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REMEDIES AVAILABLE TO PENAL INMATES FOR INJURIES RECEIVED WHILE INCARCERATED

Lawful incarceration of a prisoner by the state results in the withdrawal or retraction of many privileges and rights. Such retraction, however, must be justified by the considerations underlying our penal system.[1] Historically, penal inmates in the United States were considered to be "slaves of the state."[2] Although this "slave" status has been gradually changed[3] by modern thought and practice,[4] the problem of enforcing discipline and obedience to authority among unruly convicts still remains.[5] While the penal inmate loses his liberty and must comply with strict disciplinary rules and regulations, he does not lose the right to personal security from unlawful invasion. The problem to be dealt with in this study is the determination of to what degree civil remedies for injuries to a prisoner have been granted in an effort to preserve the rights of the prisoner while, at the same time, maintaining prison discipline and order.[6]

The most difficult obstacle to overcome before a suit may be pursued successfully against any governmental unit is the sovereign immunity doctrine. Prisoners, as well as ordinary citizens, who are injured by the state are confronted with the common law theory that "The King

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1. Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952).
2. Ruffin v. Commonwealth, 21 Gratt. 790 (Va. 1871).
3. Westbrook v. State, 133 Ga. 587, 66 S.E. 429 (1909).
4. The sociological concept of the modern day penal system differs greatly from that which was followed in this country during the nineteenth century. Today the purpose of such a program is not only to punish the offender, but also to rehabilitate him so that he may once again resume his normal place in society. Since ninety-five percent of all those who were once incarcerated will some day be returned to society, the treatment accorded them while imprisoned is all the more important.
5. State v. Mincher, 172 N.C. 895, 90 S.E. 429 (1916).
6. An interesting sidelight to this study is presented by the international law concerning compensation to war prisoners for injuries which they received during their internment. The Hague Convention Concerning Prisoners of War emphasized that such prisoners retained their civil rights. However, it had serious flaws in that it failed to provide for the liability of employers and for the compensation of those injured. By 1917 both Germany and France had classified injured prisoners as though injured in battle and hence entitled to similar compensation. The Geneva Conference entitled prisoners injured while employed in industry to the workmen's compensation of the detaining power. All major powers with the exception of Russia and Japan adopted these principles. The United States informed Japan that this country would comply with these regulations with all war prisoners and civilian enemy aliens interned in the United States during World War II. *International Law Concerning Accidents To War Prisoners Employed In Private Enterprises,* 36 AM. J. INT'L L. 294 (1942).

can do no wrong, therefore the King cannot be sued."[7] Under this doctrine no liability arises because of the tortious conduct of those acting in behalf of the state.

To avoid this prohibition to suit, the injured plaintiff must rely upon statutory provisions waiving the sovereign immunity of the state. The most prominent statute breaching the sovereign immunity doctrine is the Federal Tort Claims Act.[8] By the enactment of this legislation Congress waived the sovereign immunity of the federal government under certain circumstances. However, through a study of court interpretations of this legislation, it is readily ascertainable that recourse to prisoners for penal inflicted injuries is not included within the terms of the act as interpreted.

The leading case of *Sigmon v. United States*[9] involved a prisoner who sought damages as a result of an injury received while operating a faulty emery wheel within a prison workshop. The court held that it was not the intent of Congress to include prisoners within the terms of the Federal Tort Claims Act for several reasons.

First, the court argued that it was the intent of Congress to include only the normal run of tort cases against ordinary people, and if prisoners were allowed to avail themselves of the provisions of the act, a "new and novel procedure"[10] would be established. The court specified that it could not "impute to Congress such a radical departure from the established law in the absence of express Congressional demand."[11] This argument failed to take into consideration the fact that the entire act itself was "novel." Congress did not establish or "demand" specific areas in which liability would exist, but rather established a general policy and then made specific exceptions thereto.

Second, the act specifies that "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."[12] Consequently, the court reasoned that since a private individual has no right to hold another in penal servitude, an injured prisoner would never find himself under like circumstances and hence could not avail himself of the provisions of the act.

