Federal Probation

DECEMBER 1990

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LIV DECEMBER 1990 NUMBER 4

This Issue in Brief

Are Probation and Parole Officers Liable for Injuries Caused by Probationers and Parolees?—The number of offenders on probation and parole has risen; inevitably some offenders will commit other crimes during their terms of supervision. A growing concern for probation and parole officers is whether they can be held civilly liable for injuries caused by probationers and parolees under their supervision. While case law in this area is still developing, there are enough cases to indicate when an officer might be held liable. Authors Richard D. Sluder and Rolando V. del Carmen provide a categorization of decided cases and sketch a broad outline of when officer liability might ensue.

The Influence of Probation Recommendations on Sentencing Decisions and Their Predictive Accuracy.—Using data on all serious cases concluded in 1 year in an Iowa judicial district, authors Curtis Campbell, Candace McCoy, and Chimezie A.B. Osigweh, Yg. explore the disjuncture between sentencing recommendations made by the probation department and sentences actually imposed by judges. While probation personnel and the judiciary usually agreed on appropriate dispositions for first-time offenders, they strongly disagreed on recidivists' sentences. Probation officers recommended incarceration for recidivists almost twice as often as judges imposed it.

Home Confinement and the Use of Electronic Monitoring With Federal Parolees.—Authors James L. Beck, Jody Klein-Saffran, and Harold B. Wooten evaluate a recent Federal initiative examining the feasibility of electronically monitoring Federal parolees. Although technical problems were experienced with the equipment, the authors conclude that the project was an effective way of enforcing a curfew and supervising the offender in the community. The success of the project has served as a foundation for expansion of home confinement with electronic monitoring in 12 Federal districts.

Twelve Steps to Sobriety: Probation Officers "Working the Program."—Working with chemically dependent offenders is indisputably a challenge of the new decade. Addiction treatment is complex and, by its very nature, engenders phi-

CONTENTS

Are Probation and Parole Officers Liable for Injuries Caused by Probationers and Parolees?

BY RICHARD D. SLUDER AND ROLANDO V. DEL CARMEN*

Introduction

THE NUMBER of persons placed on probation and parole has skyrocketed in recent years. In 1983, for example, there were 1.58 million persons on probation and 246,000 persons on parole[1] Five years later, in 1987, the probation population had swollen by 41.6 percent to 2.24 million persons, while the number of offenders placed on parole rose by 47 percent to 362,000[2]. This increase may be attributed mainly to prison overcrowding.[3]

As the nation's prisons continue to deal with severe overcrowding problems in the coming years, it is expected that more high risk offenders will be placed on probation and parole.[4] This means that probation and parole agencies will be burdened with handling rising caseloads of high risk offenders who will commit additional crimes during their period of supervision.[5] A growing concern for probation and parole officers is whether they can be held civilly liable for injuries caused by probationers or parolees under their supervision.

Consider the hypothetical case of an offender placed on probation for driving under the influence. The offender's probation officer becomes aware that the offender has violated the terms and conditions of probation several times by operating a vehicle while intoxicated, yet the offender is left on probation. The offender is subsequently involved in an accident while driving under the influence, severely injuring a third party. The injured party brings suit for damages against the probation officer. May the probation officer be held liable for the injury?

Different courts hearing cases with facts similar to those in the above hypothetical have reached opposite conclusions. In one case, liability for the probation officer was inferred[6]; in another, the court held that the probation officer was not legally liable.[7] Dissimilar opinions have also been reached in cases where suits have been brought against parole officers for injuries caused by parolees. In some cases parole officials have been held liable—in others, they have not.

The important question is: When may probation or parole officers be held legally liable, if at all, for injuries caused by probationers and parolees? While case law in this area is still murky, there are enough cases to indicate when courts are likely to impose liability. This article identifies decided cases and categorizes them. It then reviews cases where no liability was found, and then those cases where liability was either inferred or imposed. The article concludes by identifying the factors courts are likely to consider when determining whether probation and parole officers are to be held liable for harm done or injury inflicted by probationers or parolees under their supervision.

Legal Approaches Courts Use

The general rule is that probation and parole officers are not liable for harm or injury caused by offenders under their supervision. In resolving these types of cases, courts tend to use three general approaches: special relationship, identifiable victim or group of victims, and discretionary or mandatory function.

