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This Issue in Brief

Guideline Sentencing: Probation Officer Responsibilities and Interagency Issues.—The recent decision by the U.S. Supreme Court to uphold the constitutionality of the sentencing guidelines system has provided the impetus for further legitimization of the Federal probation profession; yet problematic issues and difficult guideline decisions confront probation officers as they carry out the guideline presentence investigation. This article by U.S. probation officer John S. Dierna focuses on the important, challenging responsibilities placed upon the Federal probation officer conducting guideline presentence investigations and introduces a three-step process to assist probation officers assigned to these investigations.

The Presentence Report, Probation Officer Accountability, and Recruitment Practices.—Under guideline sentencing, the probation officer has become the "fixer of punishment," according to Federal probation officer Harry J. Jaffe. This new role affects the drafting of the presentence report, heightens the degree of accountability, and argues for a change in the hiring protocol of new officers. As punisher, the probation officer must now function as an evaluator of knowledge rather than as a presenter of simple facts. This untraditional role requires a diversity of analytical skills and competencies, extending beyond the vistas of the social sciences.

Prison "Boot Camps" Do Not Measure Up.—This article by Dale K. Sechrest is about prison "boot camps," or shock incarceration programs, which are proliferating in the United States and have generated great interest from the public and media. Typical programs provide a 90- to 120-day period of military-style recruit training designed to instill discipline and improve the self-respect of the individual participants, thus leading to improved future behavior. System goals include reducing prison populations, reducing costs, and perhaps reducing recidivism rates for these offenders. Recidivism evidence to date, however, shows little improvement over national norms for these offenders. In fact, they may be doing worse.

The Greatest Correctional Myth: Winning the War on Crime Through Incarceration.—Reiteration of the futility of trying to win the Nation's war on crime through overreliance on incarceration is essential, asserts author Joseph W. Rogers. Taken to extremes, the imprisonment solution has become

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Probation and Parole Malpractice in a Noninstitutional Setting: A Contemporary Analysis

BY JOHN C. WATKINS, JR.

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UNTIL the recent past, correctional professionals have enjoyed a rather wide blanket of immunity involving both institutional and postinstitutional decisions. However, this cloak of legal immunity has shown some signs of deterioration in the past several decades as a result of several interrelated factors. Among these are such things as (1) the potentially lucrative nature of malpractice litigation for both lawyers and clients; (2) the rather broad and omnibus definitions of "treatment" and "therapy" espoused by those in the helping professions; and (3) the rather fluid concept of what actually constitutes a "compensable" injury. Likewise, the changing opinions of courts themselves regarding what "duty" is owed to whom by members of the correctional establishment has opened up a previously closed niche in the law.

Negligence and Its Malpractice Component

Basically, tort liability is a specie of civil wrong in which an injured party or parties seek *economic* redress in the form of either compensatory [1] or punitive [2] damages, or both, for wrongs suffered by them at the hands of their fellow citizens. Negligence is a subcategory of tort liability in which an aggrieved party alleges that a particular defendant has failed to adhere to a certain standard of care resulting in either or both personal injury or property loss. Furthermore, the term "malpractice" denotes a particular specie of negligence occurring within a broad range of professional contacts. Liability for professional negligence (or malpractice) is premised upon three basic elements: (1) There must be a legal *duty* owed by the professional in question to a particular plaintiff, class of plaintiffs, or to the general public; (2) the professional must be shown to have somehow *breached* a required standard of care, followed by (3) a resulting *injury* to a person or group of persons which was *proximately caused* by the professional's breach of the particular standard of care involved. Thus, duty, breach and proximately caused injury come together to establish a *prima facie* case of malpractice.

This rather elementary three-step process is tremendously complicated by the range of *discretion* placed in the hands of probation and parole personnel. More will be said about discretion shortly. Another complicating element involves whether a civil lawsuit is brought against an administrator or a staff employee, or both, in their individual capacity or in their capacity as an agent of the state or Federal Government who employs them. If an agency relationship is sought to be established, the individual defendant may be able to have the litigation dismissed by virtue of the application of the doctrine of sovereign immunity or by invoking state legislation or Federal statutes addressed specifically to such matters. Whether and to what extent sovereign immunity or other insulating legislation would bar a lawsuit in this particular context would depend, of course, on the law of the jurisdiction where the injury occurred. Another area of uncertainty resides in the so-called discretionary/ministerial dichotomy.

