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FALSELY IMPRISONING THE LEGALLY DETAINED PERSON - CAN THE BOUNDS OF LAWFUL DETENTION EVER BE EXCEEDED?

The issue of whether a person who has been lawfully detained can, nevertheless, bring an action for false imprisonment has recently been considered by both the Court of Appeal and the House of Lords in England. In two cases involving prisoners allegedly subjected to adverse conditions, the courts questioned whether such circumstances could give rise to an action for false imprisonment, or whether the remedy should lie, if at all, in other torts. This article examines the impact of these decisions and considers their implications in the Singapore context.

I. INTRODUCTION

IT is well known that the branch of trespass to the person referred to as the tort of false imprisonment protects a person against the wrongful deprivation of his liberty (at least where that deprivation is direct and intentional).[1] It is also well known, and self-evident, that a person cannot succeed in an action for false imprisonment if his detention has been sanctioned by the law. The commonest example of such a situation is that of the convicted criminal who has been sentenced to spend a period in prison.

However, two cases decided by the English Court of Appeal and reported at the end of 1990, indicated that there might, in fact, be very limited situations in which even a lawfully detained person could be entitled to claim that he had been falsely imprisoned. The cases suggested that legal authority on the part of a defendant to imprison a plaintiff would not, in itself, give the defendant *carte blanche* in relation to that imprisonment.

Although the House of Lords decision in relation to both cases now appears to have removed the possibility of a false imprisonment claim in almost all circumstances, the position of a prisoner aggrieved by the conditions in which he is held is by no means clear. Their Lordships suggested alternative bases for actions either in tort or in public law - but do these alternatives really offer viable remedies? Can there be no place for the tort of false imprisonment in this area?

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[1] It is actually a matter of some debate whether the inclusion of intention as a necessary element in any action for trespass to the person is justifiable. However, the English courts seem, since the case of *Letang* v. *Cooper* [1965] 1 Q.B. 232, to have accepted that intention is indeed a prerequisite, and it is not the purpose of this article to enter into a discussion on that point.

The local provisions relating to the detention of convicted persons differ in some respects from the English ones. Indeed, given the nature of the relevant legislation in Singapore, an argument can be made that there is greater scope locally than there is in England for tort actions (whether in false imprisonment or otherwise) by convicted persons with complaints about the conditions in which they are held. Nonetheless, in view of Singapore's close ties with English tort law, the current position in England is bound to be given great weight here. This article will, therefore, consider the effect of the recent decisions in both jurisdictions. It will also seek to examine the difficult conceptual questions about the nature and function of tort law (and particularly the tort of false imprisonment) which these decisions raise.

II. THE AUTHORITIES

A. *The Court of Appeal Decisions*

1. *Weldon's case*

The first case is *Weldon v. Home Office*.[2] There, the plaintiff was a prisoner serving a four-year sentence in Leeds Prison. He claimed that, one evening, he had been dragged from his cell to a cell in the punishment block and from there he had then been taken to a strip cell, where his clothes had been removed, and where he had been kept until the next morning. He also claimed that he had been assaulted by prison officers. As a result of these alleged events, he brought an action for false imprisonment (as well as an action for assault and battery) against the Home Office, which was the authority responsible for the prison.

The Home Office applied to have the plaintiff's claim struck out on two grounds. The first was that a prisoner could not claim that he had been deprived of his liberty because he was, by definition, not entitled to any liberty. The second, and further, ground was that section 12(1) of the Prison Act 1952,[3] which provides that a prisoner might be "lawfully confined in any prison"[4] offered a complete defence to an action for false imprisonment by a duly sentenced prisoner, and that such detention was not rendered unlawful by any variation in the regime or conditions of

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2 [1990] 3 W.L.R. 465.

3 15 & 16 Geo. 6 & 1 Eliz. 2, c.52.

4 Although the Prisons Act in Singapore (Cap. 247, 1985 Rev. Ed.) does not contain an identical provision, its combined provisions have the same effect. Under section 23(1) of the Act, "[e]very prisoner confined in any prison shall be deemed to be in the legal custody of the Superintendent thereof". (A prisoner is defined in section 2 as "any person, whether convicted or not, under detention in any prison or reformative training centre".) Under section 24, Superintendents appointed under the Act are "authorised and required to keep and detain all persons duly committed to their custody ...". Furthermore, under section 32(1) the Director of Prisons "may, by order in writing, remove all or any prisoners confined in any prison to another prison within Singapore ...".

confinement.[5] The matter came before the registrar, who dismissed the application to strike out, on the basis that the allegations of false imprisonment were not unarguable, and so should go to trial. This finding was upheld by the assistant recorder at Leeds County Court, and the matter then came before the Court of Appeal.

The principal judgment of the Court of Appeal was given by Ralph Gibson L.J. He first considered the nature of the tort of falsely imprisoning a convicted prisoner and then went on to consider two specific questions - first, whether a convicted prisoner could be said to have any residual liberty, and secondly, to what extent the conditions of confinement could render unlawful an otherwise lawful detention.[6]

On the general question of whether the tort of false imprisonment was available even to a person who was already imprisoned, Ralph Gibson L.J. concluded that it was. He based this view on the fact that a plaintiff is not required to have total and instantaneous freedom to go somewhere else in order to bring a claim for false imprisonment.[7] As far as the specific questions were concerned, he considered that a convicted person could claim that he had some residual liberty, and that he could also claim that he was entitled not to be held in intolerable conditions.[8] If either of these rights were to be breached, a prisoner would be in a position to sue for false imprisonment, as long as he could establish bad faith on the part of the defendant.[9]

Assuming that the plaintiff's claims in *Weldon's* case were true, bad faith would be relatively easy to establish. In the opinion of Ralph Gibson L.J., the case was, therefore, not unarguable. The plaintiff might be able to establish all the necessary elements for a claim based on deprivation of residual liberty or on intolerable conditions of detention. As a result, his Lordship ordered that the matter should go to trial. Parker and Fox L.JJ. agreed, and the Home Office's appeal was dismissed.

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5 This argument was based on the decision of Tudor Evans J. in *Williams* v. *Home Office (No. 2)* [1981] 1 All E.R. 1211.

6 The consideration relating to the conditions of confinement was based on a statement made by Ackner L.J. in the Court of Appeal decision of *Middle-week v. Chief Constable of the Merseyside Police and Another* [1990] 3 W.L.R. 481. In that case, which was decided in 1985, but not reported until 1990, together with *Weldon's* case, Ackner L.J. had suggested that, if the conditions in which a prisoner was being held were "intolerable", then his detention would be rendered unlawful, in spite of what had been said in *Williams* v. *Home Office (No. 2) (supra,* note 5). For further discussion, see *infra,* note 29.

7 Ralph Gibson L.J. based his judgment in this respect on dicta in *Meering* v. *Grahame-White Aviation Co. Ltd.* (1920) 122 L.T. 44 and *Murray* v. *Ministry of Defence* [1988] 2 All E.R. 521.

8 Ralph Gibson L.J. rejected as unsustainably wide the argument that imprisonment would automatically become unlawful if it breached any or all of the Prison Rules 1964 (S.I. 1964 No. 388), the European Standard Minimum Rules for the Treatment of Prisoners 1973 and the European Convention of Human Rights. See *supra,* note 2, at p. 479.