Special Relationship

Most cases against probation and parole officers have been brought in state courts under tort law where plaintiffs allege negligence in the supervision of the probationer or parolee. In these cases, courts generally consider three issues: the establishment of a legal duty to a victim or group of victims, a violation of that duty, and a consequent damage.[8] The threshold question in most of these cases is whether the probation or parole officer had a duty to the victim. In resolving the duty question, various courts have indicated that, ordinarily, a person has no duty to control the conduct of a third person unless a "special relationship" has been created between the two parties. Given its convenient use in liability cases, special relationship has become a catchall phrase that eludes precise definition. In general, a spe-

*The authors are both with the Criminal Justice Center, Sam Houston State University—Richard D. Sluder as a doctoral fellow and Rolando V. del Carmen as a professor of criminal justice.

cial relationship is created when one "takes charge of a third person whom he knows or should know is likely to cause bodily harm to others if not controlled."[9] Thus, when someone takes charge of another person who has dangerous tendencies, he or she is "under a duty to exercise reasonable care to control" the person to prevent harm to another.[10] What this means is that when probation or parole officers "take charge" of dangerous offenders, a duty arises to exercise "reasonable care" in controlling the probationer or parolee. Courts, however, differ in their interpretation of what "take charge" or have "custody" means.

No Special Relationship Created. There have been a number of cases decided in favor of probation and parole officers on the basis of no existing special relationship. In *Lamb* v. *Hopkins,*[11] the Court of Appeals of Maryland held that probation officers were not liable for injuries inflicted by a probationer because no special relationship had been created. In this case, Russell Newcomer, Jr. was placed on probation following an armed robbery conviction. Newcomer's probation orders required him to obey all laws, not possess any firearms, and participate in an alcohol treatment program. While on probation, Newcomer was convicted of two new offenses—one for driving while intoxicated and another for driving while impaired. When brought back before the court for a probation revocation hearing, it was learned that Newcomer had been arrested for another driving while intoxicated charge and that he had failed to complete an alcohol treatment program for that offense. The court continued probation but cautioned Newcomer that he would likely serve time if he were convicted of another alcohol-related offense.

One month after the revocation hearing, Newcomer pleaded guilty in another court for driving while intoxicated and for driving while his license was suspended. He received probation for both offenses. Probation officers assigned to supervise Newcomer, however, failed to report these two additional convictions to the court that had originally sentenced him to probation.

Approximately 1 year later, Newcomer was again convicted, this time for discharging a firearm and for driving while his license was suspended. Probation officers again failed to report these convictions to any of the courts that had placed Newcomer on probation. Finally, again while driving intoxicated, Newcomer was involved in an automobile accident that rendered a 5-year-old girl a quadriplegic. The girl's parents brought suit against probation authorities alleging that their daughter's injuries were proximately caused by the probation officers' failure to petition the sentencing court to incarcerate Newcomer for several probation violations. The trial court dismissed the suit, ruling that probation authorities owed no duty to the victims.

On appeal, the Maryland state court of appeals affirmed. The court noted that, ordinarily, there is no duty to control the actions of another unless a special relationship exists between the two parties. A special relationship is created when one takes charge of a third person by placing him or her in custody. In this case, the court noted, probation officers were not responsible for supervising the offender on a daily basis. Thus, the probation officers did not have custodial control over the probationer, and therefore no special relationship was created which would impose a duty to protect the general public. Consequently, the court ruled that probation authorities were not liable for the victim's injuries.

In *Small* v. *McKennan Hospital,*[12] a woman was abducted from a hospital parking area by a parolee who subsequently raped and murdered her. The woman's husband brought suit against the executive director for the Board of Pardons and Parole and the parole officer assigned to supervise the offender. The suit, in part, alleged negligent supervision.

The trial court granted summary judgment for parole authorities. On appeal, the Supreme Court of South Dakota affirmed. The higher court noted that a special relationship is created when one takes charge of another whom he knows or should know is likely to cause bodily harm to others. Citing the decision in *Lamb* v. *Hopkins*, the court noted that even though the offender was on maximum supervision status, he was not supervised by parole authorities on a day-to-day basis. The court concluded that parole authorities did not take charge of the offender and, thus, were not liable for the murder committed by him.

Fox v. *Custis*[13] is also indicative of the way some courts have determined whether a special relationship exists between parole authorities and an offender. In *Fox*, a certain Morris Odell Mason was released from prison on parole after serving part of a sentence for arson and grand larceny. Within 30 days of his release, on May 8, 1978, Mason defrauded an innkeeper. Mason's parole officer, Roy Custis, and his supervisor, John Chandler, were made aware of the offense. Custis and Chandler also learned that Mason had violated other conditions of his parole by drinking to

excess and making improper advances towards women. In addition, the two parole officials allegedly suspected that Mason had committed an act of arson on May 1st which resulted in one woman's death. Nonetheless, Mason's parole was continued, although parole supervisor Chandler provided the parolee with written notice that any further parole violations would result in a revocation of parole. On May 14, 1978, Mason set fire to a house; abducted, beat, raped, and set one woman on fire; and shot, stabbed, and attacked another woman. It was later learned that on May 18, Mason had murdered another person.

Victims of the May 14th incidents brought suit under state tort law against parole officer Custis and his supervisor alleging that they were negligent in fulfilling their statutory duties by failing to arrest Mason and that they were negligent in their general duty to exercise a reasonable degree of care in supervising Mason to "prevent a foreseeable high degree of risk of harm to the person and property of others."[14] Victims also sought recovery under Section 1983, although these Federal claims were later dismissed.