Courts continue to deny liability in the malpractice field involving correctional agents for alleged negligent acts if, in the reviewing court's opinion, the acts performed were *discretionary* instead of *ministerial*. This is an interesting and potentially crucial legal differentiation that may successfully be employed by probation and parole officers who are subject to malpractice allegations.

The general rule here is that probation and parole officers are liable in tort for damages resulting from the negligent performance of a purely *ministerial* act. Per contra, when performing typical *discretionary* functions, they are generally immune from tort liability for malpractice. The problem, then, is to determine what kind or type of activities fall within the ambit of discretion. Kenneth Culp Davis of the University of Chicago, in addressing this issue, writes that "[a] public officer has discretion whenever the

[1] According to Feldman and Ward, "Compensatory damages available under a negligence or malpractice theory usually include: (1) impairment of future earning capacity, (2) loss of accumulated earnings due to injury, (3) pain and suffering, (4) curative medical expenses made necessary by the negligence. . . and (5) the cost of therapy. . . ." (Feldman & Ward, 1979, p. 86).

[2] So called "punitive" damages or "smart money" are those sums awarded to a successful plaintiff over and above compensatory damages to punish the tortfeasor for what amounts to outrageous conduct.

effective limits of his power leave him free to make a choice among possible courses of action or inaction" (Davis,1969, p.4). He further notes that "[d]iscretion is exercised not merely in final disposition of cases or problems, but in each interim step; and the interim choices are far more numerous than the final ones" (p. 4). A discretionary act is one then that may involve a series of possible choices from a wide array of alternatives, none of which may be absolutely called for in a particular situation. Clearly, professional judgment in all its manifestations plays a major role here.

On the other hand, if a court rules that a probation or parole officer's act is ministerial in nature and further finds that such an act is performed in a negligent manner, civil liability for malpractice may attach. Lawyers often talk of ministerial acts and duties in their professional discourse, but the everyday meaning of this terminology is not readily apparent. According to the author of a leading law dictionary, a ministerial act or duty is "[o]ne regarding which nothing is left to discretion—a simple and definite duty imposed by law, and arising under conditions admitted or proved to exist" (Black, 1957, p. 148). The 4th United States Circuit Court of Appeals in a 1976 Virginia decision [3] drew a distinction between discretionary and ministerial duties in probation in these words:

> Under Virginia law, a state employee who exercises discretionary judgment within the scope of his employment is immune from liability for negligence. Conversely, he is liable if injury results from the negligent performance of a ministerial act. . . . A probation officer's *basic policy decisions are discretionary* [italics added] and hence immune, but his acts *implementing* [italics added] the policy must be considered on a case-by-case basis to determine whether they are ministerial (p.127).

From this brief excerpt one can at least draw some tentative conclusions. Discretionary judgment involving a host of issues that arise in the probation and parole field are viewed by the courts with far more latitude than are matters involving ministerial activities. In fact, one reason for exposing ministerial acts to civil accountability is because there is generally only one set and definite performance posture; any deviation therefrom is, in most cases, *prima facie* evidence of negligence. While courts do not always clarify upon what basis an act may be actionable in malpractice law, a look at some fairly recent examples of appellate decisions in this field may prove instructive.

Typical Probation and Parole Malpractice Issues

While there are varied issues that could expose a practitioner to civil liability, only the following will be discussed in the interest of both space and relevance. These are (1) liability for negligent supervision; (2) liability for failure to warn or notify of release of potentially dangerous offender from custody; and (3) liability of parole boards for subsequent criminal acts of released parolees.

Liability for Negligent Supervision

Nationwide, the supervisory duties devolving upon probation and parole officers reflect a quiltwork pattern ranging from frequent and regular contacts with their clients to infrequent, sporadic or *pro forma* contacts that have little, if any impact on the offender's societal readjustment. Clearly, the offender in question, his or her offense and the past record of the individual, if any, all contribute to the felt necessity for specific levels of supervision.

It cannot be gainsaid that there are countless probation and parole personnel who perform yeoman tasks in the face of almost insurmountable difficulties. Much to the collective credit, courts have recognized, in general, both the pressures and the limits within which these individuals toil. Occasionally, however, the issue of negligent supervision is litigated and ultimately comes before an appellate tribunal for review. How have these courts responded?