Third, the act also makes liability dependent upon the law of the place where the act or omission occurred. The court held that since there

7. Alvord v. Village of Richmond, 3 Ohio N.P. 136 (1896).
8. 62 Stat. 933-84, 28 U.S.C. § 1346-2680 (1948).
9. 110 F. Supp. 906 (W.D. Va. 1953). See also Shew v. United States, 116 F. Supp. 1 (M.D.N.C. 1953).
10. Sigmon v. United States, 110 F. Supp. 906, 911 (W.D. Va. 1950).
11. *Ibid.*
12. *Id.* at 910.

had been numerous statutes enacted in an attempt to establish uniform prison systems, the treatment accorded federal prisoners did not greatly differ from one prison or "place" to another. Therefore Congress would certainly not have placed such stress upon "place" if it had intended to include federal prisoners within the terms of the act.

The Federal Tort Claims Act specifically excludes liability for injuries sustained due to assault and battery.[13] This restriction is not applicable in the *Sigmon* case, where injury was negligently inflicted. However, such a restriction would apply to a great number of prison injuries, particularly those caused by bodily mistreatment of the prisoner by prison officials or those inflicted by fellow inmates.

The Federal Tort Claims Act also precludes liability where a discretionary function is involved.[14] As will be discussed later, many of the state jurisdictions consider penal duties as discretionary. Hence, in these jurisdictions the federal government is not subject to liability for prison inflicted injuries.

New York is the only state which consistently has waived its sovereign immunity in the area of state tort liability for prison inflicted injuries. In 1930 the New York Legislature enacted the Court of Claims Act[15] waiving the state's sovereign immunity and consenting to have its liability determined by the courts. New York courts have allowed damages for injuries sustained due to the negligent acts of state officials. The chief area in which damages have been adjudged in this field is that of injuries negligently inflicted in prison workshops[16] or while attending to menial prison chores.[17]

Despite the willingness of New York to waive its sovereign immunity to suit for penal inflicted injuries, most jurisdictions hold contra. This is even the case in jurisdictions, such as North Carolina, where statutory and constitutional provisions appear to provide ample protection for the rights of penal inmates. For example, the state constitution of North Carolina requires that a proper jail structure be constructed and that it be superintended in such a manner as to "secure the health and comfort of the prisoner."[18] The North Carolina Legislature has provided a standard which specifies cleanliness, ample food, water and

13. 62 Stat. 984, 28 U.S.C. § 2680 (h) (1948).
14. 62 Stat. 984, 28 U.S.C. § 2680 (a) (1948).
15. N.Y. Sess. Laws 1930, ch. 585, § 3.
16. Duffy v. State, 197 Misc. 569, 94 N.Y.S.2d 757 (1950); Beale v. State, 46 N.Y.S.2d 824, (Ct. Cl. 1944); Paige v. State, 245 App. Div. 126, 281 N.Y. Supp. 98 (1935); Scalia v. State, 147 Misc. 622, 264 N.Y. Supp. 327 (1933).
17. Nunally v. State, 197 Misc. 764, 94 N.Y.S.2d 882 (1950); White v. State, 23 N.Y.S.2d 526, 34 N.E.2d 896 (1940).
18. N.C. Const. art. XI, § 6.

fuel. However it should be noted that the state legislature has not provided a statute waiving the state's immunity to suit. Consequently suits by penal inmates against the state[19] or its county and municipal subdivisions[20] have been for naught, even where the presumedly protected rights of the inmate have been flagrantly violated.

The sovereign immunity doctrine of the state is generally sufficient to protect municipalities within the state.[21] The principal theory considers municipalities as subdivisions of the state[22] and municipal officials, while carrying out the corporate powers which have been delegated to the municipality, as agents of the state.[23] However, the courts occasionally hesitate to use the strong, positive language of sovereign immunity when seeking municipal immunity and rely upon other bases for denying liability.[24]

In most cases the sovereign immunity of the state also serves as a protection from personal liability for governmental officials while they are acting within the scope of their power.[25] The theory behind such extension of sovereign immunity is that the only authority under which the individual may act is that of the governmental unit, hence the official is cloaked with the immunity of the sovereign.[26] There is also a strong belief that prison officials, especially, must have this protection to enable them to discharge their duties adequately and fearlessly. However, some jurisdictions, although prohibiting governmental liability, hold the official personally accountable for his misdeeds and subject to

19. Clodfelter v. State, 86 N.C. 51 (1882).

20. Parks v. Town of Princeton, 217 N.C. 361, 8 S.E.2d 217 (1940); Nichols v. Town of Fountain, 165 N.C. 166, 80 S.E. 1059 (1914); Coley v. City of Statesville, 121 N.C. 301, 38 S.E. 482 (1897); Moffit v. City of Asheville, 103 N.C. 237, 9 S.E. 695 (1889). Manuge v. Commissioners of Cumberland County, 98 N.C. 9, 3 S.E. 826 (1887).

