University of Richmond Law Review

Volume 11 | Issue 3 Article 2

1977

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UNIVERSITY OF RICHMOND

LAW REVIEW

Volume 11 Spring 1977 Number 3

VICTIMS' RIGHTS LITIGATION: A WAVE OF THE FUTURE?

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FOREWARD
by
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The victim of a crime, particularly a violent crime, is traumatized enough by the experience itself, whether it involves bodily injury or loss of money or other property. However, this may be only the start, for then comes the call for the police and subsequent briefings, appearances at police line-ups or viewing the photo albums of suspected offenders; and if someone is charged with the offense, there will be the need for courtroom testimony. The latter may entail repeated appearances in court, due, in many instances, to continuance after continuance, most of which may be permitted for unwarranted reasons such as dilatory tactics by counsel.

If a trial eventually occurs, there will be the ordeal to the victim of a public recitation of the crime, and a vigorous cross-examination by defense counsel. In rape cases, or others involving sexual assault, the courtroom experience is particularly excruciating.

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On many occasions, for reasons apart from the issue of guilt or innocence — for instance, the suppression of incriminating evidence because of the exclusionary rule — a defendant may be allowed to leave the courtroom without any controls upon him which would protect the public from his possible further criminal conduct. Even if convicted and sent to prison, his stay there probably will be of short duration — far short of what is needed as a future deterrent to him or others similarly inclined.

Throughout this process, the rights of the suspected or accused person are given careful consideration. Almost completely overlooked, however, are the human rights of the *victim.* While the rights of the accused are entitled to a certain amount of consideration, the present situation is one in which unbridled sentimentality for the former far surpasses consideration for the victim, except for a fleeting period following the report of the crime in the news media.

A shift in priorities is long overdue. There must be a greater concern for the victims of crime. Furthermore, this can be done without disregarding those rights of suspected or accused persons that are designed as safeguards for the protection of the *innocent;* there need not be a callousness toward all offenders. Some, especially the youthful first offenders, may well be deserving of compassion, rather than confinement in penal institutions. Nowhere in the delineation process, however, should we overlook the essential duty to protect potential victims.

Among the very few who have been speaking out for victims with both scholarly authority and sound professional experience, is the author of this article, Frank Carrington.

F.E.I.

* * *

INTRODUCTION

American Jurisprudence 2d quite properly claims to be one of the most, if not *the* most, comprehensive legal encyclopedia in this country. Any attorney who has had the opportunity to peruse this work would be forced to agree. It is, therefore, an interesting and unfortunate commentary upon the state of law in our society that of the thousands of topics covered in this monumental compendium of knowledge, none deals with the victims of crime.

This is in no way a criticism of American Jurisprudence 2d. Rather, it is an indictment of a criminal justice system which has developed over the two hundred years of our nation's history, largely ignoring precisely those individuals and groups which should be its primary concern: the victims of crime. The problem has been summarized concisely by two noted authorities of American criminal justice. Donald E. Santarelli, while Administrator of the Law Enforcement Assistance Administration, stated the problem thus:

> Put yourself in the shoes of a crime victim who finds himself to be a pawn on the criminal justice chessboard, who has to suffer all sorts of indignities, and then sees, as the final straw, the accused offender walking out free.[1]

Mr. Santarelli was echoed by Patrick V. Murphy, former Commissioner of the New York City Police Department, now the Executive Director of the Police Foundation:

> The way crime victims are treated in many jurisdictions from their first contact with the police to their final hours in the courtroom is often insensitive. Rarely are their needs considered to any degree.[2]

The non-status of the victims of crime has been fostered to a large extent by certain groups and individuals who take the position that since the Constitution of the United States says nothing about victims, they have no specific rights.[3] In terms of pure logic, this position is unassailable. The Constitution does not say anything about

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1. Address by Donald Santarelli, National Conference of State Criminal Justice Planning Administrators, Williamsburg, Virginia, Jan. 14, 1974.

2. Murphy, *New and Continuing Projects Listed in Police Foundation's Grants,* CRIME CONTROL DIGEST, March 25, 1974, at 7.

3. In an interview with Barbara Palmer of the *Washington Star-News,* Mr. Alan Goldstein, legal staffer of the Maryland affiliate of the American Civil Liberties Union, espoused this view:

> *Question:* You have been outspoken in your opposition to the movement to strengthen rights of victims. You have said that 'victims don't have rights.' Could you explain this?
> *Goldstein:* Well, I don't mean that victims don't have rights in a general sense. But what they really are, in the criminal justice process, are witnesses for the prosecution and in that sense they do not have constitutional rights which are guaranteed to the defendant. . . .

Washington Star-News, July 18, 1975, at 1, col. 1.

the rights of the law-abiding people who become crime victims. However, it might be difficult to get across to a young woman who has just been gang-raped that the document upon which our government is premised relegates her to the status of a mere "witness for the prosecution."

Additionally, our founding fathers, men of hard-headed common sense, were not so single-minded in their devotion to the rights of criminals and the criminally accused that they desired to exclude from consideration the rights of actual and potential victims. Conceding the fact that the rights of victims are nowhere spelled out in the Constitution or the Bill of Rights,[4] a realistic assessment of the attitudes of the framers of these documents warrants the conclusion that they simply took it for granted that one of the primary functions of government was to protect the innocent from the lawless. Thomas Jefferson, for example, whose enthusiasm influenced James Madison to steer the first ten amendments through the first Congress in New York in 1789, eleven years earlier had characterized the duty of the state to protect victims:

> Whereas, it frequently happens that wicked and dissolute men, resigning themselves to the domination of inordinate passions, commit violations on the lives, liberties and property of others, *and, the secure enjoyment of these having principally induced men to enter into society, government would be defective in its principal purpose, were it not to restrain such criminal acts . . . .*[5]

Constitutional debate aside, this article takes the position that the victims of crime *do* have rights, certainly not to the total exclusion of the rights of the accused, but with an eye to a balance in our criminal justice system. The article will, after a brief overview of what is currently being done to enhance victims' rights, focus on a developing field of law: the enforcement of victims' rights and efforts to prevent further victimization through litigation on behalf of actual and potential crime victims. This article is intended to alert

4. The closest that the Constitution comes to addressing this subject is in the Preamble which speaks of a union formed to "establish justice [and] insure domestic tranquility. . . ."