Here again we come face-to-face with the discretionary/ministerial dilemma. It has generally been recognized that a probation officer is immune from civil liability when performing a discretionary function such as the completion of a presentence report or making a decision regarding the release of an offender from some form of temporary custody. On the other hand, there is some authority for the proposition that supervision of a probationer in an alleged negligent manner is actionable on the premise that *some aspects* of supervision are ministerial rather than discretionary. For example, in 1984 in the Arizona case of *Acevedo* v. *Pima County Adult Probation Department,* [4] the Supreme Court of Arizona had before it an appeal in an action against a county probation department and four probation officers for injuries allegedly sustained by the plaintiff as a result of negligent supervision. The court ruled that the individual probation officers involved were *not* protected from such a civil lawsuit for negligently supervising a convicted felon placed on probation. The plaintiff alleged that his children had been sexually molested by the probationer in question and that the county probation officers, knowing that this particular offender had a lengthy history of sexual deviation, had permitted the probationer to rent a room from the plaintiff knowing that the plaintiff had five children residing on the premises. The Arizona court noted in its opinion that probation officers should be entitled to immunity in situations involving the preparation and submission of a presentence report and for those acts necessary to implement and enforce whatever

[3] *Semler* v. *Psychiatric Institute of Washington, C.D.*, 538 F.2d 121, *cert. denied*, 429 U.S. 827 (1976).

[4] 142 Ariz. 319, 690 P.2d 38 (1984).

conditions may be attached to the grant of probation. Nonetheless, the court stated that it did not take the view that *all* activities of a probation officer in a supervisory role were entitled to immunity. It suggested that a great deal of a probation officer's work was administrative and supervisory which, taken together, was not part of a judicial function and hence an officer could not claim a derivative judicial immunity from liability as "an officer of the court" simply by virtue of his or her position *per se*.

In an earlier California case in 1968, the Supreme Court of California in *Johnson* v. *State*, [5] held that in an action by a foster parent against the state for injuries sustained by her in an assault by a foster child placed with her by the California Youth Authority, the function of placement and providing the plaintiff with a concomitant *warning* were ministerial acts. Reasoning from that premise, the court concluded that the state was not immune from liability for assault. The opinion noted that a decision to release would be a "basic policy decision" (presumably discretionary in nature), and immune from tort liability. However, once that decision is made, a subsequent decision of exactly *where* to place the probationer (or, in this case a foster child) and what *warnings* to give to persons at risk were ministerial and their negligent performance can result in civil liability. The court stated that

> [t]he loss . . . falls peculiarly on plaintiff, who . . . must achieve vindication in litigation or not at all. Since the entire populace of California benefits from the activity of the Youth Authority, it should also share equally the burden of injuries negligently inflicted on individual citizens; suits against the state provide a far and efficient means to distribute these losses (pp. 797-798).

A third and final example comes from a 1975 Alabama decision entitled *Donahoo* v. *State*. [6] In *Donahoo*, an executrix of an estate filed a wrongful death action against State officials who were responsible for the release and supervision of two State prisoners who had murdered her husband. The Supreme Court of Alabama upheld a lower court judgment in favor of the State officials, but noted also that State officials who are responsible for release and supervision of offenders are not entitled to *absolute* immunity if the particular plaintiff successfully alleges and proves fraud, bad faith, or the fact that State officers exceeded the bounds of their legal authority in such matters. This case is noteworthy in that it carves out at least three potential exceptions to the immunity blanket if an injured plaintiff can adduce sufficient evidence to suggest to a court that there is some semblance of official wrongdoing in the acts of release and supervision. Such may be difficult to prove, but if shown, the Alabama court at least would be willing to consider attaching malpractice liability to the responsible State functionaries.

Thus, in the supervision context, what little case law there is seems to suggest the following: (1) a court will first consider, on a fact-specific basis, what acts or decisions by probation and parole personnel are discretionary or ministerial and then apply general negligence principles to those found to be ministerial; [7] (2) so-called "basic policy decisions" by probation and parole officers are immune from liability by the decided weight of authority; and (3) if an aggrieved plaintiff can marshall sufficient relevant evidence to establish fraud, overreaching or similar wrongdoing on the part of probation or parole officials, their cloak of immunity might possibly be pierced and malpractice liability be easier to establish. [8]

Failure To Warn or Notify of Release

One of the key elements a plaintiff must establish in a malpractice lawsuit is a showing that a "duty" exists on the part of a particular person, persons or group and a corresponding breach of that duty. In the failure to warn or notify context, the duty element becomes a crucial factor among several in an attempt to establish malpractice. "Indeed, the history of negligence law involves, in part, a tale of incremental recognition of new duties owed among men. In this tradition, the importance of a 'duty to warn' represents another stride toward aligning legal obligation with moral expectations" (Note, 1984, pp 498-499).

