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## Obstacles to Holding A Parole Official in Virginia Liable for the Negligent Release or Supervision of a Parolee

Diane Miller Lowder  
*University of Richmond*

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# COMMENTS

## OBSTACLES TO HOLDING A PAROLE OFFICIAL IN VIRGINIA LIABLE FOR THE NEGLIGENT RELEASE OR SUPERVISION OF A PAROLEE

### I. INTRODUCTION

With the continuing problem of overcrowded prisons, parole board officials have been under increasing pressure to release prisoners before the natural termination of their sentences. As a consequence, the public suffers the risk that the parolee, once released, will commit a violent crime. If this should occur, the question then becomes whether the injured individual can, as a result, hold the parole board civilly liable for the negligent release or supervision of the parolee.<sup>1</sup>

The issues involving official immunity of parole board members or parole officers are "relatively novel, complex and of great local importance."<sup>2</sup> With the recent abrogation of tort immunity in Virginia,<sup>3</sup> the courts have been left with the arduous task of determining the boundaries of official immunity. Thus far, however, the state courts have failed to adequately address the immunity issue as it pertains to parole officials who negligently release or supervise a parolee.<sup>4</sup> This Note will discuss the theories that have tradition-

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1. See generally Note, *Parole Board Liability for the Criminal Acts of Parolee*: Reiser v. District of Columbia, 8 CAP. U.L. REV. 149 (1978); Note, *Holding Governments Strictly Liable for the Release of Dangerous Parolees*, 55 N.Y.U. L. REV. 907 (1980) [hereinafter Note, *Holding Governments Strictly Liable*]; Note, *Civil Liability of Parole Officials for Releasing Dangerous Prisoners*: Martinez v. California, 16 TULSA L.J. 229 (1980) [hereinafter Note, *Civil Liability*]; Note, *Torts—Governmental Immunity—Absolute Versus Qualified Immunity for Public Officials Acting in Quasi-Judicial Capacities*, 24 WAYNE L. REV. 1513 (1978).

2. Fox v. Custis, 712 F.2d 84, 90 (4th Cir. 1983), appeal docketed, No. 850942 (Va. Aug. 15, 1986). In this article the terms "parole board" and "parole officials" are used interchangeably.

3. See VA. CODE ANN. §§ 8.01-195.1 to -.8 (Cum. Supp. 1986). See generally Taylor, *A Re-examination of Sovereign Tort Immunity in Virginia*, 15 U. RICH. L. REV. 247 (1981); Note, *The Abrogation of Sovereign Immunity in Virginia: The Virginia Tort Claims Act*, 7 G.M.U. L. REV. 291 (1984).

4. Currently pending in the Virginia Supreme Court is the case of Fox v. Custis, 712 F.2d

ally shielded parole officials from tort liability in other jurisdictions,<sup>5</sup> and will predict their likelihood of success in Virginia.<sup>6</sup>

## II. HISTORICAL OVERVIEW OF SOVEREIGN IMMUNITY IN VIRGINIA

"[T]he doctrine of sovereign immunity is 'alive and well' in Virginia,"<sup>7</sup> and it is deeply rooted in the state's common law.<sup>8</sup> Based upon the principle that "the King can do no wrong,"<sup>9</sup> this doctrine provides that the Commonwealth of Virginia cannot be sued unless expressly allowed by statute.<sup>10</sup> Historically, this theory dates back nearly 600 years and was followed by American law because of the notion that "there can be no legal right as against the authority that makes the law on which the right depends."<sup>11</sup> More recently, the arguments in support of sovereign immunity are based on the practical concerns of protecting public funds,<sup>12</sup> protecting official decision-making,<sup>13</sup> and preventing the fear which otherwise would accompany public service.<sup>14</sup>

There is currently a national trend toward abolishing the doctrine of sovereign immunity on the general precept that liability

84 (4th Cir. 1983), *appeal docketed*, No. 850942 (Va. Aug. 15, 1986), in which the court must address whether a parole official is liable for failing to reincarcerate a parolee who had violated parole conditions and who subsequently harmed an individual.

5. See, e.g., *Martinez v. California*, 444 U.S. 277 (1980); *Pate v. Alabama Bd. of Pardons and Paroles*, 409 F. Supp. 478 (M.D. Ala.), *aff'd*, 548 F.2d 354 (5th Cir. 1976); *Thompson v. County of Alameda*, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); *Wasserstein v. State*, 27 N.Y.2d 627, 261 N.E.2d 665, 313 N.Y.S.2d 759 (1970).

6. This article deals only with causes of action for negligent release and supervision of a parolee. It does not focus on those causes of action dealing with a parole official's failure to disclose the parolee's violent background or the failure to notify specific individuals of a parolee's release.

7. *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 666 (1984).

8. See *Eriksen v. Anderson*, 195 Va. 655, 79 S.E.2d 597 (1954); *Hicks v. Anderson*, 182 Va. 195, 28 S.E.2d 629 (1944); see also Note, *supra* note 3, at 291 n.6 and accompanying text (state immunity from suit in tort is part of the common law of Virginia).