21. Two early North Carolina cases have been found which allowed successful suits against municipalities to recover damage for penal injuries. Both cases relied heavily upon the constitutional requirement to maintain the jail facilities and the municipalities' failure to do so which resulted in death. However, neither case has been followed nor cited as authority in recent cases.

22. 245 App. Div. 126, 281 N.Y. Supp. 98 (1935).

23. Alvord v. The Village of Richmond, 3 Ohio N.P. 136 (1896).

24. Decisions in the state of North Carolina alone are not uniform in this regard. One case refuses municipal liability by classifying jail upkeep as a discretionary duty. Parks v. Town of Princeton, 217 N.C. 361, 8 S.E.2d 217 (1940). Another case relies upon the theory that wrongful acts by municipal officials are ultra vires. Nichols v. Town of Fountain, 165 N.C. 166, 80 S.E. 1059 (1914). Still another case refuses to hold the municipality liable because the prisoner was jailed for violation of a state law. Hobbs v. City of Washington, 215 N.C. 298, 84 S.E. 391 (1915).

25. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Gurley v. Brown, 65 Nev. 245, 193 P.2d 693 (1948).

26. Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1936).

civil suit.[27] The indications are that the federal courts follow this procedure and will not protect officials, other than top-ranking officials, who by acting illegally step outside the protection of their office.[28] Such ultra vires acts remove the protecting cloak of sovereign immunity and subject the officials to suit in their individual capacities.[29]

Even in jurisdictions which waive the states immunity to suit, the civil status of the penal inmate may prevent him from recovering damages for injuries received while incarcerated. Due to the fact that a prisoner is segregated from society, some jurisdictions hold that he is outside the protection of society's laws and is civilly dead.[30] It is considered the prerogative of the legislature to make the deprivation of a criminal's civil rights a portion of the penalty imposed for the commission of the crime.[31] Such a suspension of civil rights is commonly known as civil death.[32] This practice, however, did not develop in the American common law, and where it exists in this country today it is the result of legislative action.[33] Such deprivation by a state legislature can have no extra-territorial effect, but applies solely to the state in which the legislation is enacted and in which the crime is committed.[34]

A prisoner who is under the disability of civil death is denied access to the civil courts[35] and is required to await the restoration of his civil rights before bringing suit for penal inflicted injuries. There is some disagreement concerning the exact time of restoration of civil rights. For example, it is generally agreed that civil rights should be restored if a prisoner is conditionally pardoned or his sentence is commuted,[36] and some courts allow restoration upon the parole[37] of an inmate. For a

27. Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); city of Topeka v. Boutwell, 53 Kan. 20, 35 Pac. 819 (1894); Alvord v. Village of Richmond, 3 Ohio N.P. 136 (1896); Stinnett v. City of Sherman, 43 S.W. 847 (Tex. Civ. App. 1897).

28. McCartney v. West Virginia, 156 F.2d 739 (4th Cir. 1946). See also Mitchell v. Sharp 121 F.2d 964 (10th Cir. 1941).

29. Moffit v. City of Asheville, 103 N.C. 237, 9 S.E. 695 (1889).

30. Quick v. Western Ry., 207 Ala. 376, 92 So. 608 (1922); Smith v. Becker, 62 Kan. 541, 64 Pac. 70 (1901); Sullivan v. Prudential Ins. Co. of America, 131 Me. 228, 160 Atl. 777 (1932); Knight v. Brown, 47 Me. 468 (1859).

31. *In re* Donnelly's Estates, 125 Cal. 417, 50 Pac. 61 (1899).

32. This term is an extension of the old English common law which held that anyone convicted of a felony was under a bill of attainder. Such a person was required to suffer forfeiture of all his property to the king, corruption of blood (inability to heir or will property), and civil death (extinction of all civil rights). Today such a bill of attainder is forbidden by the United States Constitution, art. I, § 9.

