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Public Protection: Liability for the Actions of Prisoners and Former Prisoners

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Introduction

Prisoners, while in the confines of correctional institutions, being transported to court or for purposes of medical treatment, or on work assignments that necessitate their presence in the outside world, as well as escaped prisoners, have, from time to time, committed acts of violence and other criminal acts against private persons. In a small, but significant, number of lawsuits courts have been faced with the issue of whether and when correctional institutions, officials, or employees should face some measure of legal liability for the consequences of those actions. Could the exercise of stricter measures of control over the prisoner have prevented their criminal acts? Was it foreseeable that the failure to take particular security measures and precautions would lead to a prisoner's escape and subsequent acts of violence? Did a prisoner's history of violence indicate that the selection of them for a work release program, or a work assignment bringing them into contact with members of the public created an unacceptable risk of harm to others?

Similar issues have occasionally also arisen in the context of former prisoners released on parole or probation. Was their release improper? Were they inadequately monitored and supervised? Did they engage in conduct, prior to committing additional serious crimes, that should have triggered their re-incarceration?

In this article, court decisions dealing with these questions are examined. The article does not address the question of liability of correctional institutions and personnel for failure to prevent prisoners' assaults on each other, which was

addressed in an earlier article in this publication, Civil Liability for Prisoner Assault by Inmates, 2007 (5) AELE Mo. L.J. 301.

Public Protection Against Prisoners and Former Prisoners

Courts have generally rejected efforts to find some kind of constitutional duty to protect members of the public in general from the violent acts of prisoners or former prisoners. The fact that an individual is in custody does not alter the general rule that there is no constitutional right to have protection by law enforcement against the violent acts of third parties.

A recent discussion of this is found in Sandage v. Bd. of Commissioners of Vanderburgh County, No. 08-1540, 2008 U.S. App. Lexis 24059 (7th Cir.), in which the court ruled that a county was not liable for the deaths of two persons allegedly murdered by an inmate on work release. The plaintiffs, representatives of the decedents' estates, argued that the prisoner's work release should have been revoked when one of the decedents complained that the prisoner was harassing her, and that failure to do so violated due process under the Fourteenth Amendment. The court noted that there is no constitutional right to protection against violence by private persons. Additionally, there was no evidence that county officials did anything that had the effect of limiting the decedents' ability to use self-help to defend themselves.

Similarly, in Hall v. Freeman, No. 08-11238, 2008 U.S. App. Lexis 18421 (Unpub. 11th Cir.), a court held that a sheriff, captain, sergeant, and watch commander were not liable for a detainee's brutal attack on a female courtroom deputy, inflicting severe brain damage, when he was brought to the courtroom from a holding cell and disarmed her. The courtroom deputy, the appeals court noted, was not in custody, so that the failure to provide adequate security to prevent the attack violated her due process rights only in very extreme circumstances--if the defendants acted with deliberate indifference or engaged in conduct that was conscience shocking, which was not the case here. Further, the courtroom deputy was exposed to the danger of such an assault by the nature of her employment, and the claims against the defendants amounted to those similar to negligence, not deliberate indifference or conscience shocking behavior.

Federal courts are loathe to impose liability in this context on the basis of mere failure to act. In Bright v. Westmoreland County, No. 05-2005, 2006 U.S. App. Lexis 8074 (3d Cir.), for instance, the court ruled that Pennsylvania probation officials and employees could not be held liable for a probationer's murder of the 8-year-old sister of his 12-year-old victim based on the failure to act more promptly in seeking to revoke his probation after he violated its conditions by attempting to continue a relationship with the 12-year-old whose morals he had

previously been convicted of “corrupting.” Mere inaction or failure to act swiftly did not constitute a “state-created danger.”

The case involved a Pennsylvania man who pled guilty to “corrupting the morals” of a 12-year-old girl, and was sentenced to 23 months of probation, with conditions including no contact with his victim and no unsupervised contact with any other minor. He was under the supervision of a county probation department, and three of its employees. During his probation, he allegedly continuously violated his probation by attempting to carry on a relationship with his 12-year-old victim. Probation officers observed this, and took various actions in response to these violations, including the filing of reports and a request to a city police officer to arrest the probationer. No arrest took place, and before the date for the scheduled probation revocation hearing, the man shot and killed the 8-year-old sister of his 12-year-old victim, allegedly to retaliate against the family for its efforts to prevent him from seeing the 12-year-old victim.