9 See *supra,* note 2, at pp. 469-480. Considerable doubt about the addition of bad faith as a requirement was expressed in the next case. For further discussion of this point, see *infra,* notes 15 and 64.

2. *Hague's case*

The second case is *R.v. Deputy Governor of Parkhurst Prison and others, ex parte Hague.*[10] The case concerned a prisoner who had been sentenced to fifteen years' imprisonment for various offences, including use of a firearm to resist arrest and escaping from custody while on remand. He was a category A prisoner (which meant that he was kept under maximum security), and spent periods in several prisons before being moved to Parkhurst Prison. While there, he twice deliberately broke prison rules and went out on unauthorised exercise. The deputy governor of the prison decided to transfer him to Wormwood Scrubs prison. When he was moved, the deputy governor obtained permission from the regional director of the prison service to keep him segregated from other prisoners in Wormwood Scrubs for twenty-eight days. The segregation was made under rule 43 of the Prison Rules 1964."

The prisoner sought judicial review of the decisions to move and then segregate him. He also claimed damages for false imprisonment during the period of his segregation. The Divisional Court dismissed his application and he appealed to the Court of Appeal. Although much of the decision was based on questions of judicial review and public law generally, which are not directly relevant here, the court also gave careful consideration to the question of whether there could be an action for false imprisonment.

By the end of the hearing, the allegation of false imprisonment represented the sole basis of the prisoner's claim for damages. He argued that the deputy governor had not been empowered by rule 43 to make an order that he be segregated in another prison; the rule empowered the deputy governor only in so far as segregation in his own prison was concerned. The Court of Appeal accepted this argument, and held that the deputy governor had acted outside the scope of the rule.[12] Therefore, the question was whether a breach of this rule could rebut a defence of lawful detention and entitle the prisoner to damages for false imprisonment.

The leading judgment was given by Taylor LJ. His first finding was that a breach of the Prison Rules would not in itself defeat the statutory defence to a claim for false imprisonment that the detention was justified under section 12(1) of the Prison Act.[13] This was because the rules were merely regulatory directions, and did not confer any rights on individual

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[10] [1990] 3 W.L.R. 1210.

[1,] *Supra,* note 8. Rule 43 empowers a prison governor to remove a prisoner from association with other prisoners where it is considered desirable in the interests of good order and discipline for a period of 24 hours at his own discretion or up to one month with the approval of a prison visitor or the Secretary of State acting by the regional director. For further discussion, see *infra,* note 55.

[12] In this respect, the court rejected the *dictum* of Tudor Evans J. in *Williams* v. *Home Office (No. 2), supra,* note 5, that the power to segregate under rule 43 was not restricted to the governor of the particular prison.

[13] *Supra,* note 3.

prisoners.[14] His Lordship then went on to consider what, if anything, could defeat the statutory defence, which involved him asking whether there could ever be false imprisonment within lawful imprisonment. He concluded that it would be possible for a prisoner to claim that he had been falsely imprisoned, but only if he could show that the conditions of his detention were intolerable. Assuming, however, that a prisoner could show this, Taylor L.J. considered the presence or absence of bad faith on the part of the defendant to be irrelevant.[15]

Nicholls L.J., in a shorter, but nevertheless important, judgment, turned his attention to the question of whether a lawfully imprisoned person could ever bring a false imprisonment claim based on deprivation of residual liberty. He concluded that there could be no such claim, because a prisoner retained no residual freedom.[16] The only circumstance in which a prisoner could, therefore, sue for false imprisonment, would be if he were to be held in intolerable conditions.

On the facts of *Hague's* case, their Lordships held that the prisoner could not establish that the conditions in which he was held were intolerable, and so there could be no action for false imprisonment.

B. *The House of Lords Decision*

The appeals by the unsuccessful parties in both *Weldon's* case and *Hague's* case were conjoined in an appeal heard by the House of Lords in June 1991, and their Lordships' decision was delivered on 24th July.[17] The principal judgments were those of Lord Bridge and Lord Jauncey.[18] Their Lordships considered and rejected the possibility of either Weldon or Hague succeeding in a claim for false imprisonment, whether based on intolerable conditions of detention or on deprivation of residual liberty. Both Lord Bridge and Lord Jauncey effectively shared the opinion of Nicholls L.J. in the Court of Appeal in *Hague's* case that a prisoner retained no residual liberty. That being so, they took the view that a prisoner could not complain if his freedom was restricted by his lawful custodians to a greater degree than he considered acceptable.

Although more sympathetic to the claim that a prisoner should have a remedy if kept in intolerable conditions, they considered that the

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[14] The position in Singapore may be different since the relevant directions are included in regulations, which are subsidiary legislation, rather than merely in rules. Although the regulations do not contain any indication that they intend to confer any individual cause of action, and thus the difference in terms of actionability for breach of statutory duty is probably more illusory than real, the difference may be significant in deciding whether breach of the regulations can defeat the defence of lawful authority in a claim for false imprisonment. For further discussion of this point, see *infra,* note 62.

[15] *Supra,* note 10 at pp. 1261-1269. For further discussion of this point, see *infra,* note 64.

[16] *Ibid,* at pp. 1269 -1271. For a further discussion of the concept of residual liberty, see *infra,* note 46.

[17] *R.v. Deputy Governor of Parkhurst Prison and others, ex pane Hague; Weldon* v. *Home Office* [1991] 3 W.L.R. 340.

[18] Lords Ackner, Goff and Lowry all delivered very short judgments, essentially concurring with the judgments of Lords Bridge and Jauncey.

appropriate action in such circumstances would be to sue in negligence, rather than in false imprisonment. In addition, Lord Bridge stated that, if bad faith could be shown in either situation, then an action for misfeasance in public office might also be available to an aggrieved prisoner, though this action would generally lie only against the individual officer concerned.[19] However, they agreed that the only situation in which a prisoner might be able to sue for false imprisonment would be where the act complained of was committed by a fellow prisoner, who would be unable to raise the defence of lawful authority.

In the House of Lords, as much attention was paid to the tort of breach of statutory duty as was paid to that of false imprisonment. Counsel for Hague was able to argue it as a serious alternative for the first time at this level, having been constrained by Court of Appeal decisions[20] at earlier stages of the case. Indeed, the breach of statutory duty argument was dealt with[21] before the false imprisonment one, and the rejection of the claims for false imprisonment as far as the residual liberty argument was concerned was closely linked with the decision to reject the claim for breach of statutory duty.

The argument made by counsel for Hague was that a statutory intention to grant a tortious remedy to an individual can be implied in a statute which is designed to protect the class of which that individual is a member.[22] The Prison Act[23] and the Prison Rules[24] were designed for the protection of prisoners, and so any breach of them must give rise to an action by aggrieved prisoners. Lord Bridge and Lord Jauncey both rejected that argument, taking the view that showing a prisoner to be in the class of persons "protected" by the provisions was not in itself sufficient to indicate that the legislature intended to confer a right of action on him. Both concluded that there could have been no such intention where the relevant legislation and rules[25] were concerned, and so held that there was no cause of action.

Therefore, at the end of both actions, it was held that neither Weldon nor Hague had any right to sue for false imprisonment and that Hague's claim disclosed no cause of action for breach of statutory duty. Thus,

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19 For further discussion of this point, see *infra,* note 94.