At trial, the state court dismissed the action, ruling that parole officials were immune from suit because they enjoyed sovereign immunity. On appeal, the Supreme Court of Virginia affirmed the dismissal by focusing on whether a special relationship had been created between the victims and parole authorities. The court noted that a special relationship is created when one "takes charge" of another who is likely to cause harm to others. The court reasoned that although parole authorities were responsible under Virginia statute for supervising and assisting Mason, they did not take charge of or exercise control over him "within the meaning of accepted rules of tort law."[15] Because no special relationship existed, parole officials had no duty to prevent Mason from causing harm to persons or property.

In *Fitzpatrick* v. *State,*[16] a police officer who was shot and seriously injured by a parolee brought suit against parole officials under state tort law and Section 1983 alleging, in part, that authorities had failed to properly supervise a released offender. Jerry Lain, an offender who had a history of violence and who had been diagnosed as having an antisocial personality disorder, was released on parole in the State of Iowa. Shortly after his release, Lain committed several serious violations of his parole agreement. Lain's parole officer attempted to contact him but was informed that he had gone to the State of Washington. Although the parole officer was able to secure a warrant for Lain's arrest, he allegedly made no attempt to advise police authorities in the State of Washington of Lain's suspected presence. Lain subsequently shot and stabbed a police officer in Richland, Washington, who was attempting to arrest him for a burglary in that city. The police officer brought suit in state court alleging negligence on the part of parole officials in failing to properly supervise Lain and for failing to notify Washington authorities of Lain's suspected presence in that State.

The District Court dismissed the suit, and, on appeal, the Supreme Court of Iowa affirmed. The court considered whether a special relationship had been created which would have imposed a duty on parole officials to control the conduct of the parolee. The court rejected the plaintiff's arguments that a special relationship existed in this case, noting that "a much closer nexus between the injured parties and agents of the state [was present in previously decided cases] than has been shown to exist between the present plaintiffs and the affected state agencies."[17] The Iowa Supreme Court also affirmed the dismissal of the Section 1983 suit, noting that such claims have been denied in the past in cases where recovery was sought for injuries arising out of criminal activity claimed to have been preventable by the State.

Liability Imposed Because Special Relationship Was Present. *Sterling* v. *Bloom*[18] is a case where the special relationship doctrine was applied by a court that held that a probation officer could be held liable for failing to properly supervise a probationer. Fred Bloom was driving an automobile which struck and severely injured motorcyclist Maud Sterling. At the time of the accident, Bloom was on probation for a felony conviction for driving under the influence. One of the conditions of probation for the earlier offense was that Bloom would not operate a motor vehicle except for employment purposes. In addition he was to report monthly to his probation officer and not purchase or operate a motor vehicle without written permission from the court or the probation department.

After the accident, Sterling brought suit under state tort against the probation officer and the probation board. Sterling alleged that probation authorities were negligent in their supervision of Bloom by permitting him to operate a motor vehicle for non-employment purposes, for failing to require him to report regularly, and for failing to initiate proceedings to revoke probation after it became apparent that Bloom was violating the

terms and conditions of probation. The District Court dismissed the suit, holding that under state law, probation authorities could not be held liable. On appeal, the Supreme Court of Idaho reversed, holding that the probation officer's negligent conduct in failing to supervise Bloom foreseeably endangered "those motorists whom Bloom would encounter on the state's highways."[19] The court noted that by taking charge of a probationer having dangerous tendencies, a special relationship was created whereby the officer owed a duty to other motorists. The court also inferred that by failing to enforce the conditions of probation, the probation officer abrogated his ministerial responsibilities, thus exposing himself to a possible finding of liability.

In *A.L.* v. *Commonwealth,*[20] the Massachusetts Supreme Judicial Court ruled that a probation officer could be held liable for the negligent supervision of a probationer. In this case, a schoolteacher named Edward Darragh was placed on probation following his third conviction for child molestation. Two of the conditions of probation imposed by the sentencing judge specified that Darragh was to refrain from teaching and that he was not to associate with any young boys. Despite these stipulations, Darragh obtained employment as a teacher at a middle school. Darragh advised his probation officer, however, that he had obtained a job as a salesman. Although Darragh's probation officer made contact with him on a regular basis, he made no attempt to verify Darragh's employment, neither did he check to see if the probationer was working in a place that would put him in contact with young boys.

