on the part of the prison authorities in this regard. The facts in regard to the refusal of the plaintiff's written application for a portable radio have been

mentioned earlier in dealing with certain parts of Geldenhuys's evidence. The court below dealt with this matter at 130B - C. From the evidence of Geldenhuys as a whole it is clear, in my opinion, that he misunderstood the scope of Prison Emergency Regulation 2(3) which merely prevents a detainee from securing a radio from outside the prison. One is here concerned, however, not merely with his mistaken view of the legal position. I agree with the conclusion reached (at 130E) by the learned judge:-

> "It is not so much that Geldenhuys misapplied the regulation; he did not exercise a discretion at all, but left this to the security police. This was unlawful."

The defendant's case was that the various conditions of detention visited upon the plaintiff flowed from the exercise of a proper discretion by the prison officials concerned. In this connection King J reminded himself (at 131 C-D) that the ipse dixit of an

administrative official exercising a discretion is not decisive; and that the legitimacy of the latter's actions had to be tested against all the available evidence. King J stated (at 131 F-G) his final conclusions in the following words:-

> "If there is an onus on plaintiff to show a failure to exercise discretion, he has in my view - in the respects outlined above - satisfied it.
>
> I thus hold that the segregated manner in which plaintiff was detained for the bulk of his period of detention, the fact that he was not allowed some form of indoor exercise, that he was not allowed access to books and magazines from outside the prison and that he was not allowed some form of access to radio broadcasts constitute wrongful and unlawful conduct as. alleged by plaintiff."

I find myself, with respect, in general agreement with all of the remarks just quoted. For the sake of clarity and completeness, I would venture two further observations thereon.

The first concerns the status properly to be

assigned to those ancillary complaints which the trial court held to be valid. In his judgment in the Goldberg case (supra) Corbett JA, having stated the residuum principle, followed it up by noting (at 39 F-G) the following caveat:-

> "I would emphasize the use of the words 'basic' and 'denied' in this connection because I do not wish to convey the impression that every alleged infraction of a prisoner's rights should be allowed to be a cause for legal action. If that were permitted, the position of the prison authorities could become intolerable, and the proper- administration of gaols exceedingly difficult. In terms of the regulations prisoners who have complaints about their treatment in gaol are given the opportunity to voice them and the regulations also prescribe how such complaints are to be dealt with (see reg 103 and also reg 104). This should be the remedy for complaints not amounting to a denial of basic rights."

In the present matter the central core of the plaintiff's case is his enforced isolation. It is unnecessary, I consider, to decide whether the deprivations suffered by the plaintiff in regard to lack of indoor

exercise, the ban on books and magazines, and the absence of a portable radio in his cell were of such a nature that, either singly or cumulatively, they would have supported an action for damages based on injuria. Such an inquiry would represent an artificial exercise. Essentially these three deprivations underscored and exacerbated the hardships and tribulations of effective solitary confinement. This was, correctly so I think, the view adopted by King J. In argument in the court below a suggestion on behalf of the plaintiff was made (see the judgment at 135 I-J) that in its quantification of damages separate amounts should be allocated by the trial court under the head of each of these deprivations. The learned judge declined to do so and instead he awarded a lump sum. He remarked (at 136A):-

> "By far the major component of plaintiff's damages relates to the fact of. his segregation. The other factors in respect whereof I have found in plaintiff's favour really constitute

circumstances which aggravated the solitariness of plaintiff's situation."

The second observation I wish to make concerns the burden of proof in relation to the legality or otherwise of the conditions of the plaintiff's detention. In determining whether or not the prison officials had exercised a proper discretion the trial judge (at 131F) was prepared to assume in favour of the defendant that in this regard the plaintiff bore the burden of proof. Even on that assumption King J found in favour of the plaintiff. Although I am satisfied on all the evidence that the failure to exercise a proper discretion was in fact established on a balance of probabilities, I wish to state briefly what I consider to be the position in regard to the onus on this issue. Both in the court below and on appeal it was contended on behalf of the plaintiff that the burden of proof lay with the defendant. In my opinion that submission is correct.

The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our courts have adopted the rule that such infractions are prima facie illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.