20 *Becker* v. *Home Office* [1972] 2 Q.B. 407, and the earlier case of *Arbon v. Anderson* [1943] K.B. 252, in both of which it was held that a breach of prison rules could not, in itself, give rise to an action in tort.

21 *Supra,* note 17, at pp. 353 and 366.

22 In this respect, reference was made, *inter alia,* to *Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402 and *London Passenger Transport Board* v. *Upson* [1949] A.C. 155. *See, infra,* note 76.

23 *Supra,* note 3.

24 *Supra,* note 8.

25 They thus approved the decisions in *Arbon* v. *Anderson* and *Becker* v. *Home Office (supra,* note 20), both directly relating to the Prison Act and the Prison Rules. For further discussion of the differences between the rules in England and the regulations in Singapore, and of whether there is any greater likelihood of there being a cause of action in Singapore, see *infra,* note 68 *et seq.*

Hague's appeal was dismissed, and the false imprisonment aspect of Weldon's claim was ordered to be struck out before his case went to trial.

III. THE EFFECT OF THE AUTHORITIES ON THE TORT OF FALSE IMPRISONMENT

If one accepts (as one must) that the House of Lords decision in *Weldon's* case and *Hague's* case now represents the law in England, and if one assumes that it is also likely to be adopted as the law in Singapore, then the scope for a false imprisonment claim by a lawfully detained person is effectively limited to situations where his liberty is restricted by a fellow prisoner.

Under no circumstances will a person who is in lawful detention be able to sue the prison authorities for deprivation of residual liberty (though he may have an action for misfeasance in public office against an individual officer if he can establish bad faith, unlawfulness and damage).[26] If he can show that he has been held in intolerable conditions, he may have a cause of action in negligence against the authorities (assuming he can establish damage),[27] or possibly an action for misfeasance in public office against an individual officer (again, assuming he can establish the requisite elements). However, no action will lie for false imprisonment.

But does the House of Lords' approach offer the best solution in cases of this kind? In order to answer this question, it is necessary to examine their Lordships' reasons for rejecting the possibility of bringing a false imprisonment claim either for deprivation of residual liberty or for subjection to intolerable conditions. Having done this, the appropriateness of the alternative remedies proposed by their Lordships will be considered.[28]

A. *Intolerable Conditions*

The possibility of bringing a false imprisonment action based on the conditions of detention was raised by Ackner L.J. in the Court of Appeal decision in *Middleweek* v. *Chief Constable of the Merseyside Police and another*,[29] a case decided in 1985, but reported together with *Weldon's* case in 1990. Ackner L.J.'s views provided the basis for the decisions of the Court of Appeal in both *Weldon's* case and *Hague's* case as far as the availability of false imprisonment claims based on intolerable conditions were concerned.

Middleweek's case involved a solicitor, Mr. Middleweek, who, at a bail hearing, was suspected by a police officer of possessing a confidential police document. When he failed to explain how he had ac-

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[26] For further discussion of the advantages and disadvantages of a claim for misfeasance in public office, see *infra*, note 91 *et seq.*

[27] For further discussion of the advantages and disadvantages of a negligence claim, see *infra*, note 86 *et seq.*

[28] *Infra*, note 67 *et seq.*

[29] [1990] 3 W.L.R. 481.

quired the document, the police officer arrested him on suspicion of theft. Mr. Middleweek was questioned for about half an hour, during which time he told the officer that his client (a former policeman) had given him the document. He was then searched, his possessions were removed, and he was kept in a cell while the police officer attempted to find his client. He was allowed to call a solicitor, and, after making a signed statement, he was released, about one and a half hours after his interview had ended.

Mr. Middleweek sued the chief constable and the police officer claiming damages for, *inter alia*, false imprisonment. In a complicated chain of legal events, most of which do not concern us here, the Court of Appeal was faced with the question of whether it had been reasonable to hold Mr. Middleweek in a cell. Their Lordships held that it was indeed reasonable to hold in a cell anyone who was lawfully arrested, other than perhaps someone who was very elderly or in need of medication.

In reaching their decision, the Court of Appeal in *Middleweek's* case reviewed (and generally approved) the authorities in the area, which suggested that a change in the conditions of detention (in this case, removal from an interview room to a cell) could not render an otherwise lawful detention under section 12(1) of the Prison Act[30] unlawful.[31] However, Ackner L.J., delivering the judgment of the Court, stated that there must be an exception to this rule:

> ... it must be possible to conceive of hypothetical cases in which the conditions of detention are so intolerable as to render the detention unlawful and thereby provide a remedy to the prisoner in damages for false imprisonment. A person lawfully detained in a prison cell would, in our judgment, cease to be so lawfully detained if the conditions in the cell were such as to be seriously prejudicial to his health if he continued to occupy it, *e.g.* because it became and remained seriously flooded, or contained a fractured gas pipe allowing gas to escape into the cell. We do not therefore accept as an absolute proposition that, if detention is initially lawful, it can never become unlawful by reason of changes in the conditions of imprisonment.[32]

Ralph Gibson L.J. quoted this statement with approval in *Weldon's* case. In his view, allegations of the kind made by the plaintiff there (that he was left naked in a cell overnight, presumably without bed or bedding) would, if substantiated, amount to "intolerable conditions" as contem-

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[30] *Supra*, note 3.

[31] See in particular, *Williams* v. *Home Office (No. 2)* (High Court), *supra*, note 5, as affirmed by the Court of Appeal [1982] 2 All E.R. 564 . See, too, *R.* v. *Gartree Prison Board of Visitors ex pane Sears, The Times*, 20 March 1985.

[32] *Supra*, note 29, at p. 487. The views expressed in *Middleweek's* case were based on statements made in an earlier decision by the Divisional Court in *R.* v. *Comr. of Police of the Metropolis, ex parte Nahar, The Times*, 28 May 1983.

plated in *Middle-week's* case, and would thus enable a plaintiff to bring an action for false imprisonment. He considered that the statement about intolerable conditions in *Middleweek's* case had been part of the ratio, and he rejected the argument that the case applied only to persons under arrest and not to convicted prisoners.[33]

Taylor L.J. in *Hague's* case, though also expressing his approval of the intolerable conditions exception, initially experienced some difficulty in reconciling it with a false imprisonment action *simpliciter*.[34] This was because he saw false imprisonment as being based on deprivation of liberty and not on the conditions to which an imprisoned person might be subjected while being deprived of that liberty (a point which later proved decisive in the House of Lords).[35] Eventually, however, he concluded that the Prison Act[36] contained an implied provision that intolerable conditions were unlawful. Thus, intolerable conditions would negative the lawful right to detain a prisoner and an action for false imprisonment could be sustained on this basis.[37] He, too, therefore, ultimately gave the intolerable conditions exception his unequivocal support, as did Nicholls L.J.

