Judge rejects Ontario liabilities law in solitary confinement class-action ruling

A judge has rejected Ontario's claim that a new law gives it immunity from a wide range of lawsuits, in a ruling that grants a minimum of $30-million in damages to thousands of prisoners who were shut away in solitary confinement.

The case, a class action brought on behalf of 11,000 Ontario inmates, was the first test of the Crown Liability and Proceedings Act (CLPA), which took effect last July. Critics have said that law makes it nearly impossible to sue the government and its agencies for negligence – a failure to take proper care in their work. The law was itself the first to take aim at a 60-year-old, Canada-wide trend to end governments' immunity from being sued for wrongful conduct.

The CLPA bars lawsuits over government policy decisions. But the question at the heart of the case was what constitutes a policy decision. The Ontario Attorney-General's department defined it broadly, arguing that solitary confinement – which it calls administrative segregation – was a type of policy decision that could not be the subject of a lawsuit under the new law unless the prisoners could point to individual employees who misused it.

If that interpretation held true, said Ontario Superior Court Justice Paul Perell in his 152-page ruling Monday, it would "make all provincial government activities policy and thus immune from tort [wrongful conduct] claims." Calling the province's argument "cynical," he said it would be impossible for inmates at 32 jails to identify "individual villains."

He called solitary confinement a "dungeon inside a prison," and said that the severe psychiatric harm it causes is grossly disproportionate to its stated purpose of protecting jail security. He also quoted from George Orwell to suggest that the term "administrative segregation" was a form of doublespeak meant to conceal the true nature of solitary.

Eugene Meehan, an Ottawa lawyer, said that Ontario's new law on government liability has the potential to "move the tectonic plates of the citizen-state relationship," but that Justice Perell's ruling reduces the law's impact. "When the CLPA was enacted, the concern for many was that it was turning back the law of Crown immunity to a time where the Crown could do no wrong," he said. "It is now clear that the Crown can still do a lot of wrong and be held fully liable for it."

Brian Gray, a spokesman for the Attorney-General's department, said the province is reviewing the judgment. As the matter falls within an appeal period, he said it would be inappropriate to comment.

The lawsuit featured male and female inmates who have been locked away in solitary confinement, despite severe mental illness, or for periods in excess of 15 days, or both. One, Ahmed Mohamed, was subjected to racist beatings from other inmates and shut away for his own protection in a tiny, filthy cell for 30 days, with no TV or reading materials, and allowed out for just 20 minutes a day. Another, Conley Francis, who suffers from a psychiatric illness, testified he was placed in solitary for eight days, and later for two days, for refusing to take a psychiatric drug, Seroquel, Both men testified to suffering long-term emotional harm. They argued that such uses of solitary confinement violated their constitutional rights to personal security and protection against cruel and unusual treatment, and Justice Perell agreed.

James Sayce, a lawyer who brought the class action on behalf of inmates locked up in solitary confinement between 2009 and 2017, said the ruling protected the basic right to sue the government for being negligent in its day-to-day operations.

"The government tried to use [the law] as a get-out-of jail-free card and the court wouldn't let them," he said in an interview. "The legislation would basically do away with negligence lawsuits and that cannot be."

The lawsuit is to proceed to another stage, in which the individual inmates are entitled to make a case for additional damages, based on their treatment and the harm allegedly done to them, to a judge, arbitrator or other decision-maker.

The Ontario government argued the law, which can be applied retroactively, effectively shut down the prisoners' lawsuit, filed two years before the law took effect. It also argued that the

government could not be held responsible for its use of segregation because Ontario’s Court of Appeal ruled only last year that its prolonged use, or any use on severely mentally ill inmates, was unconstitutional.
But Justice Perell called that defence “a damning confession that it was legally and morally reprehensible for Ontario to use administrative segregation.”

Sean Fine
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