9. See Note, *Sovereign Immunity for State Hospital Employees After James v. Jane*, 67 VA. L. REV. 393, 394 n.4 and accompanying text (1981).

10. *Taylor v. Williams*, 78 Va. 422 (1884); see also Note, *supra* note 3, at 292 n.8 and accompanying text.

11. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907); see also *Taylor*, *supra* note 3, at 249-50; Note, *supra* note 9, at 397.

12. *Hinchey v. Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983); see also *Taylor*, *supra* note 3, at 253-55 (listing six arguments in support of governmental immunity); Note, *Municipal Tort Immunity in Virginia*, 68 VA. L. REV. 639, 645-47 (1982) (the greatest obstacle to imposing liability on municipalities is fear that liability will bankrupt them).

13. *Messina*, 228 Va. at 307, 321 S.E.2d at 666; *Board of Public Works v. Gannt*, 76 Va. 455, 462 (1882); see also *Taylor*, *supra* note 3, at 253; Note, *supra* note 12, at 644.

14. *Messina*, 228 Va. at 307, 321 S.E.2d at 253.

should follow negligence.<sup>15</sup> The majority view in America today is that it is an abdication of government responsibility to fail to compensate tort victims injured by the negligence of government employees and these damages should be paid just as the government pays other operating expenses.<sup>16</sup>

The Virginia General Assembly's response to the national trend was to enact, in 1981, the Virginia Tort Claims Act (the "Act").<sup>17</sup> In an attempt to abrogate or limit sovereign immunity, the Act provides that public officers and their agents and employees are not immune from tort suits unless the defendant can prove his activity falls within an exception to the general rule. Pursuant to section 8.01-195.3 of the Code of Virginia, the Commonwealth shall be liable for damages "caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment . . . if a private person would be liable to the claimant for such damage, loss, injury or death."<sup>18</sup> At first glance it seems as if the Act generously waives the defense of sovereign immunity. However, the Act preserves the "immunity of judges, the Attorney General, Commonwealth's attorneys, and other public officers, their agents and employees . . . [to the] degree that such persons presently are immunized."<sup>19</sup> This clause is significant because it does not negate those previous Virginia Supreme Court decisions which permit suit against various state employees.<sup>20</sup> Furthermore, the Act specifically lists six instances where the waiver of sovereign immunity does not apply.<sup>21</sup> Therefore, although the Act purports

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15. Taylor, *supra* note 3, at 261-64.

16. *Id.* at 255 (citing *Morash & Sons, Inc. v. Commonwealth*, 363 Mass. 612, —, 296 N.E.2d 461, 465 (1973)). "Negligence is negligence" and a person committing such should consequently be liable. *James v. Jane*, 221 Va. 43, 55, 267 S.E.2d 108, 115 (1980) (Cochran, J., concurring).

17. VA. CODE ANN. §§ 8.01-195.1 to .8 (Cum. Supp. 1986).

18. *Id.* § 8.01-195.3.

19. *Id.*

20. *See, e.g., James*, 221 Va. 43, 267 S.E.2d 108 (physicians employed at state hospital are not protected by sovereign immunity in actions for negligence brought by their patients); *Short v. Griffiths*, 220 Va. 53, 255 S.E.2d 479 (1979) (athletic director and coach/supervisor of public high school are not protected by governmental immunity in an action for negligence); *Crabbe v. School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968) (governmental immunity of school board does not extend to teacher); *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967) (state police officer not immune from liability where he spoke defamatory words while performing duties).

21. VA. CODE ANN. § 8.01-195.3 (Cum. Supp. 1986) lists the following six exceptions to the rule:

1. Any claim against the Commonwealth based upon an act or omission which occurred prior to July 1, 1982.

to abolish sovereign immunity, the numerous exclusions to the rule appear to circumvent its effect on tort liability.

### III. THEORIES PREVENTING PAROLE BOARD LIABILITY WHERE A RELEASED PAROLEE COMMITS A CRIMINAL ACT

#### A. *Quasi-Judicial Immunity*

The first obstacle a tort victim in Virginia must overcome in order to recover for the negligence of a public employee is quasi-judicial immunity. Quasi-judicial immunity is an extension of the long-recognized doctrine of absolute judicial immunity.

Under the principle of judicial immunity, judges, in the exercise of their official decision-making duties, are immune from suit even if such acts are done maliciously.<sup>22</sup> The purpose of such immunity is the compelling public policy to preserve the independence of the judiciary and to protect judges from undue influence and intimidation.<sup>23</sup>

In recent years, this immunity has been extended to shield other public officials whose duties include acts similar to those performed in the judicial process.<sup>24</sup> In determining whether defendants can take advantage of quasi-judicial immunity, it must be established that "the defendants were (1) performing judicial

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1a. Any claim against a transportation district based upon an act or omission which occurred prior to July 1, 1986.

2. Any claim based upon an act or omission of the General Assembly or district commission of any transportation district, or any member or staff thereof acting in his official capacity, or to the legislative function of any agency subject to the provisions of this article.

3. Any claim based upon an act or omission of any court of the Commonwealth, or any member thereof acting in his official capacity, or to the judicial functions of any agency subject to the provisions of this article.