The House of Lords, however, decided unanimously that, while an aggrieved prisoner in such circumstances should have a remedy, an action for false imprisonment was not the appropriate one. Lord Bridge said:

> I sympathise entirely with the view that the person lawfully held in custody who is subjected to intolerable conditions ought not to be left without a remedy against his custodian, but the proposition that the conditions of detention may render the detention itself unlawful raises formidable difficulties. If the proposition be sound, the corollary must be that when the conditions of detention deteriorate to the point of intolerability, the detainee is entitled immediately to go free .... The logical solution to the problem, I believe, is that if the conditions of an otherwise lawful detention are truly intolerable, the law ought to be capable of providing a remedy directly related to those conditions without characterising the fact of the detention itself as unlawful.[38]

Lord Bridge went on to refer to the duty of care owed by a custodian not negligently to allow, or cause, injury to a person in his custody. Lord Jauncey expressed a very similar view:

> My Lords, there is no doubt that in the conditions predicated by Ackner L.J. the prisoner would have a public law remedy and, if

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[33] *Supra*, note 2, at p. 479.
[34] *Supra*, note 10, at p. 1266.
[35] *Infra*, note 38.
[36] *Supra*, note 3.
[37] *Supra*, note 10, at p. 1268.
[38] *Supra*, note 17, at pp. 354-355.

> he sustained injury to health, a private law remedy as well, but the latter remedy would lie in negligence rather than in false imprisonment. To say that detention becomes unlawful when the conditions thereof become intolerable is to confuse conditions of confinement with the nature of confinement and add a qualification to section 12(1).[39]

Interestingly, Ackner L.J., by now Lord Ackner, was one of the five Law Lords who decided *Weldon's* case and *Hague's* case. He accepted the statements made by Lords Bridge and Jauncey, and held his own *dictum* on intolerable conditions in *Middleweek's* case to have been erroneous.[40]

The views expressed by Lords Bridge and Jauncey are persuasive, but not unanswerable. One might, for example, ask why it would be necessary, as Lord Bridge suggests, to accept that a prisoner whose successful action for false imprisonment was based on intolerable conditions must therefore automatically be allowed to go free? Could it not be argued that, if the conditions in which a prisoner is held are so appalling as to be prejudicial to his health or safety, then his detention *in that place* can no longer be lawful? In such circumstances, the overall authority to detain him can remain, and it may be lawful to move him to another place of detention (whether in the same or a different prison) which satisfies minimum standards. However, there is no reason why detention in the place where conditions are intolerable should not be regarded as unlawful and should not give rise to an action for false imprisonment.

As far as the argument of Lord Jauncey that to allow an action for false imprisonment is to confuse the conditions of confinement with the nature of confinement is concerned, it is suggested that the views expressed by Taylor L.J. in the Court of Appeal in *Hague's* case[41] are to be preferred. To say that the conditions in which a person is detained can actually become so unacceptable that his detention *in those conditions* is no longer lawful is surely not to confuse the ability to detain with the circumstances of that detention. Rather it is a statement that lawful detention can only remain so if it is carried out in acceptable conditions. Furthermore, an action for false imprisonment may be the only way to provide the prisoner who is, or has been, detained in intolerable conditions with a real remedy. An action in negligence will only be available once he can establish damage, which may not be constituted by a mere threat to his health or safety.[42] He will have no action for misfeasance in public office unless he can establish damage, unlawfulness and bad faith.[43] And although public law remedies may be available, they will only allow the prisoner's removal from intolerable conditions, not compensate him for being detained in them.

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[39] *Ibid,* at pp. 365-366.
[40] *Supra,* note 17 at p. 356.
[41] *Supra,* note 37.
[42] For further discussion of this point, see *infra,* note 86 *et set/.*
[43] For further discussion of this point, see *infra,* note 91 *et seq.*

What, then, would be the position in Singapore if the courts were to reject the views expressed by the House of Lords and to accept the possibility of bringing an action for false imprisonment based on intolerable conditions of detention? The Prisons Act[44] here actually envisages the possibility of conditions in a given prison becoming so bad that prisoners may have to be moved. Under section 5, there is provision for the use of temporary prisons either when the number of prisoners in any prison is greater than can conveniently be kept there or when, because of the outbreak of disease, or for any other reason, temporary shelter or safe custody of prisoners are required.

There is thus an argument that, in Singapore, there would be a breach of the express provisions of the Prisons Act if a prisoner were to be held under intolerable conditions. This *might* give rise to an action for breach of statutory duty, (depending on the weight given to the views expressed in this respect by their Lordships in *WeIdon's* case and *Hague's* case).[45] Alternatively, the implied right not to be held in such conditions, recognised by the Court of Appeal (though not by the House of Lords) as negativing lawful authority to detain, could support a claim for false imprisonment in such circumstances.

B. *Residual Liberty*

The House of Lords in *Weldon's* case and *Hague's* case decided that there could be no claim for infringement of residual liberty by a convicted prisoner. In this respect they shared the views of Nicholls L.J (and presumably Taylor L.J.) in the Court of Appeal in *Hague's* case. Only Ralph Gibson L.J., delivering the decision of the Court of Appeal in *Weldon's* case, considered that such a claim was possible.

The views expressed by Lords Bridge and Jauncey in the House of Lords were unequivocal. They considered that a prisoner has no residual liberty. Lord Bridge posed a question, to which he had a ready answer:

> Can the prisoner ... complain that his legal rights are infringed by a restraint which confines him at any particular time within a particular part of the prison? It seems to me that the reality of prison life demands a negative answer to this question. Certainly in the ordinary closed part of the prison the ordinary prisoner will at any time of day or night be in a particular part of the prison, not because that is where he chooses to be, but because that is where the prison regime requires him to be.[46]

Ralph Gibson L.J. in the Court of Appeal in *Weldon's* case, on the other hand, based his decision on the well established proposition that

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[44] *Supra,* note 4.
[45] For further discussion of this point, see *infra,* note 68 *et seq.*
[46] *Supra,* note 17, at p. 352.

"[t]he immediate and wholly unrestricted freedom and ability to go somewhere else are not ... a precondition for asserting a claim in false imprisonment."[47] He went on, however, to analyse the prisoner's right to residual liberty as being derived from the idea accepted in argument in the case of *Raymond v. Honey*[4]* that "a person confined in prison retains all his civil rights, other than those expressly or impliedly taken from him by law".[49] He took the view that, since the Prison Rules 1964[50] include a rule that prisoners should not in normal circumstances be deprived of the society of other persons, this meant that they were entitled to residual liberty:

> It is apparent, in my judgment, from consideration of those rules that the legislative intention is that a prisoner should, subject to any lawful order given to him and to any rules laid down in prison, enjoy such liberty, his residual liberty, within prison as is left to him.[51]

The problem with this is that the Prison Rules also contain all kinds of other rights (about being given work, education facilities, proper clothing and bedding, access to books *etc.),* which are clearly of a different nature from the right to associate with other persons, but which Ralph Gibson L.J. treated as comparable. It can accordingly be argued that the kind of residual liberty represented by such a general package of rights is so broad that it has little, if anything, in common with the tort of false imprisonment. Even someone sympathetic to the notion of residual rights might, therefore, find these views too wide to be workable.

Ralph Gibson L.J. in the Court of Appeal in *Weldon's* case and Lords Bridge and Jauncey in the House of Lords expressed extreme views at either end of the spectrum. Clearly the concept of residual liberty should not be available to allow prisoners to bring actions for false imprisonment based on variations of minor aspects of day to day life while in prison. However, there is an argument that the law should be able (without causing the prison system to grind to a halt) to recognise a prisoner's right not, in the absence of good reasons, to be incarcerated alone, and to grant him a remedy for false imprisonment if this right is infringed.