The failure to warn or notify can become particularly troublesome in the corrections and mental health fields. a duty to warn occurred, not in corrections, but in a psychotherapeutic setting. In 1976, the Supreme Court of California handed down its decision in *Tarasoff* v. *Regents of the University of California*. [9] The plaintiffs were the parents of a young woman murdered by a fellow student. In their lawsuit, the plaintiffs alleged that while receiving voluntary outpatient psychotherapy, their daughter's assailant informed his therapist that he intended to kill a woman, whom the court apparently determined was the readily identifiable daughter of the plaintiffs. In a rather lengthy opinion, the court discussed the nature of the duty concept in tort law and then made this significant observation:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to

[5] 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

[6] 479 So.2d 1188 (1985).

[7] For a detailed exposition of the descretionary/ministerial dichotomoty involving a public officer, *see Riesery. District of Columbia*, 563 F.2d 462 (C. C. Cir. 1977) (officer liable); *modified*, 58- F.2n 647 (D.C. Cir. 1978).

[8] In this connection see *Von Hoene* v. *State*, 20 Ohio App.3d 363, 486 N.E.2d 868 (Ohio App. 1985) (claim that State officials acted in bad faith or with malicious purpose stated a claim for relief).

[9] 17 Cal.3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976).

> use reasonable care to protect the intended victim against such danger (p. 431).

While *Tarasoff* has been roundly criticized by the psychiatric community, it has received at least limited recognition in several states, notably New Jersey and Washington. *Tarasoff*, of course, can be read in several different ways with varying results. However, implicit in that opinion was the concept of a recognizable "duty to warn" in those situations where there is an *identifiable victim.* Applying the *Tarasoff* rationale to the probation and parole arena, however, may be somewhat off the mark. Probation and parole personnel, unlike psychotherapists, may often avail themselves of either the defense of sovereign immunity or that of discretionary decisionmaking. In addition, the probation and parole profession may not have as intense an identification with a code of ethics relative to client confidentiality as that of psychotherapists. Finally, most probation and parole officers have quasi-law enforcement powers that would seem to militate against the view that they stand in an extremely close and confidential relationship with their individual probationers or parolees. In other words, the *Tarasoff* holding may simply add credence to an already existing willingness by probation and parole officers to warn and notify potential victims of a serous threat made by a person or persons in their caseload. This aside, the opinion by the Supreme Court of California may have a "spill-over" effect in those few cases where a threat by an offender involving a third party was made to a probation or parole officer and that individual then failed to warn or notify the potential identifiable victim.

Four years after *Tarasoff*, the Supreme Court of California had before it a "duty to warn" case involving the release of a dangerous juvenile. In *Thompson* v. *County of Alameda,* [10] the complaint alleged that Alameda County had released a dangerous juvenile from its custody and that within 24 hours of the juvenile's release on temporary leave, he had murdered the 5-year-old son of the plaintiff. It was plaintiff's contention in the lower court that his child's death was directly attributable to the county's failure "to advise and/or warn James' mother, the local police, or 'parents of young children within the immediate vicinity' of the residence of James' mother" [11] of her son's release. Apparently the released juvenile had indicated to some of the detention authorities that he would kill a young, but unspecified, child if he were released. Despite these statements by the juvenile, Alameda County released him to the custody of his mother on a temporary visit and he carried out his threat shortly thereafter against a neighbor's child.

To the dismay of many and apparently in what appeared to be a significant departure from previous California precedent, the Supreme Court of California ruled against the plaintiff and in favor of defendant county. The court concluded that the county owed no duty to warn in this case because:

> . . . the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim. . . . . [Only if] the released offender poses a predictable threat of harm to a named or readily identifiable victim or group of victims, who can be effectively warned of the danger [will the] releasing agent . . . be liable for failure to warn such persons. [12]

Thus, in contemplation of law, the death of Thompson's child was seen simply as another example of an unfortunate accident, devoid of civil liability. An interesting contrast to *Thompson* is the 1977 Arizona decision of *Grimm* v. *Arizona Board of Pardons & Parole.* [13] In *Grimm,* the Arizona Supreme Court ruled that members of the State parole board are subject to tort liability for what the court characterized as "grossly negligent or reckless release of a highly dangerous prisoner." [14] The Arizona court, in contrast to its neighboring tribunal in California, concluded that " . . . there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their outrageous conduct." [15] *Grimm* seems to be more in line with the 1968 *Johnson* decision from the Supreme Court of California upholding the right of a foster parent to sue for malpractice in the negligent placement of an assaultive foster child. For whatever reason, policy or otherwise, *Alameda County* appears to be a major retrenchment in California, at least in the analysis of liability for a potentially negligent *placement* decision.