5. THE WRITINGS OF THOMAS JEFFERSON 218 (The Thomas Jefferson Memorial Foundation 1905) (from the preamble to the Bill for Proportioning Crimes and Punishments in cases heretofore Capital) (emphasis added).

the legal profession to the potential of victims' rights litigation, a practice of law in need of the dedication of a segment of the bar as has heretofore been done to protect the rights of the criminally accused.

CURRENT VICTIM SERVICES: FROM KINDNESS TO COMPENSATION

It is only within the past few years that certain elements of our society have specifically targeted crime victims as objects of their concern.[6] Victim services include direct services to victims at the intake stage by prosecutors' offices,[7] police departments[8] and private organizations.[9] Such services may be summed up concisely as treating the victim like a human being and not merely as a witness in some future criminal proceeding. The programs recognize the trauma associated with becoming the victim of a crime, and therefore make an effort to "smooth the way" for the victim who has become embroiled in the criminal justice process. Where these services are utilized, the police and prosecutors give the victim indivi-

6. Pioneers in this area include: (1) The late Professor Stephen Schafer of Northwestern University and Professor Emilo Viano of The American University, who have developed concern for victims to a science in this country; (2) Donald Santarelli and Patrick V. Murphy who, as administrators of the Law Enforcement Assistance Administration (LEAA) and the Police Foundation respectively, funded innovative victim-oriented programs; (3) Dr. John P.J. Dussich who, while working in the office of the Governor of Florida, developed the concept of victim services as a practical and effective effort; (4) The National District Attorneys Association, which, with LEAA funding, set up the first system of victim-witness assistance offices in the country. This list is not exhaustive. Other individuals include Anna Forder and Anna Slaughter, Aid to Victims of Crime, St. Louis, Missouri; Rep. Eric Smith, Florida State Legislature; Probation Officer Jim Rowland, Fresno, California and Mrs. Kay Heyman, Illinois Law Enforcement Commission. Many others could have been included as "pioneers."

7. *See, e.g.*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, COMMISSION ON VICTIM WITNESS ASSISTANCE, SOCIAL SERVICE REFERRAL, AN IDEA TO HELP DISTRICT ATTORNEYS HELP CRIME VICTIMS (1976). *See also* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, COMMISSION ON VICTIM WITNESS ASSISTANCE, HELP FOR VICTIMS AND WITNESSES, AN ANNUAL REPORT (1976).

The Commonwealth's Attorney for Richmond, Virginia has recently begun a Victim/Witness Services Unit. The unit uses volunteers to help victims and witnesses better understand the procedures of the criminal justice system and cope with any problems that may arise as a result of their involvement. A similar program is getting under way in Portsmouth, Virginia. Richmond Times-Dispatch, Nov. 3, 1976, § A, at 14, col. 1.

8. For example, the police department of Fort Lauderdale, Florida has an on-going and extremely effective intake victim assistance program.

9. *E.g.*, Aid to Victims of Crime, Inc., Suite 1082, Arcade Building, 812 Olive Street, St. Louis, Missouri 63101; Victims Assistance Program of the Furance St. Mission, Box 444, Akron, Ohio 44309.

dualized attention and explain to him or her the complexities of the criminal justice process. Adequate notice of court hearings, assistance in finding a parking space near the courthouse and attractive waiting rooms are examples of the services provided. In short, an attempt is made to convince the victim (or witness) that the criminal justice system is working *for* him.

Additionally, efforts are made to assist the victim in such matters as intercession with employers and creditors if he should be injured by criminal action, replacement of needed items such as eyeglasses and locks on doors and general counselling services by sympathetic persons. All such humane and compassionate programs should be encouraged.[10]

Victim compensation legislation has been enacted in some twelve states, including Virginia, as of this writing.[11] Such legislation is premised upon the duty of the state to protect its citizens. The rationale is that if a citizen is victimized, the state has, by definition, failed in its duty, and thus should compensate the injured party. Although there are variations among the states, the statute in Illinois could be considered typical.[12] It provides for compensation by the state, through the Claims Division of the Illinois Attorney General's Office, to innocent victims of crimes who have cooperated with the police and the prosecution. Ten thousand dollars is the claim limit with a set-off for workmen's compensation, but not for

10. *See generally* Dussich, Victim Service Models and their Efficacy, July, 1975 (a paper presented to the International Advanced Study Institute on Victimology and the Needs of Contemporary Society, Bevogia, Italy)

11. The following states have passed some type of victim compensation statute: ALASKA STAT. § 18.67 (1974); CAL. GOV'T CODE §§ 13959-69 (West Cum. Supp. 1976); GA. CODE ANN. §§ 47-518 to -527 (1974); HAW. REV. STAT. § 351 (1968), *as amended* (Cum. Supp. 1975); ILL. ANN. STAT. ch. 70, §§ 71-84 (Cum. Supp. 1976); LA. REV. STAT. ANN. §§ 46.1801 to .1821 (West Cum. Supp. 1976); MD. ANN. CODE art. 26A (Repl. Vol. 1973); MASS. ANN. LAWS ch. 258A (Cum. Supp. 1976); NEV. REV. STAT. §§ 217.010 to -.350 (Cum. Supp. 1975); N.J. STAT. ANN. § 52:4B (West Cum. Supp. 1976); N.Y. EXEC. LAWS §§ 620-35 (McKinney 1972), *as amended* (Cum. Supp. 1976); R.I. GEN. LAWS §§ 12-25-1 to -12 (Supp. 1975); VA. CODE ANN. § 19.2-368.1 *et seq.* (Supp. 1976); WASH. REV. CODE ANN. §§ 7168.010 to -.910 (Cum. Supp. 1975). For an analysis of the Virginia statute, see p. 679 *infra*.