What, then, would happen if the courts in Singapore (or even a later House of Lords in England) were to reject the views expressed in the House of Lords and to accept the possibility that a prisoner has the (very

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47 *Supra,* note 2, at p. 470. See, too, *supra,* note 7. Lord Jauncey in the House of Lords agreed with this proposition, and with the view that a person whose liberty is restricted in some respects may nevertheless retain liberty in others. He disagreed, however, with the view that a convicted prisoner could be categorised in this way (see *supra,* note 17, at p. 367).

48 [1983] 1 A.C. 1.

49 *Ibid,* at p. 3.

50 *Supra,* note 8.

51 *Supra,* note 2, at p. 473.

limited) residual liberty not to be confined any more closely than is necessary or to be deprived of the society of others?

Under the Prisons Acts applicable in both England and Singapore,[52] the State has the right to imprison a person convicted of (or, in some circumstances, charged with) certain offences. But under both the Prison Rules[53] in England and the Prison Act and the Prison Regulations[54] in Singapore, prisoners while in prison have certain rights (either express or implied) to associate with other prisoners.

Rule 2(1) of the (English) Prison Rules provides that "[o]rder and discipline shall be maintained with firmness, but with no more restriction than is required for safe custody and well-ordered community life." Rule 3(3) goes on to say that prisoners are not "to be deprived unduly of the society of other persons." And although rule 43(1) provides that a prison governor may arrange for a prisoner's removal from association with other prisoners "for the maintenance of good order or discipline or in his own interests", rule 43(2) limits this to an initial period of twenty-four hours without further authority and to a total, renewable, period of a month with further authority.[55] Thus, segregation is clearly envisaged as an exceptional procedure, and as something which it is not legitimate to impose upon a prisoner merely by reason of his imprisonment.

The situation in relation to association with other prisoners and solitary detention appears to be very similar in Singapore.[56] In fact, the position of a prisoner who wishes to argue that he has been deprived of residual liberty is arguably even stronger here, since the Prisons Act itself contains provisions relating to the limits of solitary detention. Under sections 53 and 54 of the Act, confinement in a punishment cell for a period of up to seven days is a punishment for various offences which may only be ordered by the Superintendent. Under section 57, confinements for longer periods of up to thirty days may only be ordered by a visiting justice.

Regulation 149 of the Prison Regulations provides that "[prisoners sentenced to confinement in cells for breaches of prison discipline, shall see no one, save the officers of the prison in the execution of their duty, a Minister of Religion and the Medical Officer, and shall only have such out-door exercise as the latter certifies is absolutely necessary for health." Regulation 150 provides, however, that the confinement must not exceed an aggregate of more than ninety days in a year, and that two consecutive sentences of such confinement must be separated by a period at least as long as the longer of the periods of confinement.

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[52] *Supra*, notes 3 and 4.

[53] *Supra*, note 8.

[54] Prison Regulations 1938, S99/1939.

[55] For a fuller analysis of these provisions, see *supra*, note 11.

[56] The fact that Singapore, unlike the United Kingdom, is governed by a Constitution, has little relevance in this respect. The only applicable provision in the Constitution, Reprint No. 1 of 1980 (1985 Rev. Ed., as amended) is too ambiguous to be of assistance. It is Article 9(1), which states that "[n]o person shall be deprived of his life or personal liberty save in accordance with the law."

In both jurisdictions, then, a prisoner appears to have certain rights to associate with other people, rights which are not automatically removed merely by reason of his imprisonment. He is only to be deprived of these rights if he breaks the rules once he is in prison. Being alone, and being confined in a cell when other prisoners are not so confined,[57] are exceptional measures which are not a normal or necessary part of being sent to prison.

Is it, therefore, correct to assert that a prisoner retains some residual liberty while in prison? If one defines residual liberty only as the liberty not to be deprived of company, or confined alone, then arguably it is. A prisoner's movements may be inherently restricted, and his liberty may be very limited. But if he is incarcerated alone in a cell when he has a right to spend at least part of the day outside that cell and in the company of his fellow prisoners, then surely there is a case for saying that he has been deprived of his residual liberty.

Of course, one cannot ignore the argument (accepted by Taylor LJ. in *Hague's* case[58] and by their Lordships in the House of Lords)[59] that a breach of the rules (or in Singapore the regulations) could not itself give rise to an individual action by a prisoner, and that such a breach could not defeat the defence of lawful authority to a claim for false imprisonment. However, even if it is the case that the rules or regulations do not themselves give rise to a cause of action,[60] this does not necessarily mean that a breach of them cannot be used to defeat the defence of lawful authority in relation to a claim for false imprisonment. These are two different things. If the claim were really based wholly on those rules or regulations, the situation might be different, since, at least in England, the rules are not legally binding. But (assuming that residual liberty is defined only as the right not to be locked up alone and prevented from associating with others), the essence of a false imprisonment claim based on deprivation of residual liberty is that the prisoner has wrongly been deprived of more freedom than was inherently removed by his detention. That this freedom was not inherently removed by the detention itself is witnessed by the fact that other prisoners have not been deprived of it. The rules or regulations are, in a sense, merely evidence of a prisoner's right to this freedom, and a breach of them is evidence that the lawful authority to detain has exceeded its necessary bounds.[61]

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[57] Regulation 101 of the Singapore Regulations provides that the Superintendent will determine the hours when a prisoner is to be unlocked from his cell and finally locked up for the night. He may fix different hours for different categories of prisoners, but the implication of this regulation is that all prisoners (other than those being punished) will spend at least part of each day outside their cells.

[58] *Supra,* note 10, at pp. 1261-1262. See, too, *supra,* note 14.

[59] *Supra,* note 17, at pp. 350 and 360.

[60] *Infra,* notes 8 and 14, and note 68 *et seq.* give further discussion of this point.

[61] Although not an exactly parallel situation, the recent controversy in England with regard to the practices of children's homes in Staffordshire is of relevance in this respect. Social workers employed by Staffordshire County Council who operated a "pindown policy"

It is true that, in England, the non-binding nature of the rules may make it difficult to argue that a breach of them defeats the defence of lawful authority. However, the prisoner's argument is that his liberty has been restrained to an unnecessary and unacceptable extent compared with that of his peers. In such circumstances, where it can be shown that the liberty of an individual prisoner has, without good reason, been restricted more than that of other prisoners, a court may very well be disinclined to accept the defence of lawful authority, even where the legislation itself does not specifically preclude the action complained of.

In addition, and perhaps more importantly, in Singapore the prisoner does not have to rely on non-binding rules. The Prison Act itself limits the circumstances in which, and the periods for which, a prisoner can be detained in a punishment cell. Even if this cannot be read alone to prescribe the prisoner's rights to associate with other prisoners, the Prison Regulations make the position quite clear. And these regulations are subsidiary legislation, unlike the English Prison Rules, which are merely regulatory directions. There is, therefore, an argument that a breach of the regulations can be equated with a breach of the Prison Act itself, and that a breach of either would be unlawful.[62] If this is the case, then there is also a strong argument that in Singapore a breach of the regulations can defeat the defence of lawful authority which might otherwise be available against a false imprisonment claim.