The detention to which the plaintiff was subjected constituted an infraction of his basic rights, and, in particular, of his right to bodily integrity. For purposes of the present appeal I find it unnecessary to say anything more in regard to onus than that I respectfully agree with the approach adopted by E M Grosskopf JA in During NO v Boesak and Another 1990(3) SA 661 (A). In the course of his judgment the learned judge of appeal said (at 673 G-H):-

"Wat ek hier veral wil beklemtoon is die beginselstandpunt dat, as 'n saak van beleid, dit

reg en billik is dat 'n persoon wat inbreuk maak op die vryheid van die individu die bewyslas behoort te dra om te bewys dat sy optrede regmatig is."

And again (at 674 B-C):-

"Dit kan tog nie gesonde regsbeleid wees dat 'n persoon ingekerker bly hoewel 'n geregshof meen dat daar 'n gelyke kans is dat sy inhegtenisneming te kwader trou geskied het nie. Dieselfde oorweging geld waar die hof onseker is of die arresteerder sy aandag behoorlik toegespits het op die vraag of die inhegtenisneming nodig was vir die gemelde doeleindes. Dit druis in teen 'n mens se billikheidsgevoel dat 'n persoon in aanhouding moet bly waar 'n hof nie oortuig is (op 'n oorwig van waarskynlikhede) dat die persoon wat die aanhouding gelas het, behoorlik aandag aan die saak gegee het nie."

Substituting "alleenopsluiting" for "aanhouding" in the abovequoted passage, the same considerations of- legal policy and justice seem to me to point to the conclusion in the instant case that the defendant bears the onus of proof. This view of the incidence of the onus is, I think,

no more than a corollary of the residuum principle.

In fairness to the prison officials responsible

for the conditions under which the plaintiff was detained it is necessary to state that there was not the faintest suggestion at the trial that any of them was actuated by any feeling of spite or ill-will towards the plaintiff. Indeed, the trial judge properly recorded his impression (at 132F) that no hostility had been displayed towards the plaintiff and that, when allowance was made for " the circumscribed limits" within which the prison officials believed they had to act, the plaintiff "was shown courtesy and consideration."

This brings me to a legal issue which arises crisply in the appeal: the mental element on the part of the wrongdoer which is necessary to sustain the cause of action on which the plaintiff relies. The general principles of the modern South African law of delict are essentially derived from Roman law. See LAWSA vol 8 page 11 par 6. Injuria is the wrongful and intentional

infringement of an interest of personality. In an action for damages based on injuria the plaintiff must prove intent (dolus, animus injuriandi) on the part of the defendant. Intent and motive, however, are discrete concepts. As pointed out by Stratford JA in Gluckman v Schneider 1936 AD 151 at 159 "Motive...is the actuating

impulse preceding intention." Intention is a reflection of the will rather than desire. The pertinent difference between the two concepts was stressed in the Whittaker case (supra). At 131 of his judgment Solomon J stated: "It is not necessary in order to find that there was an animus injuriandi to prove any ill-will or spite on the part of the defendants towards the plaintiffs...." Earlier in his judgment (at 129) the learned judge of appeal remarked that he did not for one moment doubt that defendants had acted bona fide.

Dolus encompasses not only the intention to

achieve a particular result, but also the consciousness that such a result would be wrongful. See: Dantex Investment Holdings (Pty) Ltd v Brenner and Others NNO 1989(1) SA 390(A) at 396 E, and the cases there cited. On behalf of the defendant it was strenuously submitted that in the present case, even if the infringement of the plaintiff's personality rights was objectively unjustifiable, the plaintiff's action should nevertheless have failed for the reason that there was no consciousness of the wrongfulness of the conduct in question; and hence no animus injuriandi. Dolus was excluded, it was said, by reason of the ignorance on the part of the prison officials of the wrongful character of their acts which injuriously affected the plaintiff. For the reasons which follow I am unable to accede to this argument.

It is clear that without dolus the action for an injuria would lie neither in Roman law nor in Roman-Dutch

law. See the remarks of Davis J in Wade & Co v Union Government 1938 CPD 84 at 86. It is equally clear, however, that in a limited class of injuriae the current of precedent has in modern times flowed strongly in a different direction. In this limited class of delicts dolus remains an ingredient of the cause of action, but in a somewhat attenuated form in the sense that it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act. Included in this limited class are cases involving false imprisonment and the wrongful attachment of goods.