12. ILL. ANN. STAT., ch. 70, § 71 *et seq.* (Smith-Hurd Cum. Supp. 1976). *See* Brooks, *How Well Are Criminal Injury Compensation Programs Performing?*, 21 CRIME & DELINQUENCY 50 (1975); Schafer, *The Proper Role of a Victim Compensation System*, 21 CRIME & DELINQUENCY 45 (1975); Rothstein, *How the Uniform Crime Victims Reparations Act Works*, 60 A.B.A.J. 1531 (1974); Schafer, *Compensation of Victims of Criminal Offenses*, 10 CRIM. L. BULL. 605 (1974).

social security. The victim is not eligible if the assailant was a relative. In Illinois,[13] need is not a factor in making the award.[14]

The Virginia compensation statute,[15] on the other hand, is based on a determination of financial need.[16] It establishes a Criminal Injuries Compensation Fund for reimbursing good Samaritans as well as victims.[17] Since the Fund is financed through a ten dollar fine imposed on persons convicted of certain crimes, it entails a restitution aspect while at the same time assuring qualifying victims compensation by deriving the money from an entire class of convicted criminals. It should be noted, however, that the statute has extensive limitations and exclusions.

Victim compensation is probably the wave of the future. Other states are considering legislation to this effect.[18] It is a logical and humane step, the single caveat (other than fiscal pressure) being that compensation to the victims should never be allowed to create a "third-party beneficiary" situation on the part of the perpetrator; that is, the fact that the state has compensated the victim should in no way mitigate the punishment of the offender.

A few states[19] have enacted legislation which permits offenders to make restitution to their victims as a condition of probation. Like compensation statutes, these laws are good in theory, but restitution laws have the drawback of turning our already overworked probation officers into collection agents.

The above treatment of current victim services, (*i.e.*, direct services, compensation and restitution) is admittedly cursory, but this

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13. ALASKA STAT. § 18.67.080 (1974); CAL. GOV'T CODE § 13964 (West Cum. Supp. 1976); MD. ANN. CODE art. 26A, § 12 (Repl. Vol. 1973); N.Y. EXEC. LAW § 631 (McKinney 1972). *Contra,* HAW. REV. STAT. §§ 351-31 to -33 (Cum. Supp. 1976); ILL. ANN. STAT. ch. 70, § 77 (Smith-Hurd Cum. Supp. 1976); MASS. GEN. LAWS ANN. ch. 258A, § 5 (West 1968). N.J. STAT. ANN. § 52:4B-12 (Cum. Supp. 1976); R.I. GEN. LAWS § 12-25-5 (Supp. 1975).

14. Through December 31, 1975, Illinois has awarded $898,901 to 287 crime victims whose claims have been substantiated. Wiedrich, *Crime Victim Aid Balancing Scales,* Chicago Tribune, Mar. 5, 1976, § 2, at 4, col. 1.

15. VA. CODE ANN. § 19.2-368.1 *et. seq.* (Supp. 1976).

16. *Id.* § 19.2-368.13.

17. *Id.* § 19.2-368.4.

18. For a history of compensation and restitution see, S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 1-144 (2d ed. 1970); Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness,* 5 U. RICH. L. REV. 71 (1970).

19. *See* Jones, *More Judges Sentencing Criminals to Repay Their Victims Directly,* Christian Science Monitor, Dec. 8, 1975, at 1, col. 2.

is because the primary thrust of this article is the use of litigation to enforce victims' rights. Litigation on behalf of victims is a relatively new area of law, particularly at the appellate level. It differs also from the more conventional victim services in having the potential to prevent, by example, future victimization.

VICTIMS RIGHTS LITIGATION

The victim-plaintiff litigator in a civil court[20] is saying to his defendant: (1) you injured my client; or (2) by your willful or negligent conduct you were responsible for my client being injured by another and, therefore, you should respond in damages. Such litigation, if successful, vindicates the rights of the immediate victim, but, perhaps more importantly, if a body of victims' rights law develops, it will have the preventive aspect of putting would-be criminals and third parties who are responsible for victimization on notice that the law works to aid victims, in addition to punishing the wrongdoer.

VICTIM AS DEFENDANT

The principal thrust of victims' rights litigation should be on the offensive; that is, the victim is the plaintiff. Before proceeding to this, however, it is worthwhile to digress briefly to consider a class of suit in which the victim is actually the defendant. Two cases are illustrative.

In 1972, a sixteen-year-old girl was robbed at gunpoint in a Chicago suburb. She was sufficiently alert to record the license number of the perpetrators' car and call it into the police. As a result, the robbers were arrested in the commission of another robbery. The girl identified the alleged robbers at a line-up. They then sued their victim in federal district court for conspiring with the police and prosecution officers to violate their civil rights under 42 U.S.C. § 1983 (1970).[21]

In 1974, Mrs. Nora Manis was robbed and beaten in her Winter Haven, Florida home. She positively identified Leamon Lee Miller

20. This article is not concerned with criminal prosecution by the state. The concern here is with the use of the civil court process to redress victims' rights.

21. Matthews v. Janega, Civil No. 74-C-70 (N.D. Ill., June 7, 1974).

as one of her assailants, and he was arrested. For reasons not stated in the record the charges against Miller were dismissed. Miller then sued Mrs. Manis for false imprisonment. The trial court found, as a fact, that Mrs. Manis' identification of Miller was "made in good faith, without malice and [was] in fact an honest mistake if not true."[22] The court also held that the arrest of Miller, based on Mrs. Manis' identification was lawful. Nevertheless, Mrs. Manis was found liable for $3,586.00 in compensatory damages to Miller for her good faith mistake.[23]

Cases such as these are of critical importance. If the victims of crimes were held liable in civil damages for a true, or mistaken, identification of the perpetrator, then it would not be an overstatement to say that the criminal justice system in this country would collapse. The path of the victim-witness throughout criminal proceedings is sufficiently difficult as it is. A recent survey by the Law Enforcement Assistance Administration (LEAA) indicates that perhaps half of the crimes in this country go unreported, in large measure because victims and witnesses have no faith in our criminal justice system.[24] If, in addition, victims and witnesses must identify the perpetrators of crime at their own financial peril, few would come forward.[25] Indeed, the appellate court, in reversing the Florida

22. Miller v. Manis, Case No. GC-G-74-1743, at 2 (Cir. Ct., 10th Cir., Fla., June 17, 1975).

23. *Id.*

24. U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, CRIMINAL VICTIMIZATION SURVEYS IN THE NATION'S FIVE LARGEST CITIES (1975).