Thus, assuming that the prisoner has not been deprived of his residual liberty (meaning his freedom not to be locked up alone without access to other prisoners) for a reason specified in the relevant statute, rules or regulations, he should be entitled to make a claim for false imprisonment, a claim which ought not to be defeated by the defence of lawful authority.

C. *Special Requirements of any such Action*

If an action for false imprisonment were to be available to lawfully detained persons in relation either to intolerable conditions or to deprivation of residual liberty, would it be necessary for such plaintiffs to satisfy any special requirements in addition to the elements which always have to be established in a false imprisonment claim?

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when dealing with problem children and who, as part of that policy, subjected many of the children to lengthy periods of solitary confinement, have been accused of unethical practices and of breaching statutory regulations and have been informed that their actions could render the local authority liable to actions for false imprisonment. There does not seem to have been any question there about the ability to bring claims based on (or at least involving) breach of the relevant statutory regulations. The authorities have in fact agreed to settle the matter and have offered the aggrieved children up to £500 for every day they were locked up and further compensation for the psychological damage caused by their periods in solitary confinement. See *The Times*, 30 and 31 May, and 12 August 1991.

62 Section 59 of the Act even refers to "Any punishment lawfully imposed on a prisoner under this Act or any regulations made thereunder ...".

1. *Bad faith*

Considerable attention was paid at the Court of Appeal level in both *Weldon's* case and *Hague's* case to the question of whether it was necessary to show bad faith in order for someone who was in lawful detention to succeed in an action for false imprisonment. The court in *Weldon's* case, which favoured both the residual liberty argument and the intolerable conditions exception, apparently considered bad faith to be a prerequisite for any false imprisonment claim in such circumstances. On the other hand, the judges in *Hague's* case, although dismissive of the residual liberty argument, considered that bad faith should play no part in a suit for false imprisonment.

Since their Lordships in the House of Lords found that no action for false imprisonment was available to a lawfully detained person anyway, they hardly discussed the bad faith requirement at all. If, however, one were to accept that an action could be sustained in such circumstances, one would then have to consider whether bad faith ought to be an additional requirement.

Ralph Gibson L.J. in *Weldon's* case apparently suggested the introduction of bad faith as an element in order to justify his departure from decisions indicating that lawful authority to detain offered a complete defence to false imprisonment actions[63] and to place a limit on the types of situation in which false imprisonment claims could be made by prisoners. But is bad faith an appropriate requirement?

It is suggested that, as stated by Taylor L.J. in *Hague's* case, bad faith ought not to be a requirement for any false imprisonment action: "... to require proof of bad faith would be to alter the tort of false imprisonment and in effect to create a new tort special to prisons and prisoners."[64]

There is certainly no apparent reason why a claim based on intolerable conditions of detention should also require the aggrieved prisoner to establish bad faith. There is, perhaps, a more powerful case for suggesting that deprivation of residual liberty (as arguably a less fundamental wrong) should take account of the motive of the person responsible for that deprivation, but even then the action ought surely to be dependent on the fact of the prisoner's unjustifiable segregation rather than the motivation of the person segregating him. The logical conclusion therefore appears to be that to add the requirement of bad faith in either situation would, as Taylor L.J. suggested, unjustifiably complicate the tort.

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63 See, in particular, *Williams* v. *Home Office (No. 2) (supra,* note 5).

64 *Supra,* note 10, at p. 1268. Taylor L.J. went on to say that, where bad faith could be established, the plaintiff could, anyway, initiate an action for misfeasance in public office. Lord Bridge in the House of Lords agreed, but, since he did not consider that misfeasance in public office was a tort for which an employer or superior officer could normally be made vicariously liable (given that it would ordinarily involve a person acting outside the scope of his employment), he did not consider it to be relevant in the cases at hand. For further discussion of the tort of misfeasance in public office, see *infra,* note 91 *et seq.* See, also, *supra,* note 19.

2. *Substantial breach of prison rules*

The other possibility is that an action for false imprisonment should be available only when a substantial breach of prison rules has been established. This would almost certainly be satisfied in any case based on intolerable conditions of detention, but it might restrict the number of false imprisonment actions based on interference with residual liberty to circumstances where the prisoner's right to associate with others had been removed for significant (as opposed to very short) periods. Indeed, it might be a better way to answer the concerns of Ralph Gibson L.J. that the availability of false imprisonment claims, without some limiting factor, could be "adverse to the maintenance of well ordered community life".[65]

This general argument was first seriously raised by counsel for Weldon and Hague in the House of Lords. Since their Lordships were fundamentally unwilling in principle to accept the possibility of a false imprisonment action by a lawfully detained person, they treated this suggestion in much the same way as that relating to bad faith, and did not consider the point at length. Lords Bridge and Jauncey did, however, both briefly address the argument, and Lord Jauncey made the following observations on its validity:

> This argument is unsound for two reasons. In the first place it turns the tort of false imprisonment into one of degree dependent upon whether or not the breach in question is substantial ... In my view, imprisonment is either lawful or false and questions of degree do not arise. In the second place, the argument seeks to obtain by the back door the remedy which is not available by the front, namely, that based on breach of statutory duty.[66]

One could argue that this is a case of chicken and egg - had the House been inclined to allow an action for false imprisonment in the first place, their Lordships might have been more willing to recognise the "substantiality" test as a valuable limiting factor. On the other hand, it may be that because they genuinely could not accept the concept of questions of degree being part of the tort of false imprisonment, and because the possibility of actions without it appeared very wide, they felt constrained to reject across the board the availability of the tort in prison cases.

Lord Jauncey's assertion that questions of degree sit very uneasily with the tort of false imprisonment is undoubtedly a powerful one. It probably is, therefore, necessary to accept that, if the courts *were* ever to recognise that false imprisonment actions could be available to prisoners at all, those actions would have to be identical to the actions applicable to other categories of plaintiffs, with no special

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[65] *Supra*, note 2, at p. 475.
[66] *Supra*, note 17, at p. 366. See, too, *infra*, note 68 *et seq.*

limiting features. And that, of course, means that it could be very difficult to persuade either the courts in Singapore or a subsequent House of Lords in England of the need to extend the tort to those who are lawfully detained, no matter how legitimate the basis for the argument might be.

IV. ALTERNATIVE TORTS

In addition to the public law remedy of judicial review which was recognised by the judges at both levels in the two cases,[67] other tortious remedies were also discussed by the House of Lords. In order to determine whether an action for false imprisonment really ought to be available to lawfully detained persons in the circumstances examined above, it is necessary also to consider whether these alternative torts could actually offer satisfactory remedies.

A. *Breach of Statutory Duty*

An action in tort for breach of statutory duty is available to an individual who is injured as a result of the breach of a statutory obligation by a defendant. Such a claim is, however, possible only in certain circumstances. Broadly speaking, breach of a statute which is silent on the question of tortious remedies[68] will give rise to a claim only where the plaintiff can show that he is one of a particular class whom the statute is designed to protect[69] and/or that the statute does not provide adequately for any other remedy.[70]

As was pointed out at all levels in *Hague's* case,[71] neither the English Prison Act[72] nor the Prison Rules[73] specifically provide that a breach of the relevant provisions will give rise to a civil action by an aggrieved prisoner. The same is true in Singapore. Although the Prison Regulations[74] provide for the registering of prisoners' complaints,[75] they give no indication that such complaints may give rise to civil actions. Nor, however, do they provide for any other remedy for a breach, which leaves open the question of whether an action in tort can lie. And there is no doubt that prisoners are within the class of persons whom prison rules or regulations

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67 See, *e.g., supra,* note 10, at p. 1271, and note 17, at p. 365.