33. N.Y. PEN. LAW 510; ME. REV. STAT. ANN. *ch.* 76, § 19 (1930).

34. Presbury v. Hull, 34 Mo. 29 (1863); Panka v. Endicott Johnson Corp., 24 F. Supp. 678 (N.D.N.Y. 1938).

35. Green v. State, 251 App. Div. 108, 295 N.Y. Supp. 672 (1938).

36. Lehrman v. State, 176 Misc. 1022, 29 N.Y.S.2d 635 (1941).

37. Platek v. Aderhold, 73 F.2d 173 (5th Cir. 1934).

number of years the New York courts refused to allow such restoration upon parole;[38] they differentiated between parole and commutation by pointing out that commutation results in the termination of the sentence and the restoration of civil rights, while parole only provides for physical liberation contingent upon compliance with the terms of parole. However, in 1946 the New York Legislature amended the terms of the State Penal Law[39] to permit a prisoner to initiate suit while on parole.[40] Those jurisdictions which subject a penal inmate to civil death during sentence usually protect his right to sue upon the termination of sentence by tolling the statute of limitations.[41]

A penal inmate who has circumvented the doctrine of sovereign immunity and whose civil rights have not been withdrawn may initiate a suit for damages which were sustained during the period of incarceration. However, before successful consummation of such a suit, the injury and circumstances surrounding its infliction must meet certain specified criteria imposed upon suits for penal inflicted injuries in the various jurisdictions. One such criterion is that of "duty." Often the deciding factor, determining whether the penal inmate shall have a right of action, is the breach of an existing duty owed by the governmental unit or the public official to the injured inmate. The general theory is that the state and its penal officials owe a duty of safekeeping and protection from unlawful injury to those incarcerated.[42] Where the law imposes such a duty and failure to fulfill it results in injury, the injured inmate shall have a right of action.[43] *Tyler v. Gobin*[44] emphasizes that such a duty is actually two-fold in nature. First, there is a duty owed by the public official to the public to keep the prisoner and to deliver him for trial; second, there is a duty owed by the public official to the prisoner to use ordinary and reasonable care under the circumstances to keep him safe.[45] When discussing the remedies available to prison inmates, only the latter of these duties is important.

38. White v. State, 23 N.Y.S.2d, 34 N.E.2d 896 (1940); Lehrman v. State, 176 Misc. 1022, 29 N.Y.S.2d 635 (1941).

39. N.Y. PEN. LAW § 510.

40. Duffy v. State, 197 Misc. 569, 94 N.Y.S.2d 757 (1950); Grant v. State, 192 Misc. 45, 77 N.Y.S.2d 756 (1948).

41. Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); Green v. State, 278 N.Y. 15, 14 N.E.2d 833 (1938); Moss v. Hyer, 114 W. Va. 584, 172 S.E. 795 (1934).

42. Asher v. Cabell, 50 Fed. 818 (5th Cir. 1892); Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230 (1928); Paige v. State, 245 App. Div. 126, 281 N.Y. Supp. 98 (1935).

43. Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897).

44. 94 Fed. 48 (C.C.S.D. Ind. 1899).

45. This duty is compared by the court to a similar duty owed by the sheriff to keep property safely, *i.e.*, chattels and livestock.

Hale v. Johnston[46] presents a detailed discussion of the importance of duty. The Tennessee court emphasizes the necessity of the duty being owed directly to the injured party in particular rather than to the public in general. The injury suffered because of the breach of duty must be of a different nature and extent than that to which all prisoners are exposed, *i.e.*, poor food and the discomfort of solitary confinement is not sufficient for a cause of action.[47]

A factor which weighs heavily on the court's decision concerning the existence or non-existence of a duty is the type or category of conduct which causes injury to the penal inmate.[48] It must be determined if the jurisdiction in question considers the care of penal inmates as a governmental, discretionary or ministerial function. Basically, the care and maintenance of prisoners is said to be a governmental or discretionary service for which no private action accrues to an individual who sustains an injury resulting therefrom.[49] These findings are based to a great degree upon the duty of the state to protect the public safety, public health, and public morals[50] in the exercise of its vast police power.[51] Ministerial services, on the other hand, are usually of an operational nature, the more menial tasks assigned to subordinate officials.[52] However, it is often most difficult to determine just where the line of demarcation is between the two categories. Also, it should be pointed out that merely having a service classified as ministerial does not guarantee liability, for if it is one solely for the public benefit, some jurisdictions will refuse liability.[53]

A few courts allow a right of action, against the public officials involved, for injuries inflicted upon penal inmates where the injury was

46. 140 Tenn. 182, 203 S.W. 949 (1918).