Darragh subsequently repeatedly molested two young boys who were students at the middle school where he was teaching. The boys' parents brought suit under state tort law against the Commonwealth of Massachusetts alleging that the probation officer was negligent in supervising Darragh. A jury awarded damages to the victims. On appeal, the Supreme Court of Massachusetts affirmed, noting that "the conditions of probation imposed by the sentencing judge created a special relationship between these plaintiffs and the probation officer."[21] This special relationship, said the court, imposed a duty on the probation officer to the victims to make reasonable efforts to verify the probationer's place of employment. The court noted that verification of employment might have been accomplished quite easily had the probation officer required Darragh to produce a payroll stub or other evidence of employment. Given the circumstances, the probation officer alone was in a position to avert the tragedy that occurred by making reasonable efforts to verify Darragh's employment. A breach of that responsibility led the court in this case to support a finding of liability.

Identifiable Victim or Group of Victims

No Liability Because No Identifiable Victims. In a few cases, plaintiffs have alleged that authorities were negligent in failing to warn those who might be foreseeably endangered by probationers or parolees. In *Thompson* v. *County* of Alameda,[22] a young offender having violent tendencies was released to the custody of his mother on a temporary leave from a county youth facility despite having made threats that he would kill some young child living in his neighborhood. Although aware of the threats, county officials made no attempt to warn the offender's mother, local police, or neighbors having young children who lived in the area. Within 24 hours of being released, the offender murdered James Thompson, a youth living in the neighborhood. The victim's parents brought suit under state tort law alleging that county officials were negligent in: (1) failing to advise and/or warn the offender's mother; (2) failing to exercise due care in maintaining custody and control over the offender through his mother; (3) failing to exercise reasonable care in selecting the offender's mother to serve as the county's agent in maintaining custody and control over the offender.

The Superior Court dismissed the suit and on appeal, the state Supreme Court affirmed. The higher court noted that there was "no affirmative duty to warn of the release of an inmate with a violent history who [had] made nonspecific threats of harm directed at nonspecific victims."[23] The court reasoned that if officials were required to warn the public of every dangerous offender's release who had made some generalized threat, a "cacophony of warnings"[24] would be sounded that would do little to protect the public. The court went on to note, however, that a duty to warn is established when a prior threat has been made to a specific identifiable victim or group of victims. In this case, there was a rather large, amorphous group of potential targets, hence there was no duty to warn and no liability.

Liability Imposed Because of Identifiable Victims. In *Division of Corrections* v. *Neakok,*[25] the Supreme Court of Alaska ruled that parole officers could be held liable for murders committed by a parolee. Clifford Nukapigak had a history of committing violent offenses while intoxi-

cated. Following a rape involving a violent assault, Nukapigak was sentenced to a 6-year term of confinement. Psychiatric evaluations completed at the time indicated that Nukapigak had repressed sadistic impulses which made him especially dangerous. While confined, Nukapigak participated in therapy leading one counselor to express fears for the safety of Nukapigak's stepdaughter if he should be released. The counselor reported her concerns to the Parole Board and other prison staff members.

Policy required that Nukapigak's prison counselor formulate a parole plan which was to be reviewed and approved by his parole officer. No such parole plan was developed, and Nukapigak's parole officer did not read the offender's prison file until after he had been released. Prison officials also failed to comply with a policy that required them to forward information about Nukapigak to the Parole Board. In addition, Nukapigak's prison counselor and parole officer were unaware that they were authorized to impose special conditions of probation and thus failed to do so. As a result, Nukapigak was released under general parole conditions with no stipulation that he refrain from drinking alcohol. Residents of the remote village to which Nukapigak was paroled were not made aware of his status as a parolee.

Six months after his release, Nukapigak became intoxicated and murdered his stepdaughter, her boyfriend, and raped and murdered another woman. Relatives of the victims filed suit under state tort law alleging that parole officials and the Division of Corrections were negligent in failing to impose special conditions of parole, in failing to provide adequate parole supervision, for permitting Nukapigak to return to a small, isolated community that did not have police officers, and for failing to warn Nukapigak's victims of his dangerous propensities. On appeal the Supreme Court of Alaska held that state officials were in a position to know of the danger that Nukapigak posed to the community. Moreover, the court noted that state had the ability to control Nukapigak's parole by imposing special conditions. In the court's eyes, these conditions created a special relationship which imposed a duty on the state to control Nukapigak, and to protect foreseeable victims. The court furthermore noted that

> A victim may be "foreseeable" without being specifically identifiable. The victims in this case, moreover, were foreseeable as more than simply members of the general public. All three were residents of an isolated community of fewer than 100 residents into which Nukapigak was released.[26]

In essence, the court held that residents of the community constituted a sufficiently identifiable group of victims which justified imposing a duty to warn. The state was thus obligated to use reasonable care to prevent the parolee from causing foreseeable injury to other people.

Discretionary versus Mandatory Function

A third approach used by many courts in suits against probation or parole officers is whether the officer's actions are characterized as "ministerial" or "discretionary." In one case, the court defined discretionary acts as conduct which is characterized by a "high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning."[27] Discretionary acts enjoy immunity.[28] Ministerial functions, on the other hand, are broadly defined as acts which involve the carrying out of policies or orders.[29] Acts which are determined to be ministerial in nature, such as enforcing the conditions of probation, are typically not accorded immunity.[30] This means that liability might ensue if probation or parole officers fail to exercise due care in the supervision of clients.