25. This author, who was involved in the defense of both cases, found very little case law on the subject of the victim as defendant. Fortunately, such case law as was found was favorable to the defendant's position. The victim in the Illinois case was dismissed. Matthews v. Janega, Civil No. 74-C-70 (N.D. Ill. June 7, 1974) at 3. The District Court of Appeal for the Second Judicial District in Florida found for Mrs. Manis, and reversed the trial court's award of damages. Manis v. Miller, 327 So. 2d 117 (Fla. 1976). *Manis* was considered to be of such importance that amicus curiae briefs in support of the victim-defendant were filed by the Attorney General of the State of Florida, the Florida Sheriffs Association, the Florida Prosecuting Attorneys Association and Americans for Effective Law Enforcement, Inc. The language of the Florida Appeals Court opinion is instructive. It held that:

> The question presented is whether, under Florida law, the court is required to award damages for a plaintiff against a defendant who has made a good faith, honest mistake as to the identity of a party in a criminal procedure, said mistake being one of the factors to the plaintiff's arrest and imprisonment.
>
> Clearly the question posed is one of substantial public interest and great concern. Prompt and effective law enforcement is directly dependent upon the willingness and cooperation of private persons to assist law enforcement officers in bringing those who violate our criminal laws to justice. Unfortunately, too often in the past witnesses and

Circuit Court's holding in *Miller,* stated that it could find no authority for the proposition that a good faith, but mistaken, identification by the victim of the perpetrator of a crime would subject the victim to liability. There is ample authority to defend the victim who finds himself sued for such a good faith error.[26]

Thus, it would seem that the law is clearly on the side of the victims and witnesses, who make good faith, albeit mistaken, identifications of the perpetrators of crimes. This is as it should be; policy considerations dictate that victims be able to make their accusations to the police with relative impunity. In the words of the California Supreme Court, the victims of crime should not be held to the responsibility of guarantors of the accuracy of their identification.[27] Of course, a bad faith identification or accusation is still punishable under common law tort principles.[28]

Suits by Victims Against Perpetrators

There is no legal reason why the victims of crime should not have a civil cause of action against their assailants (in cases of murder the survivor or personal representative of the decedent's estate would have the cause of action). Common law torts in assault, battery or wrongful death would lie. The reason that relatively few such lawsuits have been filed is that most criminals are judgment-proof because of indigence, and often in jail. As one commentator has noted, "Crimes of violence are not ordinarily committed by the rich."[29] This creates a real problem for victims who go through the expense and often the trauma of re-living the crime only to get judgments that are, for all intents and purposes, worthless.

> victims of criminal offenses have failed to report crimes to the proper law enforcement agencies. Private citizens should be encouraged to become interested and involved in bringing the perpetrators of crime to justice and not discouraged under apprehension or fear of recrimination.

Id. at 117.

26. 327 So. 2d at 117-18. *See* Armstead v. Escobedo, 488 F.2d 509 (5th Cir. 1974); Turner v. Mellon, 41 Cal. 2d 45, 257 P.2d 15 (1953); Hughes v. Oreb, 36 Cal. 2d 854, 228 P.2d 550 (1951); Linnen v. Banfield, 114 Mich. 93, 72 N.W. 1 (1897); Shires v. Cobb, 534 P.2d 188 (Ore. 1975); White v. Pacific Tel. & Tel. Co., 162 Ore. 270, 90 P.2d 193 (1939).

27. Turner v. Mellon, 41 Cal. 2d 45, 257 P.2d 15, 17 (1953).

28. *See, e.g.,* W. Prosser, Law of Torts 834, 837 (4th ed. 1971).

29. Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime,* 10 St. Louis U.L.J. 238, 243 n.2 (1965).

Nevertheless, newspaper accounts from across the country indicate that increasing numbers of such lawsuits are beginning to crop up. Apparently, in some instances, victims are able to convince attorneys, or vice versa, that actions for civil damages should be brought against the perpetrators of violent crimes. At least one jurist has called for such a development. Judge John B. Wilson, Jr. of the Marion County, Indiana, Criminal Court, in a speech before the Marion County Victim Advocate Program, suggested that victims of violent crimes should file civil lawsuits against those who have harmed them and that victim advocate groups should get state funds to finance such suits, just as many defendants receive free legal counsel. Judge Wilson said there is really very little deterrent to criminally inclined individuals in our legal system, and that the threat of civil action might provide some.[30]

The idea of state assistance in filing victims' rights lawsuits is certainly novel. Moreover, it would appear to stand up under analysis. We have seen the growth of any number of state-funded human rights and civil rights boards and commissions charged with the laudable task of enforcing the civil rights of our citizens. Why, then, should not the government get into the business of enforcing the rights of the victims of crime? The problem remains that even if there was state funding for the civil suits, thus taking the financial burden off victims, the result in most cases would be the same: an uncollectible judgment.

Some of the current crop of suits by victims against perpetrators have built into them a sort of catharsis for the victim. A recent case is of interest in this respect. In January of 1976, Mrs. Mary Knight of Montgomery County, Maryland received an award of $365,000 in civil damages against two men who had beaten and raped her in August of 1970. A jury assessed $40,000 in compensatory damages and $325,000 in punitive damages against William D. Christianson and Edwin E. David, both of whom had earlier pled guilty to rape and attempted rape charges.[31] According to Barry Helfand, an attorney for the victim, the case was the first of its kind in Maryland.[32] Mrs. Knight was outspoken about her ordeal and her motivation for

30. Indianapolis Star, June 10, 1976, at 17, col. 3.
31. Washington Post, Feb. 1, 1976, § B, at 1, col. 6.
32. *Id.*

filing the suit. She candidly told newspaper reporters that she did not believe that she would ever be able to collect the money, but she continued:

> [T]he purpose of this trial wasn't to collect. The purpose of this trial was that it's high time somebody got off their tail and did something about "rape". . . .
>
> I'm not a woman's libber . . . . I'm not one of these girls who thinks men are chauvinist pigs and gets insulted if a man opens the door for them. [But] so what if these guys are sitting in jail, big deal. What about my doctor bills? What about the hospital bills? What about the mental anguish?[33]

But of more importance to the victim than the potential monetary remuneration was the opportunity to express through the civil courts the outrage that she felt so strongly. This is made apparent when we consider the fact that Mrs. Knight knew before she filed the lawsuit that the civil jury would hear details of her sex life, and the fact that she had been a topless dancer. She persisited nevertheless, and the jury, by its verdict, vindicated her right not to be beaten and raped.[34]

Other similar lawsuits have been filed in other parts of the country.[35] The common thread running throughout all of the actions is that the plaintiff-victim (or personal representative) has elected to

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33. *Id. See also* National Observer, Feb. 14, 1976, at 7, col. 1.