47. Williams v. Adams, 3 Allen 171 (Mass. 1861); Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949 (1918).

48. McIlhenney v. City of Wilmington, 127 N.C. 146, 37 S.E. 187 (1900). For an excellent discussion of this general area, see Dalehite v. United States, 346 U.S. 15 (1953), where the Court went into great detail to point out that discretionary functions include more than the initiation of programs or activities. Such functions are wide in latitude and include most, if not all, determinations made by executives and administrators on a planning rather than on an operational level. Matters of professional judgment made by qualified and competent persons are certainly included within this category.

49. Gentry v. Town of Hot Springs, 227 N.C. 665, 44 S.E.2d 85 (1947); Liming v. Holman, 10 N.J. Misc. 582, 160 Atl. 32 (1932); Alvord v. Village of Richmond, 3 Ohio N.P. 136 (1896).

50. Carty v. Winooski, 78 Vt. 104, 62 Atl. 45 (1905).

51. White v. Board of Comm'rs, 129 Ind. 396, 28 N.E. 846 (1891); Alvord v. Village of Richmond, 3 Ohio N.P. 136 (1896).

52. Gurley v. Brown, 65 Nev. 245, 193 P.2d 693 (1948); Hipp v. Farrell, 173 N.C. 167, 91 S.E. 831 (1917).

53. Hipp v. Farrell, 173 N.C. 167, 91 S.E. 831 (1917).

caused by the breach of a ministerial task.[54] These courts consider jail upkeep to be a ministerial function. In some jurisdictions, even where the menial task of jail upkeep is considered as discretionary and liability is denied in suits against governmental units, dicta seems to indicate that the prison officials who inflicted injuries upon penal inmates would be personally liable for such acts.[55]

A marked distinction can be seen in the courts' treatment of the term "discretionary" in suits against governmental units for injuries received in penal institutions and its treatment of the same term in connection with injuries received in other institutions such as government hospitals. In the latter type of institution the discretion is that of deciding if the patient should be admitted or if the operation should be performed. Subsequent acts which negligently cause injury are ministerial, and hence a suit may be instigated.[56] As discussed, this is seldom the case in penal institutions.

If it is established that a duty does exist, there still remains the problem of determining the standard of care which must be met to avoid a breach of the existing duty. The usual standard has been specified as "the exercise of reasonable and ordinary care to protect the prisoner."[57] In assisting the jury to arrive at what should be considered reasonable under penal conditions, the instructions of the court have varied considerably. For example, the New York Court, when discussing the standard of care required in the operation of prison industries, pointed out that since the penal inmate had no choice to do anything except as he was ordered and did not voluntarily assume any of the risks or liabilities of his occupation, the state should actually maintain a higher standard of safety for the prisoner's protection than that resting upon the employer of free labor in the industries of the state.[58] However, the court in a later case[59] held that, the state must comply with the same standard of care as its citizens engaged in similar employment in industry. Although no case has been found which holds the state subject to a lesser standard of care than that required of civilian industry, such might

54. Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897); Clark v. Kelly, 101 W. Va. 650, 133 S.E. 365 (1926).

55. White v. Board of Comm'rs, 129 Ind. 396, 28 N.E. 846 (1891); McIlhenney v. City of Wilmington, 127 N.C. 146, 37 S.E. 187 (1900); Alvord v. Village of Richmond, 3 Ohio N.P. 136 (1896).

56. United States v. Grey, 199 F.2d 239 (10th Cir. 1952); Costley v. United States, 181 F.2d 723 (5th Cir. 1950).

57. Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230 (1928); O'Dell v. Goodsell, 149 Neb. 261, 30 N.W.2d 906 (1948); Riggs v. German, 81 Wash. 128, 142 Pac. 479 (1914).