No Liability Because Function Was Discretionary. In some cases, courts have accorded probation and parole officers immunity from suit on the basis that the challenged conduct was a discretionary function. In *Hurst* v. *State*,[31] suit was brought under state tort law against the State of Wyoming and parole officials for injury done by a parolee. Robert Dale Henderson was granted parole by the Wyoming State Board of Parole. Before the expiration of his parole term, Henderson was allegedly granted permission by parole authorities to move to Ohio with his new wife. About a month after his move to Ohio, Henderson murdered his wife's mother, father, and brother. Henderson also admitted to having committed a total of nine additional murders in other states from the time that he left the State of Wyoming until he was arrested.

Relatives of some of the murder victims brought suit against the State of Wyoming and parole officials alleging negligence in authorizing and permitting the parolee to travel to Ohio without obtaining that state's permission and for failing to contact Ohio officials when Henderson failed to return to Wyoming.

The trial court granted summary judgment for the state which the Supreme Court of Wyoming affirmed. The higher court based its decision on a state law which provided governmental immunity to public employees, with certain exceptions. Finding that parole officials were not an exception under the law, the court ruled that they

were entitled to immunity, and, thus, the suit had been properly dismissed by the lower court.

In *C.L.* v. *Olson*,[32] the Court of Appeals of Wisconsin held that a parole officer was not liable for injuries suffered by a woman who was raped by a parolee. In this case, Donald Olson was released from prison on parole after serving a sentence for sexual assault. Under rules adopted by the state's Department of Health and Human Services, parole officers were authorized to grant permission to parolees to operate a motor vehicle. Olson's parole officer gave permission to him to operate a motor vehicle. Thereafter, Olson offered a ride to a young woman and assaulted her.

The victim brought suit against the parole officer alleging negligence in failing to refuse Olson permission to operate a vehicle, or to restrict his driving privileges to normal employment hours. The trial court granted summary judgment for the parole officer and the victim subsequently appealed. The Court of Appeals of Wisconsin affirmed the summary judgment, basing its ruling on whether the decision to grant the parolee driving privileges was ministerial or discretionary in nature. The court reasoned that

> the decision to parole necessarily includes the imposition of terms and conditions for parole. We conclude that an agent shares in the parole decision to the extent that the agent sets terms and conditions for parole. We further conclude that whether to allow a parolee to drive is a decision setting a term and condition of parole, and we hold that governmental immunity attaches to it.[33]

In sum, the court indicated that in granting driving privileges to the parolee, the parole officer exercised a discretionary power, hence the parole officer was entitled to immunity from suit.

Liability Because Function Was Ministerial. In other cases where there have been findings of liability, courts have weighed whether the probation or parole officer's acts were ministerial or discretionary. In *Johnson* v. *State*,[34] a California court considered whether the actions of a parole officer who placed a youth in a foster home were ministerial or discretionary. In that case, the California Youth Authority placed a youth with homicidal tendencies who had a background of violence and cruelty in the Johnson's home as a foster child. Youth authorities failed to advise the Johnsons of either the youth's background or propensity for violence. The youth subsequently assaulted and injured Mrs. Johnson. The Johnson's brought suit under tort law against the state. The court rejected the state's contention that under California law the parole agent enjoyed absolute immunity because his act of placing the youth in the foster home was discretionary. The court noted that while the decision to parole the youth was immune from suit, the failure of the parole agent to warn the Johnsons of a foreseeable latent danger which led to Mrs. Johnson's injury was a "determination at the lowest, ministerial rung of official action,"[35] hence carried potential liability.

In *Acevedo* v. *Pima County Adult Probation Department*,[36] suit was brought against probation authorities by the parents of children who were sexually molested by a probationer. In this case, Jesse Christopher was sentenced to confinement to be followed by 20 years probation. One of the conditions of probation imposed by the sentencing court was that Christopher was not to have any contact whatsoever with children under the age of 15. Despite this condition, probation officers permitted Christopher to rent a room in plaintiff Acevedo's home where five young children resided. Probation officers also approved Christopher's participation in a work program. Christopher subsequently sexually molested the Acevedo children and his employer's children.

