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Elmer Liston Bishop III

Rather than determine the issue, however, the court left it for "further sifting through the lower courts."[56]

Conclusion

Both from the standpoint of providing equitable treatment for all maritime workers and from the standpoint of providing a more uniform body of law in the maritime tort area, there is little question but that *Moragne* is properly decided. The inequity of the pre-*Moragne* law, as pointed out by Justice Goldberg, was so apparent as to be beyond dispute. The only real choices open to the court in eliminating this inequity were to reduce the recovery available to land-based workers so as to bring them into line with seagoing workers, or to extend the recovery available to seagoing workers. In light of recent trends in tort law—not only in maritime law, but also in products liability and other areas—for the Court to have chosen the first alternative would have been to turn back the hands of time. Its commendable choice of the second alternative creates a uniform, equitable and much more easily understandable body of law to replace what had been a totally unsatisfactory morass.

Louis W. Payne, Jr.

Civil Rights—Section 1983 Action Lies for Gross and Culpable Negligence

Section I of the Civil Rights Act of 1871, now 42 United States Code section 1983,[1] in recent years has been relied upon increasingly by individuals seeking redress for alleged deprivations of constitutional rights under color of law. In *Jenkins v. Averett*,[2] the Court of Appeals for the Fourth Circuit has broadened the scope of conduct actionable under this statute. Robert Jenkins, an 18-year-old black youth, was shot by a policeman in the course of a pursuit following a confrontation with some white youths in Asheville, North Carolina. Jenkins brought suit in the United States District Court to recover damages under section 1983, and for

[56] *Id.* at 408.

[1] 42 U.S.C. § 1983 (1964) states:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] 424 F.2d 1228 (4th Cir. 1970).

assault and battery under a pendent state claim. While Jenkins claimed that the shooting—resulting in a six-inch hole in his thigh—was intentional, the officer testified that his gun fired accidentally as he returned it to his holster.[3] The district court found that the shooting was not intentional, but did find that the policeman was grossly or culpably negligent. Based on these findings, the court rejected the section 1983 claim but held the defendant liable on the state cause of action.[4]

The court of appeals, in reversing the lower court's decision on the section 1983 claim, held that the defendant's "reckless use of excessive force"[5] amounted to a deprivation of the plaintiff's constitutional right to be free from injuries arbitrarily inflicted by the police.[6] Hence, grossly or culpably negligent police action was found to be sufficiently arbitrary for the purposes of the federal statute.

Although section 1983 is silent as to the type of conduct actionable under its provisions, prior to *Jenkins* no recovery had been allowed for anything less than intentional conduct. Indeed, the District Judge had dimissed the federal claim in *Jenkins* because there was no finding of intent, but allowed the state claim for assault and battery on the principle that gross or culpable negligence, in lieu of intentional conduct, may be actionable in North Carolina.[7] Judge Sobeloff, writing for the majority, reversed the district court and fashioned new federal law by asserting that

[3] The chase took place at night but on lighted streets. The youth ran with an eighteen-inch tire tool stuck down his trousers leg and later held in his hand. The policeman claimed that he thought it was a gun and that as soon as he realized his error, he started to put his pistol away. The youth alleged that the policeman shot him deliberately and that he had taken aim to fire a second time when another policeman arrived, causing the defendant to put his gun away. Jenkins had neither committed a crime nor was he subsequently charged with one.

[4] 424 F.2d at 1231.

[5] *Id.* at 1232.

[6] For examples of police abuse, *see* Screws v. United States, 325 U.S. 91 (1945); Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963).

[7] The lower court's interpretation of North Carolina law is at best questionable. The North Carolina cases cited by the court of appeals are the following: State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Agnew, 202 N.C. 755, 164 S.E. 578 (1932); State v. Sudderth, 184 N.C. 753, 114 S.E. 828 (1922). These decisions suggest that such might be the rule in *criminal* actions for assault and battery. While it is not unreasonable to assume that the court might hold similarly in civil actions, it has not done so yet. Only a few jurisdictions have so held: *e.g.*, Lentine v. McAvoy, 105 Conn. 528, 136 A. 76 (1927); Lambrecht v. Schreyer, 129 Minn. 271, 152 N.W. 645 (1915). Some jurisdictions have explicitly said that only intentional acts would support the civil claim: *e.g.*, Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957). Thus for the majority opinion to call the proposition a "general rule," especially in civil actions in North Carolina, is misleading.