^ Obviously, where a statute specifically states whether it can or cannot give rise to a civil claim one need look no further to determine the availability of a claim in tort.

69 See, *e.g.. Groves* v. *Lord Wimborne* [1895-9] All E.R. Rep 147.

70 See, *e.g., Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398.

71 See, *e.g., supra,* note 10, at pp. 1261-1263; and note 17, at p. 350.

72 *Supra,* note 3.

73 *Supra,* note 8.

74 *Supra,* note 54.

75 Regulation 24 requires the gaoler to allow prisoners to make complaints and to "take such steps as may appear to him necessary to redress any grievance" (or report it to the Superintendent). Regulation 36 requires all prison officers to report the complaints and grievances of prisoners.

are designed to protect, so there is at least an argument that aggrieved prisoners might be able to sue for breach of statutory duty.

This argument was clearly and unequivocally rejected by the House of Lords in *Hague's* case. Both Lord Bridge and Lord Jauncey took the view that there could be no automatic assumption that being in the class protected by a statute would, in itself, be sufficient to give an individual a right to sue for breach of a statutory provision. Both judges examined in some detail the cases in the area.[76] Lord Bridge concluded that the cases in which an individual remedy had been held to be available for breach of a statutory provision had generally been situations involving plaintiffs who had suffered personal injuries.[77] In other situations, an intention by the legislature to offer tortious actions to persons aggrieved by breaches of statute had hardly ever been implied.[78] Turning to the Prison Rules in general, and rule 43[79] (the relevant rule in *Hague's* case) in particular, he concluded:

> ... I can find nothing in rule 43 or in any context that is relevant to the construction of rule 43 which would support the conclusion that it was intended to confer a right of action on an individual prisoner ... The rule is a purely preventive measure ... where the power has been exercised in good faith, albeit that the procedure followed in authorising its exercise was not in conformity with rule 43(2), it is inconceivable that the legislature intended to confer a cause of action on the segregated prisoner.[80]

Lord Jauncey reached the same conclusion.

Of course, it can be argued that the English view should not automatically be applied in Singapore. After all, in England, the Prison Rules are (as discussed above)[81] not statutory in nature but are merely regulatory directions. On the other hand, in Singapore, the Prison Regulations are subsidiary legislation. It can therefore be suggested that they are more likely to give rise to an action for breach of statutory duty in Singapore than would be the case with the rules in England.

If it were to be decided that the relevant legislation in Singapore is indeed intended to give rise to an action by an individual for breach of statutory duty, then a prisoner who could show that he had been injured

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[76] These included *Groves* v. *Lord Wimborne* [1898] 2 Q.B. *402,Atkinson\. Newcastle Water Works Co.* (1877) 2 Ex. D. 441, *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398, *Butler (or Black)* v. *Fife Coal Co. Ltd.* [1912] A.C. 149, *London Passenger Transport Board* v. *Upson* [1949] A.C. 155, *Lonrho* v. *Shell Petroleum Co. Ltd.* [1982] A.C. 173, *P. V.Liverpool Daily Post and Echo Newspapers pic [\99\]* 1 All E.R. 622 and *Calveley* v. *Chief Constable of the Merseyside Police* [1989] A.C. 1228.

[77] See, *e.g., Groves* v. *Lord Wimborne, London Passenger Transport Board v. Upson, Butler (or Black)* v. *Fife Coal Co. Ltd., ibid.*

[78] See, e.g., *Lonrho* v. *Shell Petroleum Co. Ltd. (No. 2), supra,* note 76.

[79] *Supra,* notes 11 and 55.

[80] *Supra,* note 17 at p. 350.

[81] *Supra,* notes 8 and 14; and note 58 *et seq.*

by breach of any regulation could sue. This would presumably include deprivation of his residual liberty not to be locked up alone and deprived of company as well as breach of his implied right (whether under regulations or the Prisons Act[82]) not to be held in intolerable conditions. It would not be necessary to establish bad faith, intention (or even negligence) since breach of statutory duty is a strict liability tort.

Although the tort of breach of statutory duty usually requires a plaintiff to show that he has suffered actual damage, this is not essential where the right which the statute protects is so fundamental that it needs to be actionable per *se.*[K] Thus a claim based on the fact that a prisoner had been deprived of his residual liberty or had had his health imperilled (rather than actually harmed) by the intolerable conditions in which he was held would not necessarily fail, even though the grievance involved might not constitute the type of damage usually required for an action in tort.

However, even given the differences between the position in England and that in Singapore, it is quite unlikely that the courts here would, in fact, hold a cause of action for breach of statutory duty to be available in such circumstances.[84] Although it is true that the arguments for an action being possible at all are technically better in Singapore than they are in England, the reasoning of the House of Lords in *Hague's* case was based at least as much on the nature and purpose of the relevant provisions as on the form they took. If the local courts were to look to the reasoning of Lords Bridge and Jauncey[85] in that case, it is difficult to imagine that they would find that the regulations in Singapore are intended to give rise to a cause of action by aggrieved prisoners simply because they are subsidiary legislation when there is no such intention in England simply because the rules there are merely regulatory.

B. *Negligence*

In the House of Lords, there was unanimous approval for the view that a prisoner subjected to intolerable conditions of detention should sue not

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[82] *Supra,* note 4.

[83] See, *e.g., Ashby* v. *White* (1703) *2* Ld. Raym. 938.

[84] There is a recent Malaysian case,//« Sepa«£ *v.Keong On Eng and others* [1991] 1 M.L.J. 440, which suggests that a breach of the Police Act of 1967 might give rise to an action by an individual on the ground that the statute contains no penalty (or other remedy) for its breach. However, the reasoning in the case is based almost entirely on English authorities, which suggests that there is little local divergence from the English position.

[85] One interesting point about the views of Lords Bridge and Jauncey in *Weldon's* case and *Hague's* case is that they rejected the claims for false imprisonment (particularly as far as residual liberty was concerned) largely because they had already decided that breach of the relevant provisions could not give rise to an action for breach of statutory duty (see *supra,* note 21). They both felt that to allow a false imprisonment claim in such circumstances would be to allow the same claim under a different guise, and that this would be unacceptable. If, therefore, the courts in Singapore *were* (though this is unlikely) to reach a different conclusion in relation to breach of statutory duty from that of the House of Lords, then this might also increase the chances of an action for false imprisonment succeeding.

in false imprisonment but in negligence.[86] The problem with offering a remedy in negligence rather than in trespass is that the plaintiff is required to prove that he has suffered recognisable damage in the former whilst the latter is actionable *per se.* Although a person who has been held for some time in intolerable conditions is likely to be able to establish damage to his health, this will not necessarily be so, and a person whose conditions of detention have only recently become intolerable may well be able to show no more than a threat to his health or safety. Of course, such a person could seek an immediate order that he be moved by using his public law remedies,[87] but he would not in such circumstances be entitled to damages for the time he spent in intolerable conditions, since threats of harm are not generally recognised as recoverable damage.