58. Scalia v. State, 147 Misc. 622, 264 N.Y. Supp. 327 (1933). See also Nunally v. State, 197 Misc. 764, 94 N.Y.S.2d 882 (1950).

59. Beale v. State, 46 N.Y.S.2d 824 (Ct. Cl. 1944).

actually be the case where prison officials are given wide latitude in the performance of prison duties. In suits against the personal liability of prison officials, some jurisdictions hold that the prison officials shall be presumed to be exercising the necessary reasonable care, and this presumption must be refuted before an inmate may successfully pursue an action for injury.[60]

In determining whether the injured inmate has a cause of action against the prison official in his individual capacity, courts rely heavily upon the malice and intent behind the act which precipitated injury. Although cases may be found which hold that such malice or intent is immaterial when determining the liability of top-ranking prison officials[61] or the governmental unit,[62] it is of utmost importance when determining the personal liability of lesser officials. The penal inmate has a much better chance of recovery if his injuries were sustained by an intentional tort. For example, some cases specifically refuse to allow a right of action against the prison official in his personal capacity because no malice or intent to do bodily harm was proved.[63] The case of *Hale v. Johnston*[64] provides an excellent discussion of this area. The court held that a common law action may be maintained against a public official for misfeasance or nonfeasance in the discharge of a ministerial duty only if the elements of willfulness and malice are present. The court also indicates that even if the duty breached were discretionary, liability would lie if the official acted with malice and corruptly.

A few cases may be found where a suit for penal inflicted injuries was successfully brought against the personal liability of penal officials for acts which were not done intentionally or with malice. However, successful litigation for damages caused by negligent torts is rare. In those jurisdictions which do permit such actions the basis for the prison official's liability generally rests on the fact that a dangerous condition existed, the official involved had adequate knowledge of its existence and yet failed to exercise the ordinary and reasonable care necessary to protect the prisoner from injury. This is particularly true in the case of injuries inflicted at the hands of "kangaroo courts."[65] A good ex-

60. Riggs v. German, 81 Wash. 128, 142 Pac. 479 (1914).

61. Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1936).

62. *In re* Moore, 97 Ind. App. 492, 187 N.E. 219 (1933); Nichols v. Town of Fountain, 165 N.C. 166, 80 S.E. 1059 (1914); McIlhenney v. City of Wilmington, 127 N.C. 146, 37 S.E. 187 (1900).

63. Williams v. Adams, 3 Allen 171 (Mass. 1861); Moye v. McLawhorn, 208 N.C. 812, 182 S.E. 493 (1935); Richardson v. Capwell, 63 Utah 616, 176 Pac. 205 (1918).

64. 140 Tenn. 182, 203 S.W. 949 (1918).

65. Ratliff v. Stanley, 224 Ky. 918, 7 S.W.2d 230 (1928); Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Hixon v. Cupp, 50 Okla. 545, 49 Pac. 927 (1897); Eberhart v. Murphy, 110 Wash. 168, 188 Pac. 17 (1920).

ample of the importance which the courts of today, when dealing with negligent torts in this area, place upon the fact that the prison official had "knowledge" of the existing circumstances can be seen by comparing two Washington cases involving "kangaroo court" injuries. The court in *Riggs v. German*[66] refused to allow recovery for such injury. The decision condoned the "kangaroo court" practice and further emphasized that the testimony was insufficient to prove the sheriff had actual knowledge of the existing conditions. However, the later case of *Eberhart v. Murphy*[67] repudiated *Riggs* and stated the modern trend of thought. After expressing disagreement with the previous case concerning the place of "kangaroo courts" in the American penal system, the court emphasized that in the present case there had been a past history of brutal treatment and that the sheriff had adequate knowledge thereof.