The victims' parents brought suit under state tort law against the probation officers who supervised Christopher and the department. The trial court granted summary judgment for probation authorities, ruling that they were immune from liability. On appeal, the Supreme Court of Arizona reversed, holding that the probation officers were not immune from suit. The court noted that probation officers are entitled to absolute immunity when performing a judicial function—such as preparing and submitting presentence reports to the court and for engaging in actions necessary to carry out and enforce the conditions of probation imposed by the court. The probation officers in this case, however, acted contrary to a judicial order by permitting Christopher to be in a position to have contact with a minor. The court said that "any possible claim to immunity ceased when the officers ignored the specific directions of the court."[37]

Other Cases Where Liability Was Imposed

Liability Based Upon Unauthorized Change of a Probation Condition. *Semler* v. *Psychiatric Institute*[38] is one of the earliest cases where liability was imposed on a probation officer. John Gilreath was charged with the abduction of a young girl in 1971. While awaiting trial, Gilreath entered the Psychiatric Institute of Washington, DC, for treatment. At the time, his doctor concluded that he was a good candidate for treatment and that he was unlikely to be a danger to himself or others so long as he was in a struc-

tured, supervised setting—like the one that existed at the hospital. Gilreath pleaded guilty to the charges and was given a 20-year suspended sentence conditional upon his continued treatment and confinement at the Institute.

In the ensuing months, Gilreath's doctor recommended to the probation officer that restrictions on Gilreath's movements be relaxed. The probation officer subsequently appeared before the court, and the judge granted, initially, weekend passes and, later, permission to become a day care patient permitting Gilreath to report to the hospital each day and leave each evening.

In July 1973, the probation officer, without the approval of the court, granted Gilreath a 3-day and a 14-day pass enabling him to travel to Ohio to prepare for a transfer of probation. After being rejected by Ohio authorities for transfer, Gilreath returned to Virginia and was enrolled by his doctor in a therapy group that met two nights a week. While the probation officer was aware of this change in status, he did not report it to the judge.

On October 29, 1973, Gilreath murdered a young woman. The victim's mother subsequently brought a negligence suit under Virginia law and was awarded $25,000, half of which was to be paid by the probation officer. On appeal, the judgment was affirmed, the court noting that the original court stipulations were put into place to protect the public from a foreseeable risk of attack. In essence, the probation order created a special relationship imposing a duty on the government and the probation officer to protect members of the public from the reasonably foreseeable risk of harm at Gilreath's hands. A key to liability in this case, however, was the fact that the probation officer, in effect, changed the status of the probationer without authorization from the judge. This usurpation of authority resulted in the probation officer being held liable. Had the judge authorized the change in status, liability would most likely not have been imposed.

Liability Based on Foreseeability. Another approach used by courts in liability cases is the presence of "foreseeability." Foreseeability, in these types of cases, generally refers to whether injuries inflicted by probationers or parolees were a foreseeable consequence of the officer's failure to use due care in supervising the offender, including the failure to warn an identifiable victim or group of victims. Courts have taken various approaches in determining whether probationers or parolees present a reasonably foreseeable risk of harm to others. The narrow approach postulates that there is no liability unless a specific person can be identified who could be at risk of harm from a probationer or parolee's actions.[39] In contrast, some courts have interpreted foreseeability in a broad sense, implying that some situations may dictate a duty to protect virtually any foreseeable victim.[40]

In at least a few cases, courts have based a finding of liability on foreseeability. In *Georgen* v. *State*,[41] parole authorities were held liable for injuries suffered by a citizen at the hands of a parolee. In this case, a young parolee was hired by a 58-year-old widow to work for and live with her at a remote farm. At the time that the parolee was placed with her, parole officials failed to fully disclose the offender's criminal record and social history. The parolee subsequently physically attacked and injured the widow. The widow filed suit against parole officials and the New York Court of Claims held that the state was liable for injuries sustained by the victim. The court said that parole officials had abdicated their responsibilities by placing a "known vicious, perverted and assaultive parolee" in the home of the victim.[42] The attack, the court said, was predictable, and thus parole officials had a duty to protect the victim.

In another case, the U.S. District Court for the District of Columbia held parole officials liable for a murder committed by a parolee. In *Reiser* v. *District of Columbia*,[43] parolee Thomas Whalen was assisted by a parole officer in finding employment at an apartment complex despite the fact that, at the time, the parolee was a suspect in two rape-murder cases. The parole officer failed to disclose to the parolee's employer information about Whalen's status as a suspect in the two murders, a previous conviction for an attempted rape, his prior juvenile record, and the results from psychiatric evaluations. After being hired, Whalen became a suspect in a third murder at the apartment complex. Although later advised by the police that Whalen was a suspect in the three murders and that he had a violent history, his employer did nothing. Shortly thereafter, Whalen entered the apartment of Rebecca Reiser and raped and murdered her. The victim's mother filed suit under state law and the U.S. District Court awarded damages of $201,633 against the District of Columbia. The U.S. Court of Appeals for the District of Columbia affirmed the award, holding that the parole officer was under a duty to disclose Whalen's full adult record and to provide adequate parole supervision. The court noted that the parole officer's negligent

conduct created an actionable duty to reasonably foreseeable plaintiffs, subjecting them to an unreasonable risk of harm. The court noted that