It would seem to be the general rule today that, by and large, parole boards and probation personnel are immune from tort liability if they release an offender with no warning unless there is some pre-existing *agreement* to warn which has been carelessly disregarded, or the offender has threatened an *identifiable victim* or *victims.* In the latter situation, following the *Tarasoff* precedent, probation or parole personnel or boards in their corporate capacity may be liable for malpractice in failing to warn. However, unlike a psychiatrist or a licensed psychotherapist, most probation and parole officers do not have to reckon with the problem of confidentiality and its attendant pressures

[10] 27 Cal. 3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980).

[11] 27 Cal. 3d at 746, 167 Cal.Rptr. 72, 614 P.2d at 730.

[12] 27 Cal. 3d at 758, 167 Cal.Rptr. 80, 614 P.2d at 738.

[13] 115 Ariz. 260, 564 P.2d 1227 (1977).

[14] 115 Ariz. at 268, 564 P.2d at 1235.

[15] *Id.* at 266, 564 P.2d at 1233.

to preserve inviolate a probationer or parolee's communications. While there may be some professional reluctance to divulge certain information passing between the offender and a probation or parole officer, it would seem that both common sense and a balancing-of-interests test would weigh in favor of divulging any *identifiable* threat or threats to a potential individual or group. Failure to do so with full knowledge of the potential consequences would probably be civilly actionable in most jurisdictions.

Board Liability for Criminal Acts of Parolee

With prison overcrowding in the United States reaching epic proportions, one of the more immediate, albeit patchwork remedies for this state of affairs is the release of certain offenders on parole to ease incremental prison overcrowding. Let's assume for argument's sake a worst-case scenario—a released offender subsequently injures or kills an individual while on parole. Since most typical offenders are civilly "judgment proof," [16] the question naturally arises as to whether or not the releasing parole board bears any civil liability for such action? Traditionally, parole boards have escaped third party liability by virtue of a host of governmental immunity provisions shielding their actions.

A typical judicial response to this no-liability doctrine was echoed in a 1976 lower Federal court decision in Alabama. In *Pate* v. *Alabama*, [17] the plaintiff's father commenced a civil rights action against the State and its board of pardons and parole for the rape-murder of his daughter by a parolee. The board and its three individual members were named as defendants. None of the defendants were found liable, the court noting that

> . . . The function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is that of an executive administrator. It is essential to the proper administration of criminal justice that those who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit. [18]

Other jurisdictions have, likewise, immunized parole board and parole officials against charges of malpractice, but on somewhat variant analyses. Some courts, for example, have found state boards of pardons and parole to be immune from civil liability under a provision of the state constitution. [19] Other courts reach the same result by employing a purer form of tort law analysis, namely, the foreseeability of harm concept. In *Wasserstein* v. *State*, [20] the Appellate Division of the Supreme Court of New York ruled that due to the lack of the foreseeability of harm on the part of the paroling authority, no actionable "duty" was owed to the aggrieved plaintiff, hence no liability.

Such a refusal by a court to discover a "duty" that was breached by a board finds wide support in the so-called "public duty doctrine." This is a concept generally employed in common law negligence cases, and, in its most elementary form means that courts may not impose civil liability upon a *municipality* unless that municipality owed some form of "special duty" to the injured plaintiff. Contrariwise, a breach of a "public duty" owed to the general population at large will not give rise to tort liability, all other things being equal. By drawing an analogy between parole boards and the various functions they perform to those of a municipality (both being functionaries of state government), some courts very easily come to the conclusion that a parole board, as a board, owes no "special duty" to the public at large. Finding thus, it is then only one further step to hold that an injured plaintiff or that person's successor in interest is a member of the general public and that the parole board in question owes no "special duty" to such plaintiff. Liability here is truncated then on a "duty" analysis.