The possibility that in the case of certain forms of injuriae involving constraints on personal liberty the wrongdoer's legal liability might exist even in the absence of his appreciation of the wrongful nature of his injurious act, has been explicitly recognised by this court. In

Ramsay v Minister van Polisie en Andere 1981(4) SA 802(A)

Botha AJA (with whom the remaining members of the court

concurred) agreed with the order appearing at the end of

the judgment of Jansen JA but was at pains to dissociate

himself from certain observations in regard to

animus injuriandi in the judgment of Jansen JA. At 818

E-H Botha AJA said the following:-

> "Hy aanvaar, na aanleiding van die posisie by laster, dat animus injuriandi, wat onregmatigheidsbewussyn verg, in die algemeen 'n
> element is van alle inbreuke op die persoonlikheid wat as injuriae aangemerk word. Ek aanvaar dit nie. Ek laat die moontlikheid oop dat daar by bepaalde vorme van injuria na die else van die regsbeleid aanspreeklikheid kan bestaan in die afwesigheid van onregmatigheidsbe-wussyn by die dader. In der waarheid word my benadering onderskraag deur die huidige stand van die regspraak. Dit val nie te betwyfel nie dat daar in die regspraak, veral in die Transvaai, oor 'n tydperk van jare met betrekking tot seker vorms van injuria 'n standpunt ingeburger is wat beteken dat by sekere injuriae onregmatigheidsbe-wussyn by die dader geen voorvereiste vir aanspreeklikheid is nie. Ek hoef nie daaroor op besonderhede in te gaan nie. By wyse van enkele voorbeelde verwys ek slegs na Birch v Ring 1914

> TPD 106; Cohen Lazar & Co v Gibbs 1922 TPD 142; Smith v Meyerton Outfitters 1971(1) SA 137(T)."

In the Cohen Lazar case (supra) a court messenger, on the instructions of a creditor who had no judgment, seized property of the debtor. A full court (Wessels JP and Gregorowski J) held that the seizure was an injuria. In the course of his judgment Wessels JP said at 144:-

> "The mere illegal and intentional interference , with the liberty of a free man by seizing him or his property is a delict which will support an action for damages."

And later in his judgment at 145:-

> "it is revolting to one's common sense to think that a person unsupported by any judgment could induce a clerk to issue to him a writ, seize a person's property, and escape liability merely because he acted without malice and under the impression that no judgment was required. If a person by his own unauthorised act intentionally injures an innocent person in his property, the latter is prima facie entitled to damages for loss caused to him."

Smit v Meyerton Outfitters (supra), which involved a claim based on an illegal arrest of the plaintiff by the

messenger of the court, was also a decision of the full bench. The case of Cohen Lazar (supra) was followed. At 139 C-D the following was said:-

> "In die geval van die actio injuriarum net die skuldbegrip met twee oorwegings te make. Die eerste is dat die verweerder opsetlik (intentionally) gehandel het en die tweede is dat hy geweet het dat die handeling onregmatig is. In die geval van onregmatige arrestasie, hoewel dit uit die actio injuriarum ontwikkel het, is die tweede oorweging nie 'n vereiste vir aanspreeklikheid nie."

I have cited the majority judgment in the Ramsay case (supra) as an example of recognition by this court of the fact that in cases involving the liberty of the citizen there may be liability for an injuria despite the wrongdoer's unawareness of the wrongful character of his act. No less significant, however, is the line of reasoning adopted by this court more than eighty years ago in the Whittaker case (supra). The same recognition, although not roundly expressed, is, I think, implied in the

decision in the Whittaker case. It is clear from the judgments delivered therein that dolus was predicated as an essential element of the injuria with which the court was concerned. Innes J in the course of his judgment (at 122) put the matter thus:-

> "I agree with WESSELS J [who delivered the judgment of the court below] in holding that the illegal treatment to which the plaintiffs were subjected amounted to a delict on the part of those responsible for it. And I think the delict was of the class dependent upon intent (dolus); in other words, that it constituted an injuria. The action of the Governor was a wrongful and intentional interference with those absolute natural rights relating to personality, to which every man is entitled."

and again at 124:-

> "I have already pointed out that the infringement of the rights of these persons amounted to an injuria; a necessary feature of which is the existence of dolus, or intent. But when an unlawful aggression of this nature has been proved, the law presumes that the aggressor had in view the necessary consequence of his conduct; that is, that he had the intention to injure, the animus injuriandi (De Villiers, Injuries, p 145). That does not mean that he was actuated by malice

> or ill-will, but that he deliberately intended that the operation of this unlawful act should - have effect upon the plaintiff."