Other courts have permitted successful suits against prison officials for negligent torts to inmates where the inmate was taken from the sheriff and killed by a lynch mob,[68] where the inmate was injured by another inmate who was violently insane,[69] and where the inmate was injured due to the failure of a superior prison official to perform certain lesser ministerial duties.[70] Two cases[71] subject a penal official to personal tort liability because of failure to properly discharge incompetent subordinates. Admittedly, this is a novel doctrine in the area of penal injuries. The first of these cases[72] relied upon the principles of agency and held that since the sheriff was responsible for reasonable care in the selection of deputies, he was also responsible for the negligence of these deputies. This is contrary to the great weight of authority in this field, for numerous cases specifically reject liability based on agency principals or respondeat superior.[73] The second case[74] specifically rejects the agency principal and specifies that it is not the wrongful act of the subordinate which makes the superior liable, but it is the superior's failure to remove his subordinate, after knowledge of his incompetence, which imputes

66. 81 Wash. 128, 142 Pac. 479 (1914).
67. 110 Wash. 168, 188 Pac. 17 (1920).
68. *Ex Parte* Jenkins, 25 Ind. App. 532, 58 N.E. 560 (1900).
69. Moxley v. Roberts, 43 S.W. 482 (Ky. Ct. App. 1897); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940).
70. Hunt v. Rowton, 142 Okla. 181, 288 Pac. 342 (1930); Clark v. Kelly, 101 W. Va. 650, 133 S.E. 365 (1926).
71. Fernelius v. Pierce, 22 Cal. 2d 226, 138 P.2d 12 (1943); Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918).
72. Kusah v. McCorkle, *supra* note 71.
73. Martin v. Moore, 99 Md. 41, 57 Atl. 671 (1904); Gentry v. Town of Hot Springs, 227 N.C. 665, 44 S.E.2d 85 (1947); Clodfelter v. State, 86 N.C. 51, (1882); Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949 (1918).
74. Fernelius v. Pierce, *supra* note 71.

liability to the subordinate for injuries caused as a result of such incompetence. The court further held that failure of the superior to act by removing his subordinate was, in effect, an instrumentality in the hands of the superior, himself, and he must be liable for the use, or lack of use, of the instrumentality within his control.

Another basic problem which confronts an injured penal inmate, particularly in those jurisdictions where suit must be instigated against a lesser prison official, because sovereign immunity protects the state and top penal officials, is that of the possible lack of financial responsibility of the official against whom the suit must be brought.[75] A remedy is to no avail unless there are means by which it can be satisfied. For this reason some jurisdictions require penal officials and employees to be bonded. These surety requirements are generally provided by statute and provide that the bond of such official shall be subject to suit for any injury which results from the breach of a duty prescribed upon the official by law.[76]

Some jurisdictions provide statutory means by which an injured penal inmate may seek at least partial recourse for his injuries. For example, it is of interest to note that some states provide by statute for intermediary bodies to assist the prisoner in the protection of his rights. West Virginia provides a prisoner's committee which may sue or be sued;[77] while in California, the Adult Authority Board,[78] if it thinks justice requires, may restore any of the prisoner's civil rights with the exception of the right to act as trustee, hold public office, exercise the privilege of an elector or give a general power of attorney.

By the terms of the Prison Industries Fund,[79] the United States Attorney General may promulgate regulations under which Federal prisoners who have special skills, or whose behavior is exemplary, may be paid for the labors they perform while incarcerated. In the event of injury to these prisoners the act provides for compensation to the inmates or their dependents. This compensation is limited to no greater amount

75. Courts have emphasized the importance of the surety in the redress of penal inflicted injuries by pointing out that, even in the case of a lesser official, the sureties "are the sponsors of his integrity as an officer while acting as such." Taylor v. Slaughter, 171 Okla. 152, 153, 42 P.2d 235, 236 (1935). "It is poor law that would permit the sheriff . . . to throw away his badge and ply his billy with deadly effect." Price v. Honeycutt, 216 N.C. 270, 274, 4 S.E.2d 611, 614 (1939). The measure of damages against the surety is usually considered to be just compensation for actual injury, hence exemplary damages should not fall upon the bondsman. Hixon v. Cupp, 5 Okla. 545, 4 Pac. 927 (1897).