> if intent is required [for recovery under section 1983], it may be supplied, *for federal purposes,* by gross and culpable negligence, just as it was supplied in the common law cause of action.[8]

Presumably then, for future actions under section 1983, the type of conduct involved in *Jenkins*—whether it be labeled as "wanton," "arbitrary," or "reckless"[9]—may be substituted for the supposed requirement of intent.[10]

Jenkins is one of a series of cases that have wrestled to determine the reach of section 1983. The seminal case in the interpretation of the statute's motivational requirements was *Monroe v. Pape*[11] in which the Supreme Court held that one acting under color of state law need not specifically intend a deprivation of a plaintiff's constitutional rights in order to be liable. Thus, it would be sufficient that a defendant intentionally do the *act* which led to a deprivation. Prior to *Monroe,* some courts had required that the defendant should have acted with specific intent. This supposed requirement had been carried over from an earlier Supreme Court decision in *Screws v. United States,*[12] an action based on the criminal counterpart[13] of section 1983, in which specific intent was held to be an essential element. The Court in *Monroe* noted the difference in statutory language; while the criminal statute requires that the defendant *willfully* subject the plaintiff to a deprivation, that term does not appear in the text of section 1983.

Most significant to later interpretations of section 1983 was the observation in *Monroe* that "Section 1979 [now 1983] should be read

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[8] 424 F.2d at 1232 (emphasis added).

[9] "Gross or culpable negligence" is an imprecise term, especially in North Carolina. The court in *Jenkins* seems to use the term as a shorthand expression of several other labels it put on the defendant's conduct: "reckless use of excessive force"; "wanton conduct"; "arbitrary and gross abuse of police power"; and "raw abuse of power." 424 F.2d at 1232.

[10] North Carolina, as noted in *Jenkins,* also holds a policeman liable for criminal assault if he "arbitrarily and grossly abuse[s] the power confided to him." State v. Pugh, 101 N.C. 737, 740, 7 S.E. 757 (1888).

[11] 365 U.S. 167 (1961).

[12] 325 U.S. 91 (1945).

[13] Now 18 U.S.C. § 242 (1964):

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment of any term of years or for life.

against the background of tort liability that makes a man responsible for the natural consequences of his actions."[14] The broad language of the Court would appear to authorize a claim for any type conduct recognized under tort law principles—whether the claim be based on intent to do wrong, gross negligence, or simple negligence. The Supreme Court's invitation to expand the grasp of section 1983 has not brought a uniform reaction from the courts. Some seem to have ignored it and looked for different obstacles. Courts have held that the defendant must have acted with a bad motive.[15] But other courts, in the spirit of *Monroe*, have rejected the "bad motive" requirement.[16] In *Joseph v. Rowen*[17] police officers arrested the plaintiff without a search warrant and without probable cause; the plaintiff's claim was allowed under section 1983 even though there was no showing that the police officers had acted malevolently. The court observed that nothing in the statute's language required restriction to bad motive.[18]

Although *Joseph* exemplifies the expansive spirit of *Monroe*, the type of conduct required of the defendant for a valid claim under section 1983 depends upon how broadly the courts are willing to interpret the Supreme Court's mandate. There appears to be a trend in the courts toward requiring less sophisticated states of motivation, and after *Jenkins*, there is precedent for bringing an action based on gross negligence. Arguably, a logical extension of *Monroe* would be to allow recovery on conduct amounting to simple negligence; however, in most cases brought under section 1983, the possibility of negligent deprivation has not been in issue since the acts complained of have been clearly intentional.[19]

Nevertheless, there have been attempts by prisoners in custody of a

[14] Monroe v. Pape, 365 U.S. 167, 187 (1961).

[15] Striker v. Pancher, 317 F.2d 780, 784 (6th Cir. 1963). In Beauregard v. Wingard, 230 F. Supp. 167, 183 (S.D. Cal. 1964), the court stated, "[i]n determining what constitutes lack of 'due process' we think that motive should and does bear heavily in cases under Section 1983, 42 U.S.C.A. where police officers are involved . . . ." *Accord*, Bargainer v. Michal, 233 F. Supp. 270 (N.D. Ohio 1964).

[16] *E.g.*, Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) (and cases cited at 787).

[17] 402 F.2d 367 (7th Cir. 1968), *overruling* Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961).

[18] In those situations where good motive might be a defense to an action under the federal statute, it is a defense only because the analagous comon law tort claim would recognize it. 402 F.2d at 369.

[19] *E.g.*, Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) (highway patrolman blackjacked plaintiff after arrest for driving intoxicated); Jackson v. Martin, 261 F. Supp. 902 (N.D. Miss. 1966) (policeman allegedly shot plaintiff maliciously); Brooks v. Moss, 242 F. Supp. 531 (W.D.S.C. 1965) (constable stopped car, assaulted the driver without cause, then arrested him wrongfully).

state to sue under section 1983 for allegedly negligent medical attention.[20] In *Hopkins v. County of Cook*,[21] the court said that mere negligence was not actionable under the statute. The disallowance of claims based upon negligence in the prison situation reflects a judicial policy decision to avoid ensnarlment in suits by prisoners grumbling about the management of their captivities.[22] Although it has been intimated by one court that in extreme circumstances improper care might form a basis for an action under section 1983,[23] it is unclear whether the court would require conduct amounting to gross negligence or only simple negligence coupled with exceptionally shocking results.