34. Other examples of instances in which the victim has sued the perpetrator directly are: (1) The parents of a University of Virginia coed who had been stabbed to death in Charlottesville in 1972 were awarded $15,746 in a jury verdict against the killer. Washington Post, May 20, 1976, § C, at 16, col. 2; (2) The families of three prison guards at San Quentin killed in a bloody escape attempt in 1971 were awarded $2.1 million in a California Superior Court default judgment against the convicts accused of engineering and participating in the breakout attempt. San Francisco Chronicle, October 24, 1975, at 41, col. 4; (3) The wife of a Phoenix, Arizona man who was shot to death filed a $1.6 million suit against the convicted killer and his wife in Phoenix Superior Court. The case has bizzare overtones: the wife of the killer, desiring to make her husband jealous, lured him to a bar, then hugged and kissed the victim on the dance floor, whereupon the husband shot him. The allegation is that the killer and his wife negligently caused the victim's death. Arizona Republic, Aug. 2, 1975, § A, at 25, col. 5; (4) An Edwardsville, Illinois dentist, whose office was burglarized five times in one year, filed suit against two of the convicted burglars in Madison County Circuit Court, seeking $50 in compensatory damages and $200,000 in punitive damages against them. St. Louis Post-Dispatch, June 2, 1976, § E, at 1, col. 1.

35. Washington Post, April 26, 1975, § B, at 2, col. 1; Phoenix Gazette, June 24, 1975, at 13, col. 5.

utilize the civil process to redress criminal injury. The problem common to all is the difficulty of collecting any judgments obtained. Most of the perpetrators are currently incarcerated and will be for quite some time, and none appear, from the reports of the cases, to be affluent.

The deterrent or preventive effect of such lawsuits is problematical. It is conceivable that if a sufficient number of civil suits was filed in a given jurisdiction over a period of time, a statistically valid sample could be tabulated from which it could be determined whether there is a measurable impact on crime rates. As it is, the paucity of lawsuits and their scattered nature provide insufficient data to resolve this question. This is not to say that such lawsuits should not be filed. Where recovery *is* possible, even in small amounts, the victim is surely entitled to be compensated by the criminal. Additionally, the mere fact that some attorneys are willing to file on behalf of victims indicates that there is a rising consciousness of victims' rights in the legal profession. Finally, and perhaps as important as anything else, is the cathartic effect illustrated by Mrs. Knight's successful suit against the men who raped and beat her. From her comments, it is apparent that if she never recovers a penny of the judgment award, at least she now believes that her right to go about her business without being molested has been vindicated in the civil courts.

Suits by Victims Against Third Parties

The theory behind this class of suits is that a criminal has injured a victim, and that one of the reasons that the criminal was in a position or at liberty to do so was that a third party negligently failed in some duty that he owed the victim, such as to provide proper security on the premises, to supervise the criminal or to confine the criminal safely.

Usually the third parties will not be judgment-proof as often as the criminals themselves, but there are practical and conceptual problems involved in third-party lawsuits. First, many defendants in such cases will be government entities — states and cities, parole boards, correctional administrations and so on. Consequently, an initial problem will be whether the defendant is absolutely immune

from a civil suit under the doctrine of sovereign immunity.[36] Several states have waived tort immunity, in whole or in part,[37] and this obviates the problem in those that have.

A conceptual problem also arises of "second-guessing" the defendants' good faith decisions which led to the negligence complained of. For example, it would be unfair to hold a corrections administrator liable every time he released a convict on work release or on furlough, where that convict later victimized someone. The job of corrections officers and administrators is difficult enough as it is, without requiring them to act at their financial peril every time they make a disposition in a given case. It is for this reason that there is usually some additional factor involved when liability has been found against third parties: an unauthorized act or implementation.

A recent and important case, decided by the United States Court of Appeals for the Fourth Circuit, illustrates most of the principles involved in third-party victims' rights litigation. The case, *Semler v. Psychiatric Institute*,[38] involved a lawsuit by Mrs. Semler to recover damages for the death of her daughter, Natalie, who was killed by John Stephen Gilreath, a Virginia probationer who had been a patient at the defendant institute and who was released inadvertently. Gilreath's probation officer, Paul Folliard, was joined as a third-party defendant by the original defendants. The case was filed in the United States District Court for the Eastern District of Virginia based on diversity of citizenship. The trial court heard the case without a jury and awarded the plaintiff $25,000 jointly and severally against the psychiatric institute, Gilreath's psychiatrist (Dr. Wadeson) and probation officer Folliard.[39] The defendants appealed. The Fourth Circuit affirmed in a unanimous three-judge panel opinion.[40]

The facts were not really in dispute. Gilreath had been indicted in Fairfax County, Virginia for abducting a young girl in October of 1971. Pending his trial, and after he entered the defendant psychiat-

36. *See generally* 57 AM. JUR. 2D *Municipal, School, and State Tort Liability* § 1 *et seq.* (1971).

37. *See generally* COUNCIL OF STATE GOVERNMENTS, SUGGESTED LEGISLATION (1973).

38. 538 F.2d 121 (4th Cir.), *cert. denied*, 97 S. Ct. 83 (1976).

39. *Id.* at 121.