76. NEB. REV. STAT. § 11-112 (1943); KY. REV. STAT. § 2224 (1936).

77. W. VA. CODE ch. 28, art, 5, § 33-36 (1931).

78. CAL. PEN. CODE § 2600-02 (1949).

79. 62 Stat. 852, 18 U.S.C. 4126 (1948).

than that provided in the Federal Employees' Compensation Act.[80]

For several years the state of California provided for the compensation of prison-inflicted injuries through the normal state workmen's compensation laws if the prisoner was injured under certain conditions. The California Road Camp Bill[81] permits prisoners to work on the state highways for limited compensation, but does not specify that an employee-employer relationship exists. However, until 1941[82] California courts so interpreted the law and permitted prison inmates injured while employed under the terms of this act to pursue action against the State Industrial Accident Commission successfully.[83]

In summary, the subject of a penal inmate's recourse for prison-inflicted injuries is one of controversy. Some jurisdictions defend the refusal to compensate for injury on the ground that such would be a severe blow to the state's authority. They point out that public officials must be free to exercise their duties without fear of harassment by civil suit, and that firmness and strict treatment is the only language most penal inmates understand. Those who adhere to this school of thought further suggest that it would be most dangerous and unfair to subject the public taxpayers to this financial burden.[84] This thought is well summarized in *Brown v. Town of Goyandotte*[85] where the court points out that governmental subdivisions and the duties of their employees are not designed for private gain but for the "public weal." If liability were permitted, "it would be impossible to say where [the taxpayer's] liability would end or how onerous would be the burden laid upon those who sustain their existence."[86]

Other jurisdictions point out that a prisoner is not a slave, and that governmental authority is limited to authority to incarcerate one who

80. It should also be pointed out that the provisions of this act are applicable to less than one-third of all Federal prisoners.

81. CAL. ACTS 1923, ch. 316, at 667.

82. The California Legislature by Stats. 1941, ch. 106, § 15, specified that an employee-employer relationship would not exist between the state and its prisoners.

83. California Highway Comm., v. Industrial Accident Comm., 200 Cal. 44, 251 Pac. 808 (1926).

84. The New York precedent, which subjects the state to liability for negligently inflicted injuries to penal inmates, raises the problem of the burden this practice places upon the taxpayers of the state. In a most helpful report, the New York Solicitor General has pointed out that during the last three years, from 1955 to 1958, there have been only five judgments in favor of prisoners. Each of these awards resulted from injuries sustained while the inmate was engaged at prison labor. The total damages amounted to $49,900. (This report is contained in a letter from New York Solicitor General, Paxton Blair, November 13, 1948, on file in Business Office, INDIANA LAW JOURNAL).

85. 34 W. Va. 299, 12 S.E. 707 (1890).

86. *Ibid.*

perpetrates a wrong against society. It does not include the right to harm his person with impunity. "A man does not cease to be a human being because he is convicted and is imprisoned. . . . Although occupying a felon's cell, he may experience as great mental anguish over the disfigurement of his person as if he were a free man, and the law is not so inhuman as to deny him compensation in damages against anyone who may have negligently inflicted an injury upon him."[87]

To say the least, the prison inmate is in an unusual position. In many respects he is helpless to help himself. If he is forced to await completion of his sentence before initiating suit, he finds that his proof has become stale. Such a procedure also has little or no deterrent effect. The very fact that he is a penal inmate and that most, if not all, of his witnesses are fellow inmates is a decided disadvantage.[88] If the suit must be brought against the employee who has actually harmed the prisoner, and not against that authority which incarcerated him, the financial responsibility of the defendant will often make such a suit highly impractical.

The penal inmate who is injured faces two tremendous obstacles—sovereign immunity and civil death. It would be inequitable to propose that a felon should be granted civil recourse to the courts, when his fellow citizens outside the prison walls are not. He has committed a wrong against society. Yet in that small area where the prisoner, helpless as he is to prevent such treatment, is willfully and maliciously subjected to inhuman treatment, it is most unjust to allow him to go uncompensated and to leave his antagonist free to continue the assault.

PRICE-FIXING WITHIN THE BARBER INDUSTRY

The barber trade faces problems in the realm of self-government and self-regulation which can best be solved by a system of fixed industry prices. The problems which barber groups can advantageously eliminate through a fixed price system are temporary but costly price wars; competition from low cost, price-cutting shops; and prices which inadequately or unsatisfactorily cover the personal income needs of local barbers. Often, however, price-fixing methods employed by barber groups conflict with social and economic policies embodied in state anti-

87. St. Louis I.M. & S. Ry. v. Hydrick, 109 Ark. 231, 234, 160 S.W. 196, 199 (1913).

88. The credibility of such individuals is always subject to serious examination, and in many cases they may actually be afraid to talk.