Turning to the judgment of Solomon J one finds the

following remarks at 130-1:-

> "It seems to me that we have present here all the requisites which are necessary to found an action of injuria. Those requisites are well laid down by De Villiers in his work on the law of injuries as follows: First: 'An intention on the part of the offender to produce the effect of his act'; in other words, the animus injuriandi. It is not necessary in order to find that there was an animus injuriandi to prove any ill-will or spite on the part of the defendants towards the plaintiffs; and it is quite immaterial what the motive was or that the object which the defendants had in view was a laudable one. It is sufficient that the injuries suffered by the plaintiffs were inflicted by the defendants, not accidentally or negligently, but with deliberate intention."

Neethling, Persoonliksheidsreg 2nd ed (1985) says

at p 116:-

> "Alhoewel onregmatige vryheidsberowing 'n injuria is waarvoor animus injuriandi 'n aanspreeklik-heidsvereiste behoort te wees, het die regspraak onder invloed van die Engelse reg hierdie

vereiste feitlik geheel en al negeer." In amplification of the above statement the learned author in footnote no 11 on the same page points out that in the Whittaker case (supra) at 122 and 130-1:-

> "....dolus of animus injuriandi onomwonde as vereiste vir onregmatige vryheidsberowing gestel word. Nietemin is die verweerders aanspreeklik gehou nieteenstaande die feit dat hulle bona fide geglo het dat hulle optrede geregverdig was (vgl - op 129) en opset weens gebrek aan onregmatig-heidsbewussyn bygevolg by hulle ontbreek het...."

Having referred to the decision in Smit v Meyerton Outfitters (supra) Prof Neethling comments:

> "Die opsetselement, onregmatigheidsbewussyn, en by gevolg dwaling as 'n verweer word dus -uitdruklik verwerp. Mens kan gevolglik konludeer dat aanspreeklikheid op grond van onregmatige vryheidsberowing skuldloos is."

To which he adds (by way of footnote no 16 on the same page):-

> "Afgesien daarvan dat hierdie negering van die skuldvereiste aan die invloed van die Engelse reg

toe te skryf is, kom spesiale oorwegings wat sodanige afwyking regverdig nietemin hier te pas...."

In my opinion the succinct dictum in Smit v Meyerton Outfitters (supra) quoted earlier in this judgment embodies a correct statement of our modern law. The application of the principle therein stated furthermore entails practical consequences which seem to me to be both sensible and just.

The principles of our law of delict which govern the legal liability of a wrongdoer for the infliction of unlawful bodily restraint, touching as they do the liberty of the subject, are principles of vital importance. I do not think that this court should try to reverse the direction along which our law has developed as reflected in the line of judicial precedents examined in this judgment. To upset an established and satisfactory principle because it is not in accordance with the Roman or Roman-Dutch law

would be to deny development to our law. Law is not a static thing. It is forever changing and being adapted to novel conditions. In the Scottish Juridical Review (1958) 242 at 244 J J Gow writes:-

> "....antiquarianism may be a hobby: it cannot be the badge of a living system of jurisprudence. In the long run the test of what is good is the test of social utility, and that applies to any system of law...."
> (quoted by Hahlo and Kahn, The Union of South Africa (1960) at p 50).

This truth has long been recognised in South Africa. In 1909 a Transvaal full bench composed of three future chief justices of this court (see Blower v Van Noorden 1909 TS 890 at 905) had this to say:-

> "There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions."

I return to the judgment of King J. Upon a

thorough appraisal of all the relevant facts of the case he considered R50 000 to be an appropriate award of damages. I see no reason for interfering with his award. In Hassim and Another v Officer Commanding, Prison Command, Robben Island and Another 1973(3) SA 462(C) Diemont J remarked (at 480 B-C):-

> "I can think of few greater hardships than for an active man to be locked up in a small cell day and night, week after week and month after month, in enforced idleness."

With that statement I entirely agree.

In the result the appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

G G HOEXTER JA

SMALBERGER JA)
F H GROSSKOPF JA) Concur
GOLDSTONE JA)
NICHOLAS AJA)