40. 538 F.2d 121, 123 (4th Cir. 1976).

ric institute for treatment, Dr. Wadeson wrote to Gilreath's attorney that, in his opinion, Gilreath would benefit from continued treatment, and that he did not " 'consider him to be a danger to himself or others as long as he is in a supervised, structured way of life such as furnished here at Psychiatric Institute.' "[41] As a result of these representations, Judge William Plummer sentenced Gilreath on his guilty plea to twenty years imprisonment, but suspended the sentence, conditioned upon his continued treatment and confinement at the Institute. In the ensuing months, Judge Plummer, at the recommendation of Dr. Wadeson and at the request of the probation officer, allowed Gilreath to visit his family at Thanksgiving and Christmas, allowed additional three-day passes, allowed the probation officer to grant week-end passes at his discretion and then permitted Gilreath to be placed on day-care patient status. In August, Gilreath was discharged from the Institute on the assumption that Ohio probation authorities would accept him. When Gilreath was not accepted by the Ohio authorities he returned to Virginia, but Dr. Wadeson, with the consent of the probation officer, decided to enroll Gilreath in a therapy group that met two nights a week, rather than return him to day-care status. This decision was made on September 19, 1973, without informing the court. On October 29, 1973, Gilreath killed the plaintiff's daughter.

The appeals court could find no Virginia case specifically on point, so it resorted to a general principle of Virginia tort law. The court found the applicable statement of law to be:

> To constitute actionable negligence there must be a duty, a violation thereof, and a consequent injury. An accident which is not reasonably to be foreseen by the exercise of reasonable care and prudence is not sufficient ground for a negligence action.[42]

The Court then analyzed each of the elements of actionable negligence with regard to the facts of the specific case. It found the question of whether there was a duty owed to the general public, and to plaintiff's decedent in particular, to be a question of law,[43] and then found that there was such a duty.

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41. *Id.*

42. Trimyer v. Norfolk Tallow Co., 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951).

43. Chesapeake & Pot. Tel. Co. v. Bullock, 182 Va. 440, 29 S.E.2d 228, 230 (1944). The appeals court in *Semler* first analyzed and rejected defendants' contention that the state trial

In dictum that may bode well for the future of victims' rights litigation, the court next noted a general principle of law: "Confinement of criminals frequently is intended to protect the public, as well as punish and rehabilitate the wrongdoer."[44] However, the duty in this case could be premised, not on general principles, but on the state court judge's specific order which, in turn, was based on the judge's concern for the protection of the public.[45] The court of appeals found that a duty of "reasonable care" was owed.[46] "Reasonable care" in this case was delineated by the court's order to confine Gilreath until release by the court; the court order was violated, thus the standard of reasonable care was violated.

The court next determined that there was a breach of the duty owed. Defendants contended that the transfer of Gilreath from day-care to outpatient status was merely a normal progression of treatment, which required no prior judicial approval. The court of appeals, however, affirmed the federal trial court's finding that there was a significant difference between day-care and outpatient status, including the lack of supervision, lack of daily psychiatric treatment and failure to monitor essential medication for Gilreath. Failure to obtain the state trial judge's permission to transfer Gilreath to outpatient status was a breach of the duty owed.

The court then found that the death of Natalia Semler was proximately caused by defendants' negligence, upholding the civil trial court's finding, based on expert psychiatric testimony, that it was less likely that Gilreath would have killed her had he remained

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judge's order of confinement of Gilreath until release by the court was solely to rehabilitate Gilreath, and that their duty extended only to him. First, said the court, the nature of the defendants' duty depends in large measure upon the forseeability of harm to the public, or to Natalia Semler, if Gilreath were released in violation of the court's order.

44. 538 F.2d at 124.

45. It is apparent that the decision to release Gilreath was not to be simply a medical judgment based on the state of his mental health. The decision would also entail a judgment by the court as to whether his release would be in the best interest of the community. 538 F.2d at 125.

46. The special relationship created by the probation order, therefore, imposed a duty on the appellants to protect the public from the reasonably foreseeable risk of harm at Gilreath's hands which the state judge had already recognized. 538 F.2d at 125. The court cited RESTATEMENT (SECOND) OF TORTS § 319 (1965), providing:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

on day-care. In addition, the state court's order was based on the foreseeability of harm, thereby making the violation of that order, in itself, a demonstration of proximate cause.

Finally, the court found no error in the trial court's rejection of the defendant parole officer's contention that his actions were discretionary, and therefore immune. Under Virginia law, a state employee who exercises discretionary judgment within the scope of his employment is immune from liability for negligence, but not for the performance of ministerial acts.[47] While a probation officer's policy decisions are discretionary, the manner in which such policy decisions are implemented is to be considered on a case-by-case basis in order to determine if they are ministerial.[48] In this case, the court found that the sentencing court's order, in effect, removed from the probation officer the discretion to release Gilreath. Since such an act had to be made in obedience to a mandate of the court, it was ministerial, and therefore not immune.[49]

Is *Semler* a watershed case in the area of victims' rights litigation, or is it merely a restatement of the law of negligence in light of the particular factual situation of the case? Earlier in this article it was postulated that in third-party victims' rights litigation, at least from the standpoint of not "second-guessing" the defendants' good-faith decisions, there must be "something extra" in the case if the plaintiff is to recover. In *Semler,* the something extra was, of course, the state court's order not to release Gilreath from confinement without its approval. Phrased another way, would the outcome have been the same if the order had been a mere administrative commitment of Gilreath to the Institute without further limitation on release? It seems likely that, absent the court order, the outcome would have been different for probation officer Folliard, at least insofar as the immunity question was concerned. This is so because the civil trial court premised its finding that Folliard's actions were ministerial, and hence not immune, precisely on the fact that he was operating under a mandate of the court, and simply had no discretion under which to act.

47. Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973).
48. Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).
49. *Id.*, 447 P.2d at 362, 73 Cal. Rptr. at 250.

With regard to the defendants, Psychiatric Institute and Dr. Wadeson, it is more difficult to say whether they would have been liable, absent the violated court order. Certainly the court of appeals relied specifically on the state court's order to establish the duty which was found to have been breached; but, as noted, it also said that confinement of criminals is intended to protect the public, as well as to punish and rehabilitate the wrongdoer. While it is unclear what effect this language, standing alone, will have on prospective victims' rights litigation, the following cases may be illustrative.