> Abron's position as a parole officer vested in him a general duty to reveal to a potential employer Whalen's full prior history of violent sex-related crimes against women, and to ensure that adequate controls were placed on his work. Placement of Whalen at [the apartment complex] put him in close proximity to the women tenants, with the opportunity to observe their habits, and gave him potential access to the keys to their apartments and dormitory rooms. . .The jury could conclude that a breach of Abron's duty would present a specific and unreasonable risk of harm to the women tenants of [the apartment] therefore giving rise to a specific duty toward them.[44]

Framework for Analysis

It should be apparent from the cases cited above that case law does not provide clear guidelines as to when probation and parole officers will be held liable for injuries caused by offenders under their supervision. Indeed, different courts hearing cases with similar facts have reached opposite conclusions leading one scholar to note that, "It doesn't take a legal genius to see the inconsistency in these [types] of cases."[45] While there are inconsistencies in some of the cases decided thus far, there also appears to be an emerging trend which generally indicates when courts would hold probation and parole officers liable.

Probation officers are likely to expose themselves to a finding of liability if they fail to enforce the terms and conditions of probation. In *Sterling* v. *Bloom*,[46] the court supported a finding of liability after noting that a probation officer negligently permitted the offender to violate conditions established in both the agreement of probation and the court's order of probation. The court noted that the probation orders put into place by the sentencing judge created a special relationship which imposed a duty on the probation officer to protect the public from a reasonably foreseeable risk of harm. The officer's negligence in enforcing these conditions led the court to issue a finding of liability. Similarly, in *A.L.* v. *Commonwealth*[47] a probation officer was held liable because he failed to ensure that an offender was complying with two conditions of probation specified by the court; namely, that the offender was to refrain from teaching and that he was not to associate with any young children. In *A.L.*, the court considered important the fact that the probation officer could have easily taken steps to verify the employment of the offender. The court noted that the officer failed to make reasonable efforts to make sure that this condition of probation was met. Viewed together, probation officers in these cases would have been exempt from liability had they made reasonable efforts or used ordinary care to ensure compliance with probation conditions. A problem is the term "reasonable" or "ordinary" care is subject to sometimes conflicting interpretation by a judge or jury.

Probation and parole officers are also exposed to liability if they fail to abide by department, agency, or state regulations or policies. In *Neakok*,[48] for example, the court's decision hinged, in part, on the fact that parole authorities failed to formulate a parole release plan as required by state policy. The court noted that officials also neglected to consider imposing special conditions of parole—which was in violation of a Parole Board directive requiring consideration of such conditions for all releasees who had been convicted of crimes of violence. Moreover, the court found a connection between officials' failure to impose special conditions and the offender's subsequent criminal acts. Because officials had the ability to control the offender's parole by imposing special conditions, a special relationship was created which imposed a duty on the state to control the offender and to protect foreseeable victims from risk of harm. A breach of that duty led to a finding of liability.

Liability might also ensue if probation and parole officers neglect, or negligently perform, ministerial functions. In *Johnson* v. *State*,[49] for example, the court noted that decisions to grant parole are discretionary in nature and entitled to immunity. The court went on to note, however, that subsequent actions in the implementation of the parole decision are ministerial in nature and must be adjudicated on a case-by-case basis on questions of negligence. Using this standard, the court determined that the parole officer's decision not to warn foster parents of a youth's propensity for violence amounted to a ministerial function and was thus not entitled to immunity. In *Acevedo*[50] the court noted that probation officers who assist the court in the judicial process in such tasks as completing presentence reports and enforcing conditions of probation are entitled to absolute immunity. The court went on to state, however, that probation officers must act in accordance with the directions of the court before they can assert the immunity defense. In this case, the probation officer acted contrary to a judicial order by failing to ensure that the probationer did not have any contact with minors. Thus, immunity ceased when the officer ignored the directions of the court.

A finding of liability is likely to result if proba-

tion officers, in effect, modify the conditions of probation without obtaining court approval. In *Semler*,[51] for instance, a probation officer was held liable for a young woman's murder because he failed to obtain judicial approval for a change in the probationer's status. Although the probation officer in *Semler* did not order the change in the offender's status himself, his passive acknowledgement and acceptance of the change was sufficient for a finding of liability. Had the officer obtained authorization from the judge for the change, liability most likely would not have been imposed.

Liability may ensue in cases where courts find that injuries inflicted by probationers and parolees were a foreseeable consequence of a probation or parole officer's failure to use due care in supervising an offender. In *Georgen*[52] parole officials were held liable for an offender's attack because they failed to advise the victim of the parolee's propensity for violence. The court considered unimportant the fact that a parole officer met with the offender on a weekly basis. The court reasoned instead that the placement of an offender with violent tendencies in the home of an unsuspecting victim created a situation where a prudent person could have clearly foreseen the possibility of an attack. Had parole officials fully advised the woman of the offender's background and propensity for violence, liability most likely would not have been imposed because the victim would have assumed a known risk of harm.