It may be that the House of Lords implicitly understood this problem, since Lord Bridge, having formulated his concept of the duty of care owed in such situations, framed the possibility of bringing an action for its breach very broadly:

> If the custodian negligently allows, or *a fortiori,* if he deliberately causes, the detainee to suffer in any way in his health he will be in breach of that duty. But short of anything that could properly be described as a physical injury or an impairment of health, if a person lawfully detained is kept in conditions which cause him for the time being physical pain or a degree of discomfort which can properly be described as intolerable, I believe that could and should be treated as a breach of the custodian's duty of care for which the law should award damages.[88]

As long as any subsequent court having to decide an intolerable conditions case as a negligence action were to be prepared to adopt such a liberal approach, and even to recognise the discomfort of being held in such conditions as constituting damage, then it might be true that a negligence action could offer as good a remedy (at least where a claim based on intolerable conditions is concerned) as an action for false imprisonment would provide. However, to treat the concept of damage this broadly is, in its way, quite revolutionary,[89] and there is no guarantee that future judges will follow Lord Bridge's dictum. It is perhaps sig-

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[86] See the *dicta* of Lords Bridge and Jauncey, *supra,* note 17 at pp. 355 and 365. See also *supra,* note 39.

[87] Lord Jauncey was of the opinion that "[i]n the case of a continuing wrong done to him a prisoner could expect that a hearing in judicial review proceedings could be obtained with little delay" *(ibid,* at p. 362).

[88] *Supra,* note 17 at p. 355.

[89] One of the reasons for the argument that there should continue to be a tort of negligent false imprisonment is that the mere fact of being negligently detained, however uncomfortable or unpleasant that detention may be, will not give rise to an action in negligence unless actual damage can be proved. For an interesting discussion of this point, see Harding AJ. and Tan K.F. "Negligent False Imprisonment - A Problem in the Law of Trespass" (1980) 22 Mai. L.R. 21.

nificant in this respect that Lord Goff in *Weldon's* case and *Hague's* case, whilst basically agreeing with the judgments of Lords Bridge and Jauncey, stated that damages in negligence would be available "only in respect of the type of damage which, on accepted legal principles, will give rise to such an action."[90]

Given, therefore, that a negligence action would only cover the intolerable conditions situation (and not the residual liberty one) anyway, and given that there is uncertainty as to what would constitute damage for the purposes of such an action, it cannot be said with any certainty that the tort of negligence offers an adequate alternative remedy to that offered by the tort of false imprisonment.

C. *Misfeasance in Public Office*

There is, as Taylor and Nicholls L.JJ. pointed out in the Court of Appeal in *Hague's* case[91] and as Lords Bridge and Jauncey observed in the House of Lords,[92] another tort which might be applicable to a prisoner wishing to obtain damages for the wrongful acts of prison officials. That is the tort of misfeasance in public office, first recognised in England in the case *ofBourgoin S.A.* v. *Ministry ofAgriculture, Fisheries and Food.*[91]

The tort of misfeasance in public office would be available where a prison official acted without justification and with knowledge that he was infringing a prisoner's rights and thus caused the prisoner loss or damage. It was held in *Bourgoin's* case that malice is not a prerequisite for establishing a claim for misfeasance in public office, so as long as the defendant was aware that he was acting unlawfully and that his act would injure the plaintiff, there would be a valid cause of action.

Thus, if one assumes that, under the current law, a prisoner cannot sue those detaining him for false imprisonment, then he might well be inclined to seek damages under this tort instead. Misfeasance in public office is, however, a much more difficult action to bring than is false imprisonment. A plaintiff has to show bad faith on the part of the defendant. He also has to show that the act complained of was unlawful, and that it caused him loss or damage.

It may be that bad faith (in the sense of knowledge that one is acting unlawfully) will be very easy to imply in circumstances such as those in *Weldon's* case, where the allegations were of ill-treatment by prison officers. However, this will not be so in every situation, and the tort will, for that reason alone, offer a remedy in only a limited number of cases. Furthermore, as Lord Bridge observed in the House of Lords, even if such an action can be sustained, it will frequently be available only against the individual officer concerned, and not against the prison authorities

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[90] *Supra,* note 17, at p. 356.
[91] *Supra,* note 10, at pp. 1267 and 1271.
[92] *Supra,* note 17, at pp. 353 and 362.
[93] [1986] Q.B. 716.

or the government, since the deliberate wrongful acts of an officer outside the scope of his authority will not give rise to vicarious liability.[94] This will make it less attractive than any action which does not depend on establishing the bad faith of the perpetrator.

The one respect in which an action for misfeasance in public office is likely (in Singapore at least) to be relatively straightforward is in proving the unlawfulness of the act. Although it is not clear whether a breach of the English Prison Rules[95] would satisfy the unlawfulness requirement, a breach of the Prison Regulations[96] in Singapore would almost certainly be unlawful and would therefore support an action.

Apart from the specific problems indicated above (and the problem of establishing damage, which is similar to the situation in relation to an action in negligence),[97] there is also the general problem that the tort of misfeasance in public office is a new tort, poorly defined and at the first stages of development. It is unclear to what extent it will develop to allow claims by persons injured by public officials, and is, for that reason, far from ideal as the sole basis for a civil action for damages.

V. CONCLUSION

The decision of the House of Lords in *Weldon's* case and *Hague's* case appears, at least for the time being, to have made it impossible in England for anyone who is in lawful detention to bring an action for false imprisonment against those detaining him. The decision also has the effect of barring such a person from suing for breach of statutory duty.

Although the situation in Singapore is theoretically slightly different from that in England, in practice the prospects of a plaintiff here succeeding in either action are slim. The likelihood is that the House of Lords' views will be adopted by the local courts. That fact, when considered together with the public policy arguments and problems of access to the courts which will always be inherent in actions by prisoners, means that such claims will almost certainly be rejected in this jurisdiction.

Whilst it is true that the House of Lords suggested alternative actions for prisoners who have been subjected to intolerable conditions of detention or deprivation of their right to associate with other prisoners, the torts proposed in this respect may well not cover every case in which a private law remedy is required. The torts of negligence and misfeasance

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94 *Supra,* note 17, at p. 353. One might, however, question whether such an act, carried out during the course of a prison officer's employment, would necessarily fall outside the ambit of vicarious liability. Cases such as *Morris v. C.W. Martin & Sons Ltd.* [1966] 1 Q.B. 716 suggest that there can be vicarious liability in some situations even for a deliberate wrongful act by an employee if that act is sufficiently connected with his employment.

95 *Supra,* note 8 and note 58 *et seq.*

96 *Supra,* note 54.

97 *Supra,* note 86 *et seq.*

in public office require proof of elements which are not appropriate, and should not be relevant, in cases of this kind. Moreover, neither tort is designed specifically to address the fundamental significance of bodily integrity which is the keystone of an action for trespass to the person.

For these reasons, it is to be hoped that it will not be too long before the whole question of the rights of a lawfully detained person to argue that his custodians have exceeded the bounds of their lawful authority is examined again.

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