A case involving an apparent breach, by a corrections officer, of a duty to protect the public arose under unusual circumstances in the State of Washington. In 1972, a convict, with the improbable name of Arthur St. Peter and a record of forty felonies and seventeen escape attempts, left the walls of the maximum security state penitentiary at Walla-Walla to have supper with a prison baker. He escaped through a bathroom window and, two weeks later, in the course of an armed robbery, shot and killed a fifty-four-year-old pawnbroker named Robert Taylor and wounded his wife, Lorraine.[50]

St. Peter had been free and unguarded when he made his escape under an ill-conceived "Take a Lifer to Dinner" program instituted by Warden Bobby J. Rhay. Mrs. Taylor sued Rhay and the State of Washington under the theory that the release of St. Peter was negligent, in that the program had never been authorized by the state legislature. The trial court instructed the jury that the warden did not have the authority to let prisoners outside the prison walls without specific authorization in the form of legislative programs. Mrs. Taylor was awarded $186,000.00. The state elected not to appeal. Here again is a case of recovery by a victim against a third party for an obviously negligent action. Additionally, there is the "something extra" because Warden Rhay did not have the administrative authority to release the prisoner as he did.

Other cases have permitted recovery or denied a motion to dismiss in suits involving the general area of negligent release when the plaintiff was able to prove that the custodial facilities had a history

50. Taylor v. State, No. 211-130 (Super Ct., Pierce County, Wash., Sept. 10, 1973); *see also* Tacoma News Tribune, May 20, 1973, at 1.

of lax security, or that the escaped prisoner had a history of violent tendencies.[51]

It is difficult to generalize in this area. For one thing there is little appellate case law, and what there is is not uniform. It can perhaps be said that, absent absolute immunity or discretionary immunity,[52] cases on behalf of victims (or survivors) premised on a theory of negligent release or negligent failure to prevent escape can be won. While a showing of something extra, such as violation of a court order[53] or action in excess of administrative authority,[54] may not be essential to winning the case, it is certainly most helpful. The balance is delicate. On the one hand, it would not be fair to second-guess the already hard-pressed corrections and custodial officers when they make a mistake. On the other hand, if real negligence is demonstrated in the release or escape of a criminal who then victimizes another, it would seem that the victim should be entitled to recover. It may take years to resolve this conflict, but it is one which should engage the attention and energies of the legal profession.

Another type of victims' rights litigation against third parties arises in the form of suits alleging negligent failure to provide security which the defendant had a duty to provide the victim, which,

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51. Webb v. State, 91 So. 2d 156 (La. App. 1956) (negligence found based on faulty prison security and knowledge of violent record of prison escapee who shot plaintiff with a gun stolen from a prison guard). *But cf.* Green v. State, 91 So. 2d 153 (La. App. 1956). In Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964) (the warden had promised plaintiff's decedent that he would warn him if a certain prisoner was released), although the warden was under no duty to give a warning in the first place, his failure to do so after his promise amounted to a breach of a duty upon which liability could be predicated. *Contra,* West Virginia v. Fidelity & Cas. Co., 263 F. Supp. 88 (S.D.W. Va. 1967) (no proximate cause); Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965) (discretionary immunity); Hullinger v. Warrell, 83 Ill. 220 (1876) (no proximate cause); William v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955) (no duty to particular victims of escapee).

52. *See, e.g.,* Pate v. Alabama State Bd. of Pardons & Paroles, 409 F. Supp. 478 (D. Ala. 1976); Reiff v. Pennsylvania, 397 F. Supp. 345 (E.D. Pa. 1975), which held members of state probation and parole boards and state parole officers are immune from civil suit in the discretionary release of criminals who shot the plaintiff.

53. *See, e.g.,* Semler v. Psychiatric Institute, 538 F.2d 121 (4th Cir. 1976). Of course, one way to ensure that an action will lie for violation of a court order would be through the enactment of state and federal legislation requiring that no person who has been convicted of a violent crime, and received probation conditioned upon psychiatric treatment, shall be granted any lesser degree of confinement, without prior approval by the committing court. This sort of legislation would have the advantage of placing questions of the safety of society within the criminal justice system, where they belong, rather than in the hands of psychiatrists.

54. *See* notes 46 & 47 *supra* and accompanying text.

if it had been provided, would have prevented the victimization. Provided there are no immunity problems, defendants can be government entities or private parties. The following cases are illustrative. In *Neering v. Illinois Central Railroad,*[55] the plaintiff, a regular commuter on the defendant's line, was assaulted, raped and robbed by a tramp lingering in the railroad station while the victim waited for her train. She and her sister had complained vigorously during an eight-month period preceding the attack that, with growing prevalence, bums and hobos were loitering in the station. The Illinois Supreme Court, finding that the defendant railroad company and its police were on notice of the dangerous condition, and that the attack was foreseeable, reversed a directed verdict for the defendants.

In *Bass v. City of New York,*[56] the plaintiff's decedent sued the New York Housing Authority which was the sole landlord for a low-cost housing unit in which the plaintiff lived. Although the housing unit covered sixteen acres and comprised ten fourteen-story buildings, there was only one housing authority policeman on duty at the time of the victim's death (and he was at lunch). The victim, a nine-year-old girl, was abducted while returning to school after lunch, carried to the roof of the project, beaten, raped and finally thrown off the roof. The trial judge awarded $100,000 to the victim's parents for pain and suffering, and $35,000 for her death, on the theory that the Housing Authority was negligent in failing to provide adequate protection for the residents after leading them to believe that this had been done.[57]

In *Rutledge v. Midwest Security Agency,*[58] the plaintiff, a 52-year-old hospital cashier was attacked by two youths while she was entering her apartment, causing her to lose an eye. After settling with the building's landlord, the plaintiff sued the agency that provided the private security guards to the building. Her complaint alleged that the guards on duty did not patrol the area or disperse youths who regularly drank, smoked marijuana and abused tenants. On the night in question, certain guards were observed coming out of a

55. 383 Ill. 366, 50 N.E.2d 497 (1943).
56. 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969).
57. 305 N.Y.S.2d at 803.
58. No. 71L-16265 (Cir. Ct. Cook Co., Ill. July, 1965).

lounge, and later sleeping in their cars. The plaintiff also argued that the guards were not adequately trained or screened. A jury awarded her $100,000.[59]