In *Reiser*,[53] liability was based on a finding that a parole officer failed to fully disclose an offender's full adult record to a potential employer and for failing to provide adequate parole supervision. The court noted that the parole officer's initial failure to fully disclose the offender's history of sex-related crimes against women had the effect of placing the parolee in a position to become a virtual member of the victim's household. Moreover, the court noted that the parole officer was also negligent in failing to ensure that the parolee was not permitted to work alone or to have access to apartment keys once it was known that the offender was a suspect in other rape-murders. These failures on the part of the officer led the court to support a finding of liability because they had the effect of subjecting reasonably foreseeable victims to an unreasonable risk of harm.

Conclusion

The liability of probation and parole officers for injuries caused by offenders under their supervision is an area of the law that invites more scrutiny and attention. Given the increasing number of offenders placed on probation and parole, these types of lawsuits are potentially one of the greatest liability threats facing probation and parole officers.

A review of court decisions where liability has been imposed or inferred reveals one common denominator: In each case, the injury or harm inflicted by the probationer or parolee was flagrant and could be linked to actions that probation or parole authorities took (or failed to take) prior to the commission of the offense. A bromide among lawyers is that bad cases make bad law. If this is true, then an ironclad rule to avoid liability can hardly be prescribed. Where the facts of a case are bad, judges and juries are prone to be result-oriented in that they award liability and then, almost as an after-thought, look for a legal handle to justify the award. Nonetheless, abiding by agency rules and performing one's task professionally and in good faith should go a long way towards minimizing liability risks in this largely uncharted and sometimes confusing area of law.

NOTES

[1]*Probation and Parole, 1987*. BJS Bulletin, NCJ 113948. Washington, DC: U.S. Government Printing Office, 1988.

[2]Id. at 4.

[3]J. Austin, *The NCCD Prison Population Forecast: the Growing Imprisonment of America*. San Francisco, CA: National Council on Crime and Delinquency, 1988. See also, A.R. Klein, When Should We Revoke Parole? 27 *Judges Journal* 3 (Winter, 1988).

[4]R. Guynes, *Difficult Clients, Large Caseloads Plague Probation, Parole Agencies*. NIJ Bulletin, NCJ 113768. Washington, DC: U.S. Government Printing Office, 1988.

[5]J. Petersilia, *Granting Felons Probation: Public Risks and Alternatives*. Santa Monica, CA: Rand, 1985.

[6]*Sterling* v. *Bloom*, 723 P.2d 755 (Idaho, 1986).

[7]*Lamb* v. *Hopkins*, 492 A.2d 1297 (Md., 1985).

[8]See, for example, *Fox* v. *Custis*, 372 S.E.2d 373 (Va., 1988) at 375.

[9]*Restatement of Torts* (Second), Section 315, 1965.

[10]Id.

[11]Supra note 7.

[12]403 N.W.2d 410 (S.D. 1987).

[13]Supra note 8.

[14]Id. at 375.

[15]Id. at 376.

[16]439 N.W.2d 663 (Iowa 1989).

[17]Id. at 667.

[18]Supra note 6.

[19]Id. at 769.

[20]521 N.E.2d 1017 (Mass. 1988).

[21]Id. at 1021.

[22]614 P.2d 728 (Cal. 1980).

[23]Id. at 735.

[24]Id.

[25]721 P.2d 1121 (Alaska 1986).

[26]Id. at 1129.

[27]*Whitney* v. *Worcester*, 365 N.E.2d 1210 (Mass., 1977) cited in *A.L.* v. *Commonwealth*, supra note 20, at 1024.

[28]See, for example, *Acevedo* v. *Pima County Adult Probation Dept.*, 690 P.2d 38 (Ariz., 1984) at 41.

[29]See, for example, *Sterling* v. *Bloom*, supra note 6 at 770-775.

[30]Id. at 776.

[31]698 P.2d 1130 (Wyo. 1985).

[32]409 N.W.2d 156 (Wis.App. 1987).

[33]Id. at 161.

[34]447 P.2d 352 (Cal. 1968).

[35]Id. at 362.

[36]Supra note 28.

[37]Id. at 41.

[38]538 F.2d 121 (4th Cir. 1976).

[39]See, for example, *Lamb* v. *Hopkins*, supra note 7 at 1306.

[40]See, for example, *Sterling* v. *Bloom*, supra note 6 at 769.

[41]196 N.Y.S.2d 455 (Ct.Cl. N.Y. 1959).

[42]Id. at 462.

[43]563 F.2d 462 (D.C. Cir. 1977).

[44]Id. at 479.

[45]W. Collins. Special Relationships Are Key to Liability - But When Do They Exist? *Correctional Law Reporter* 7 (March, 1989).

[46]Supra note 6.

[47]Supra note 20.

[48]Supra note 25.

[49]Supra note 34.

[50]Supra note 28.

[51]Supra note 38.

[52]Supra note 41.

[53]Supra note 43.