The family filed a federal civil rights lawsuit alleging that the “inexplicable delay” of nearly ten weeks in processing the revocation petition and/or the failure to initiate an arrest or detention of the probationer in the face of known probation violations constituted a “state-created danger” which caused the murder of the 8-year-old girl.

The trial court dismissed the federal civil rights claim, ruling that the state officials or employees did not “use their authority to create an opportunity for harm that would not otherwise have existed,” and therefore did not “create” the danger. State law claims for wrongful death were also dismissed on the grounds of immunity under a state statute.

A federal appeals court upheld this result. Under DeShaney v. Winnebago Cty. Soc. Servs. Dept., No. 87-154., 489 U.S. 189 (1989), the due process clause of the Fourteenth Amendment does not impose an “affirmative obligation” to protect individuals against private violence by third parties, except in instances where a person is in custody and must be protected. Subsequent case law created an exception to this when state action “creates” a danger to an individual. The elements of such a “state-created danger” claim, the court stated, are:

> (1) “the harm ultimately caused was foreseeable and fairly direct;” (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that “the plaintiff was a foreseeable victim of the defendant's acts,” or a “member of a discrete class of persons subjected to the potential harm brought about by the state's actions,” as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the

citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

The appeals court noted that it had never found a “state-created” danger claim to have merit without the fourth element of the affirmative exercise of state authority, as opposed to simple inaction.

In this case, the appeals court found, all of the plaintiff's claims were based on failure to act. It concluded that a state cannot “create danger” giving rise to liability for violation of substantive due process by “failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation.”

See also, Gaston v. Houston County, Texas, 196 F. Supp. 2d 445 (E.D. Tex. 2002), in which a county was found not liable to parents under 42 U.S.C. Sec. 1983 for an escaped prisoner's actions in killing one of their sons based on policies or customs that allegedly allowed the prisoner to escape. In shooting at the parent's sons, the prisoner did not act under color of state law, and the county was not aware that the victims of the prisoner's actions, as opposed to the public at large, faced any special danger from the escaped prisoner.

A good number of state courts, as well as federal courts applying state law, have also resisted claims that correctional institutions or personnel, or private entities charged with custody or control of prisoners, should be held legally liable for violent acts by a prisoner, escaped prisoner, or former prisoner.

In Norris v. Corrections Corporation of America, No. 3:07CV-273, 2007 U.S. Dist. Lexis 83965 (W.D. Ky.), for example, a private company that operated a prison under a contract with the State of Kentucky was found not liable for an escaped prisoner's robbery, assault, and rape of a woman several hours after his escape. Under Kentucky state law, applied by the federal court on the plaintiff's negligence claim, there is no negligence liability when the harm to a third person, the victim, is caused by another person's intentionally criminal acts. Intentionally violent acts against unknown third persons, the court stated, are generally not regarded as foreseeable under Kentucky state law.

Under state negligence law, it is often necessary to show that there is some special relationship between law enforcement or correctional agencies and the victim of the crime imposing a duty of protection towards the victim that is distinct from the more general duty to protect the public at large. This might be based on a specific promise of protection, knowledge of a particular threat made by the prisoner towards a particular potential victim, or actions by correctional officials that arguably “created” the danger to the victim or greatly enhanced it.

Examples of these principles include:

* Lodge-Stewart v. N.Y., No. 501952, 2007 N.Y. App. Div. Lexis 10976 (3rd Dept.), in which the State of New York was found not liable for the murder of the plaintiff's daughter on the basis of inadequate supervision of the parolee who killed her. The plaintiff failed to demonstrate that the State owed the decedent a duty of compliance with its supervisory procedures and policies which was different from that owed to the public at large.

* Henry v. Philadelphia Adult Probation and Parole Dept., Civil Action No. 05-4809, 2007 U.S. Dist. Lexis 66247 (E.D. Pa.), concluding that a City and its probation and parole department were not liable for the murders of a number of persons killed by a parolee who escaped from home detention. The plaintiffs failed to show that those killed by the parolee were “foreseeable” victims or that the defendants took affirmative actions that created or enhanced the danger to the victims, as required for the “state-created danger” theory of liability.

*Rice v. Center Point, Inc., No. A114953, 2007 Cal. App. Lexis 1434 (Cal. App. 1st Dist.), stating that a residential substance abuse facility and its operator were not liable for crimes inflicted on victims in a nearby park by four inmates who escaped from the drug rehabilitation program there, and used a knife stolen from the facility's kitchen to stab the plaintiffs. There was no duty to protect the specific persons attacked from such injuries under California state law.