In short, the winning of a malpractice case against a board, and, by hypothesis, against individual board members is not at all an easy accomplishment. When one considers such impediments to liability as (1) constitutional immunity, (2) statutory immunity, (3) the foreseeability/remoteness doctrine, and (4) "no duty" to the general public concept, one would have to conclude that a plaintiff seeking damages against a parole board for criminal acts of a released parolee faces formidable odds. Most courts will simply adhere to the thesis that the state (acting through its parole board) cannot be an insurer against the vagaries of potential acts of violence committed by released parolees. Parole as a viable correctional mechanism would inevitably cease to exist if there was a wholesale recognition by the courts of a tort of negligence release. The weight of reported authority seems to affirm this stance. Unfortunately, however, this is not the end of the matter. Malpractice liability may arise on the basis of an averment, not of negligent release, but rather on the basis of an allegation of *inadequate supervision.*

A leading case involving the issue of inadequate supervision arose in the District of Columbia in 1977.

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[16] The term "judgment proof" refers to the financial inability of a person to satisfy a civil judgment for money damages. In most cases, a typical released offender is not in any financial posture to satisfy a judgment, nor do most of them have any significant property upon which a court can levy an attachment to satisfy such a judgment.

[17] 409 F. Supp. 478 M.D. Ala. (1976), *aff'd*, 27 N.Y.2d 625, 313 N.Y.S.2d 759, 261 N.E.2d 665 (1970).

[18] 409 F. Supp. at 479.

[19] *See, e.g., French* v. *Commonwealth*, 23 Pa. Commw. Ct. 546, 354 A.2d 908 (1976), *modified*, 471 Pa. 558, 370 A.2d 1163 (1977).

[20] 32 App. Div. 119, 300 N.Y.S. 2n 263 (1969), *aff'd*, 27 N.Y.2d 625, 313 N.Y.S.2d 759, 261 N.E.2d 665 (1970).

In *Rieser* v. *District of Columbia*, [21] the United States Circuit Court of Appeals for the District of Columbia circuit imposed liability on a parole board for the failure of a parole officer to adequately supervise a parolee. The victim's father brought suit against the District of Columbia after his daughter was raped and strangled by a paroled offender. The discretionary/ministerial dichotomy again was raised in this case and the court declared that "discretionary" acts generally related to the *formulation* of policy, whereas "ministerial" acts related to the *execution* of policy. The court then applied a guideline that was already apparently in force in that jurisdiction noting that "[a]n action will be considered 'discretionary' only if the prospect of liability for the decisions the officer must make in the course of his performance would unduly inhibit the officer's ability to perform his function." [22] From this the court concluded that the failure to provide adequate supervisory measures was a "ministerial" act and not thereby cloaked with immunity. Perhaps one of the key factors in this particular decision was that there was evidence in the record that the parole officer involved had been given specific directives from the parole board to closely monitor and supervise the parolee in question. The evidence failed to show this was done. It could well be argued that such directives removed any "discretionary" issue and placed supervision of the parolee in question entirely in the "ministerial" category. Once transposed in that fashion, negligent supervision resulting in injury may result in actionable malpractice.

The *Rieser* court found a "special relationship" arising between the parole board and the victim, in part at least, because of specific directives found to be present in that situation. The parole officer's failure to supervise the particular parolee created an unreasonable risk of harm not only to the victim, but to other female residents living in the victim's apartment complex. From this, the court reasoned that there was an actionable duty of care owed by the defendant parole board to the victim. "*Rieser* is . . . significant in that it has expanded the potential number of individuals to whom a parole board may owe an actionable duty of care. Generally, where a governmental unit provides a service that benefits the community at large, no individual duty of care is owed to members of the public. An exception, however, [is recognized] if a special relationship is found between the governmental unit and the individual" (Note, 1978, p. 165).

The continued vagaries in both case law and in legislation in this particular field of law will give lawyers and courts continued fodder for generating contradictory outcomes in future litigation. For the moment, at least, probation and parole personnel do not face the same imminent perils that malpractice litigation poses for their brethren in the medical, psychotherapeutic, or legal professions. While the potential for civil liability should be realistically assessed by probation and parole personnel, its impact on a day-to-day basis has not been as keenly felt as it has in other higher visibility callings. Whether and to what extent this state of affairs will remain in *status quo* is anyone's guess.

[21] 563 F.2d 462 (D.C. Cir. 1977), *modified*, 580 F.2d 647 (D.C. Cir. 1978).

[22] 563 F.2d at 475.

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