A district court has suggested that the logical end to the *Monroe* rationale would indeed be an action founded on simple negligence. Dictum in *Huey v. Barloga*[24] indicates that negligent deprivations of constitutional rights under color of state law *are* actionable under section 1983:

> Section 1983 has been interpreted to provide a new type of tort: the invasion, under color of law, of a citizen's constitutional rights. It is also clear that it is not necessary that this invasion be intentional; it may merely be negligent.[25]

However, no court has yet gone as far as the court in *Huey* suggests is possible. But Judge Bryan, dissenting in *Jenkins*, argues that "given the scope the court now grants it, 1983 would indeed be all-pervasive."[26]

Despite the fears of Judge Bryan, *Jenkins* does not appear to herald the day when claims resulting from simple negligence will be actionable under section 1983. The federal courts are still looking for an intentional act—or something that they consider, for federal purposes, as having the same legal weight. The court in *Jenkins* makes clear that its "concern

[20] Jackson v. Hartford Accident and Indem. Co., 422 F.2d 1272 (8th Cir. 1970) (plaintiff claimed doctor and sheriff had not furnished nonnegligent professional medical and surgical attention); United States *ex rel.* Gittlemackey v. Pennsylvania, 281 F. Supp. 175, 177 (E.D. Pa. 1968) (plaintiff complained of improper medical treatment).

[21] 305 F. Supp. 1011, 1012 (N.D. Ill. 1969). "It is an abuse of the Civil Rights Act to characterize a charge of negligence or malpractice, properly questions of state law, as a violation of constitutional rights."

[22] *E.g.*, Coppinger v. Townsend, 398 F.2d 392, 393 (10th Cir. 1968), in which the court stated that "[t]he internal affairs of prisons, including the discipline, treatment, and care of prisoners are ordinarily the responsibility of the prison administrators and are not subject to judicial review."

[23] Stiltner v. Rhay, 371 F.2d 420, 421 n.3 (9th Cir. 1967).

[24] 277 F. Supp. 864 (N.D. Ill. 1967).

[25] *Id.* at 872.

[26] 424 F.2d at 1235.

. . . is with the raw abuse of power by a police officer . . . and not with simple negligence on the part of a policeman or any other official."[27] The decision to reject section 1983 claims based on simple negligence is not an irrational line drawing. Assuming that the purpose of the statute is punitive and corrective, as well as compensatory,[28] courts are not unreasonable to require that the defendant should have intended to do the act resulting in the deprivation—or at least to have behaved so recklessly or arbitrarily that the courts will view his actions with the same level of indignation heretofore reserved for intentional deprivations. Simple negligence, even when resulting in the deprivation of constitutional rights, does not carry the same weight of culpability.

The *Jenkins* decision turns heavily on the factual situation. The court does not suggest a readily apparent standard for the type of conduct now required for a section 1983 action, other than "gross or culpable negligence"—a particularly imprecise concept. One suspects that the decision is a visceral one—more emotional than objective.[29] Its utility in future litigation will depend upon how readily a future court is shocked by the circumstances of the case then before it.

ELMER LISTON BISHOP, III

Constitutional Law—Exemption of Church Property From Taxation

Since the birth of the nation, Congress and the states have afforded religious organizations a favored status under tax legislation.[1] An important example of that benevolence is the universal practice of exempting from ad valorem taxation property owned by religious organizations and used exclusively for religious purposes.[2] *Walz v. Tax Commission of City*

[27] *Id.* at 1232.

[28] *See* Monroe v. Pape, 365 U.S. 167, 170-87 (1961).

[29] Notice, for example, the considerable space Judge Sobeloff gives to recounting the rather remarkable testimony given at the trial. 424 F.2d at 1230-31.

[1] *See, e.g.*, Stimson, *The Exemption of Churches from Taxation*, 18 TAXES 361 (1940); Zollman, *Tax Exemptions of American Church Property*, 14 MICH. L. REV. 646 (1916); Note, *Constitutionality of the Real Property Church Exemption*, 36 BROOKLYN L. REV. 430 (1970).

[2] A representative provision is N.C. CONST. art. 5, § 5. State constitutional and statutory provisions for the property tax exemptions are collected in Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L.J. 461 (1959); Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK L. REV. 533 (1970).