* Kiernan v. City of New York, #QDS: 22703794, Supreme Court, N.Y. County, Judge Stallman, reported in New York Law Journal, Jan. 19, 2001, ruling that New York City was not liable for an escaped prisoner's shooting and injuring of a man who attempted to subdue him during a bar robbery. Even if the city had knowledge of the prisoner's violent propensities and tendency to escape, there could be no liability without a “special relationship” to the plaintiff based on prior contact or assurances of protection.

* Leonido v. State of New York, No. 99960, 784 N.Y.S.2d 331 (Ct. Cl. 2004), finding that the victim of a carjacking by a New York state prisoner who escaped while being transported from one correctional facility to another could not collect damages against the state. She failed to show that there was any special duty to protect her in particular from the inmate, or that she relied on the performance of such a duty. Even if correctional officers failed to properly perform their duties in connection with the custody and control of the prisoner, that was a violation of a general duty for the benefit of the public as a whole and not for the benefit of any specific individual. The state was therefore entitled to immunity from liability.

* Kennerly v. Montgomery Cty. Bd. of Commissioners, 814 N.E.2d 1252 (Ohio App. 2d Dist. 2004), ruling that a county could not be held liable for the death of a murder victim allegedly killed by a detainee who removed an electronic

home monitoring restraint and escaped home detention before committing the crime. The county and its agencies had no “special duty” to protect the victim from the crime, and an exception to statutory immunity for injury and death that occurs within the grounds of buildings used in performance of public functions did not apply.

* Alabama Department of Corrections v. Thompson, 855 So. 2d 1016 (Ala. 2003), a case in which the Alabama Supreme Court ruled that a correctional agency, officials, and employees had no duty to protect a specific individual from assault by an escaped prisoner. A woman assaulted by an inmate who escaped from a technical college at a prison facility therefore could not be awarded damages.

* Doe v. State Ex Rel. Mississippi Department of Corrections, #2002-CA-00135-SCT, 841 So. 2d 1127 (Miss. 2003), finding the Mississippi Department of Corrections was not liable for a parolee's alleged rape of a woman based on discretionary decision not to revoke his parole when he failed to report to parole officer within 72 hours of his release from his custody in Illinois. Evidence failed to show gross or reckless failure to supervise parolee or that there was any knowledge of the parolee's intent to harm a particular person.

* Harrison v. Director of Dept of Corr., 487 N.W.2d 799 (Mich. App. 1992), concluding that a warden and parole board members did not owe a duty to victims murdered by a prisoner while on parole, despite the prisoner's ineligibility for parole, and could not be held liable for the murders under Michigan law. No special relationship existed with the murder victims, nor had they relied on any explicit assurances from defendants.

* VanLuchene v. State, 797 P.2d 932 (Mont. 1990), holding the state not liable for the murder and sexual assault of a child by a prisoner released at the end of his sentence. The state had no duty to rehabilitate prisoner or warn the public of the release of a dangerous offender.

That is not to say that such liability is not possible. In Smith v. Hope Village, Inc., Civil Action No. 05-633, 2007 U.S. Dist. Lexis 26904 (D.D.C.), the court stated that a halfway house, which allegedly prematurely released a convicted felony into the community, could be held liable for his subsequent murder of the plaintiff's daughter. The question of whether the halfway house's negligence had caused the murder was a question for the jury. The court stated that it could be found to be reasonably foreseeable that a felon with a history of armed violence and burglary might commit a violent crime while breaking into a house if he was prematurely released. The halfway house's motions for summary judgment or judgment on the pleadings were denied.

Similarly, in Prindel v. Ravalli County, No. 04-640, 133 P.3d 165 (Mont. 2006), the Montana Supreme Court overturned summary judgment for a defendant county in a lawsuit filed by a stabbing victim claiming that the failure of the county jail to require that his attacker begin serving a sentence on other offenses prior to the attack was negligence that caused his injuries. A court order existed requiring the attacker to begin serving his sentence prior to the date of the attack, establishing a special custodial relationship, and the county, under these circumstances, had a duty to protect some third parties from the offender. Further proceedings were ordered on whether the offender's intentional action in stabbing the plaintiff was unforeseeable.