In November of 1974, a George Washington University coed reached a $6,000 settlement with the university in a suit alleging a failure to protect her from forcible sodomy and rape.[60] The young lady was sexually assaulted by a 17-year-old male. Her suit alleged that the campus police failed to arrest the rapist on a previous occasion when he sexually assaulted another student, that they failed to respond to the plaintiff's cries for help and that they assisted the defendant in the criminal case, out of a hope that his acquittal would prove favorable to the university in the civil action. The young lady's case against the university was strong, since statements made by her attacker prior to, and after, his criminal trial corroborated the victim's version of the incident. However, five days prior to trial, settlement was reached, with the victim receiving $6,000, and the security officer, in a counterclaim of libel against the victim, receiving $1,000.[61]

The preventive aspect of these cases should not be ignored. Since we are all potential victims of crime, it should be of considerable interest to every citizen that, in addition to vindicating the rights of the actual victim in a given instance, such cases are likely to cause people and organizations responsible for protecting the public from criminals and would-be criminals to take greater care in the future. Thus, psychiatrists and probation officers who are made aware of the *Semler* case, and they all should be, will not be quite as ready to make similar dispostions of their other charges. Likewise, a third party who fails to provide adequate security, and is forced to pay in damages for this failure, will probably ensure that

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59. *Id.*

60. Goldenberg v. George Washington Univ., No. CA-416-72 (Super. Ct., D.C., Oct. 9, 1974).

61. *Id.* Recovery has been denied in a number of cases. In Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975), the court found no liability on the part of owners of a shopping center to customers assaulted in a parking lot when the premises did not attract a climate of crime or criminal elements, and there was no reason to know that acts posing a probability of harm were likely to occur. In Slater v. Alpha Beta Acme Markets, Inc., 44 Cal. App. 3d 274, 118 Cal. Rptr. 561 (1975), no recovery was allowed a customer against a supermarket. Two policemen and a plain clothes security officer were stationed in the store because of prior robberies. When another robbery took place the plaintiff was thrown to the floor by another customer, apparently as a security precaution.

future security is adequate. Wardens tempted to initiate release programs of dubious value, and which do not adequately provide for public safety, will think twice if they learn of Mrs. Taylor's recovery against Warden Rhay. The importance of the preventive aspect of victims' rights litigation can be summed up succinctly: it is all very well to counsel and compensate a victim who has been hit on the head, but the chances are that he would rather not have been hit on the head in the first place.

Two recent cases have resulted in sensational amounts of damages in third party victims rights suits. In January, 1975, a Montgomery County, Maryland jury awarded $13,355,000 to a man whose wife was raped and murdered by an employee of a furniture leasing company in the El Dorado Towers apartments in White Oak, Maryland.[62] In July of 1976, a Brooklyn federal court jury awarded singer Connie Francis $2.5 million in damages against the Howard Johnson Motor Lodge in Westbury, New York. Ms. Francis had alleged that the motel was negligent in not providing adequate security and room door locks and, as a consequence, she was raped and traumatized to such an extent that she was unable to resume her singing career because she was afraid to stay alone in a motel room.[63]

The findings of *liability* in these two cases seem to square with

62. Yaeger, *$13 Million Damages in Rape-Murder,* Chicago Sun-Times, Jan. 24, 1975, at 1, col. 1. The $11,000,000 in punitive damages was awarded against the company which owned the apartment building, on the grounds that it had failed to provide the security that it had promised to its tenants. The $2,355,000 in compensatory damages was paid by the apartment owners and the furniture leasing company which had hired the decedent's murderer. The allegation against the employer was that it had failed to investigate the background of the employee, which would have shown that he had been convicted of armed robbery in the District of Columbia and that he was on parole at the time of the slaying. This case raises a particularly thorny problem with regard to an employer's liability for failure to investigate the background of an employee. Several states now have laws which prohibit or restrict employers from requesting information about prospective employees' arrest record. *See, e.g.,* ILL. REV. STAT. ch. 38, § 206-7 (1973). Other statutes require expungement of arrest records if no conviction is obtained. *See, e.g.,* CONN. GEN. STAT. ANN. § 54-90 (West Cum. Supp. 1976). S. 2008, 94th Cong., 1st Sess. (1975), would have gone even further. It was intended to prohibit law enforcement agencies from disseminating any criminal justice information, including records of arrests and convictions, to non-criminal justice agencies, including employers. Obviously, it would be grossly unfair to an employer to hold him liable for negligent failure to investigate the background of an employee if, under the law, the necessary information would not be available to him. If this could be proven, it should be an absolute defense to such a claim.

63. Des Moines Register, July 7, 1976, at 1, col. 5.

the theories of third party victims' rights litigation discussed above: a duty to provide reasonable security of premises, a breach of that duty, reliance by the victims on an express or implied promise of security and proximate cause. However, the *size* of the awards causes this writer some problems, and, as usual, brings into sharp focus the inherent conflicts in most areas of victims' rights litigation. On the one hand, these cases are two examples of the most vicious sort of victimization, with a loss to the victims (or survivors) which cannot be measured in damages. On the other hand, the results of runaway jury verdicts, such as have occurred in medical malpractice cases, are all too clear. Excessive awards in medical malpractice cases have driven many insurance companies out of the field and increased the rates of those who will still write insurance astronomically, with the result that some physicians in high risk specialties are refusing to engage in their specialties. There is no easy solution to this problem. It can only be hoped that as victims' rights litigation develops, a balance will be struck which will ensure that the victim is adequately compensated without creating the syndrome of runaway jury verdicts.

CONCLUSION

The victims of crime in the United States are long overdue their day in civil court. Our legal system has, for the most part, reached the point of providing a remedy whenever there is an injury. Yet, this aspect of civil litigation on behalf of crime victims has been largely ignored, as has its preventative aspect.

Victims' rights litigation can be classified basically into two areas — victim v. perpetrator; and victim v. third party. In the former class of cases, the practical aspect of uncollectable judgments may serve as a realistic bar to doing anything consistently successful for victims. In the latter class of cases, in many instances, collectibility is no bar; the defendants are not judgment-proof. Problems of immunity remain, although the trend seems to be away from absolute sovereign tort immunity. In any event, if a person has been victimized through the negligence of a non-immune third party, and if the elements of negligence (duty, breach and proximate cause) can be alleged and proved, then the crime victim, as plaintiff, should have the same status in our legal system as other parties, injured by the negligence of others, have had for decades.