In Willis v. Settle, 162 S.W.3d 169 (Tenn. App. 2004), review denied, Tennessee Supreme Court (2005), a hospital employee taken hostage by an inmate was held to have been properly awarded $500,000 in damages against a private security company that took the prisoner to the hospital for medical treatment under contract with the state of Tennessee. Company employees were negligent in failing to both stay in hospital room with inmate and in allowing the prisoner access to a weapon, which he used to escape and kidnap the employee and drive away with her in her car.

See also, Bianco v. State of Indiana, settled before filing, July 5, 1989, reported in 33 ATLA L. Rep. 20 (Feb. 1990) (prisoner on furlough murders ex-wife in front of daughters; $900,000 settlement on suit brought for failure to warn family of release as promised), Wilson v. Dept. of Public Safety & Corr., 576 So.2d 490 (La. 1991) (Department of Corrections liable for $32,500 to victims of robbery by escaped prisoner which took place 13 days after escape, based on negligence in preventing escape.), and Schultz, Underdahl v. State of Washington Dept. of Corrections, Nos. 99-2-20537-5-KNT, 99-2-20542-1 (Super. Ct., King Co. Washington), reported in The New York Times, National Edition, p. A29 (Jan. 19, 2001) (Washington state Dept. of Corrections reaches $8.8 million settlements in lawsuits alleging failure to adequately supervise paroled rapist who then raped and killed one woman and slashed another woman's throat, leaving her for dead; correctional employees allegedly missed numerous required contacts with former prisoner).

Some other cases in which significant amounts of liability flowed from the violent acts of prisoners or former prisoners include:

- Joyce v. State of Washington, Department of Corrections, #26499-4-II, 64 P.3d 1266 (Wash. App. 2003), upholding a jury verdict finding the Washington State Department of Corrections liable for $22 million to the estate of a driver killed in a collision with an offender under the Department's community supervision who was driving a stolen vehicle. The question of whether the Department's failure to take action over the

offender's violations of his conditions of supervision was a cause of the driver's death was for the jury, the court held.

- Couch v. Washington State Dept. of Corrections, No. 99-2-11902-4 (Super. Ct., Pierce Co., Wash.), reported in The National Law Journal, p. A14 (Nov. 27, 2000), in which a Washington state jury awarded $15 million to the family and estate of a 65-year-old woman repeatedly raped and ultimately murdered by an ex-convict. The lawsuit claimed that state correctional officials failed to adequately supervise him after his release and should never have placed him on "minimum management."

- Stevenson v. State of Washington, No. 98-2-09351-OSEA (Super. Ct., King Co., Wash., May 16, 2001), reported in The National Law Journal, p. A12 (June 11, 2001) in which Washington state and a county reached a $5.5 million settlement with the family of a man stabbed outside a ballgame by a former prisoner released from a county jail eleven days earlier despite a hospital's recommendation that he be civilly committed as dangerous to others.

Some courts, while acknowledging the possibility of circumstances in which liability might be imposed, have found such liability inappropriate if the prisoner has not engaged in prior acts of violence, despite other criminal conduct. See Buchler v. Oregon Corrections Div., 316 Or. 499, 853 P.2d 798 (1993), in which the Oregon Supreme Court held that the state has a duty to exercise reasonable care to prevent dangerous prisoners from causing harm to others, but did not breach this duty in failing to prevent escape of a prisoner who subsequently shot two persons; since the prisoner's prior crimes had not involved violence.

In Ryan v. Hayes, #1001578, 831 So. 2d 21 (Ala. 2002), the Alabama Supreme Court overruled prior caselaw providing that all state officials have no duty to protect unforeseeable members of the public from harm resulting from escaped prisoners. The new rule, except for parole officials, is that the trial court must consider, on a case-by-case basis whether there was a duty to protect third parties and whether the defendant officials were entitled to qualified immunity defense. Parole officials, under the court's reasoning, could not be held liable in the absence of proof that the officials "knew or should have known that an aggressor might be a danger to a specific individual."

In State of Alaska v. Sandsness, No. S-9910, 72 P.3d 299 (Alaska 2003), the court held that state youth correctional officials could not be held liable for a seventeen-year-old juvenile offender's shooting and killing of a taxi driver after he was released from custody. The state of Alaska had no duty to use due care in deciding whether or not to extend the juvenile's commitment and there was no

showing that the offender presented a “particularized” threat to the person he killed.

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