4. Any claim based upon an act or omission of an officer, agent or employee of any agency of government in the execution of a lawful order of any court.

5. Any claim arising in connection with the assessment or collection of taxes.

6. Any claim arising out of the institution or prosecution of any judicial or administrative proceeding, even if without probable cause.

22. *Johnston v. Moorman*, 80 Va. 131, 143 (1895); see also *Bellamy v. Gates*, 214 Va. 314, 200 S.E.2d 533 (1973); *Berry v. Smith*, 148 Va. 424, 139 S.E. 252 (1927).

23. *Mullins v. Oakley*, 437 F.2d 1217, 1218 (4th Cir. 1971).

24. See *Harlow v. Clatterbuck*, 230 Va. 490, 339 S.E.2d 181 (1986) (immunity of a rehabilitative counselor, a juvenile learning center supervisor and a juvenile after care supervisor). Earlier cases also extended immunity to public officials whose duties were similar to judicial functions. See, e.g., *Yates v. Ley*, 121 Va. 265, 92 S.E. 837 (1917) (notary public acting in good faith qualifies for immunity); *Johnston*, 80 Va. 131 (Mayor of Danville qualifies for immunity in suit for false imprisonment).

functions, (2) acting within their jurisdiction, and (3) acting in good faith."<sup>25</sup>

A number of jurisdictions apply quasi-judicial immunity to parole officials when they are making parole decisions.<sup>26</sup> The basic premise underlying these cases is that the decision to grant parole can be equated to that of a judge determining a sentence. As the court stated in *Pate v. Alabama*:<sup>27</sup>

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 to 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.<sup>28</sup>

While the Virginia Supreme Court has never specifically addressed parole official liability, dicta can be found in the recent case of *Harlow v. Clatterbuck*<sup>29</sup> lending strong support for the premise that parole board members and parole officers in Virginia would be protected by quasi-judicial immunity. In *Harlow*, a juvenile was committed by the Virginia Department of Corrections (Department) to a juvenile learning institution for assaulting a police officer. Approximately seven months later, a discharge order was issued for the juvenile on the advice of the defendants, a rehabilitative counselor, a learning center supervisor and an after care supervisor respectively. Twelve weeks after the discharge, the juvenile and four accomplices robbed and assaulted the plaintiff. Plaintiff brought a tort action against the employees of the Department claiming that "defendants knew or should have known that [the juvenile] presented a danger to members of the public. Accordingly, [they] were grossly negligent in discharging [the juvenile]

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25. *Harlow*, 230 Va. at 494, 339 S.E.2d at 185.

26. *Pate v. Alabama Bd. of Pardons and Paroles*, 409 F. Supp. 478 (M.D. Ala.), *aff'd*, 548 F.2d 354 (5th Cir. 1976); *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968) (in reviewing applications for parole, parole board members were performing quasi-judicial functions and therefore granted immunity), *cert. denied*, 394 U.S. 990 (1969); *Lang v. Wood*, 92 F.2d 211 (D.C. Cir.), *cert. denied*, 302 U.S. 686 (1937) (immunity for federal parole board members upon the allegations of arbitrarily revoking plaintiff's parole).

27. 409 F. Supp. 478.

28. *Id.* at 479.

29. 230 Va. 490, 339 S.E.2d 181.

without after care supervision and that this negligence proximately caused her injuries."<sup>30</sup>

The court held that the defendants were shielded from civil liability on the grounds of quasi-judicial immunity. The court stated:

It is in the interest of the public and of the committed child that the defendants, and other public officials who perform similar functions, be immune from suits for damages . . . . If they were not shielded with quasi-judicial immunity, it is probable that their judgments would be always against a child's release.<sup>31</sup>

While *Harlow* deals only with Department juvenile officers, the language "and other public officials who perform similar functions"<sup>32</sup> evinces intent by the court to apply the holding by analogy to parole officials supervising adult criminals as well. This intent is also demonstrated by the court's conclusion that the defendants' judgments were similar to those made by parole board members who have been clothed with immunity from 42 U.S.C. § 1983 civil rights actions based on their parole decisions.<sup>33</sup>

Arguably, however, a plaintiff could contend that there are important distinctions between judicial decision-makers and parole board members. Judges and parole officials are dissimilar in that a judge's decision can be questioned by appellate review; no such safeguards check a parole board's decision.<sup>34</sup> Also, whereas a judge owes a duty to the public in general, a parole official narrows his duty to individual members of the public by assuming parole supervision over a dangerous person.<sup>35</sup> Finally, a judge's opinion receives special deference whereas a parole board's decision receives

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30. *Id.* at 493, 339 S.E.2d at 183. Alternatively, the plaintiff also claimed that the defendants failed to perform certain ministerial duties imposed on them by Department regulations and the Code of Virginia. *Id.*

31. *Id.* at 495, 339 S.E.2d at 185.

32. *Id.*

33. *Id.* at 494, 339 S.E.2d at 184-85 (citing *Sellars v. Procnier*, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981)); *Douglas v. Muncey*, 570 F.2d 499 (4th Cir. 1978); *Pope v. Chew*, 521 F.2d 400 (4th Cir. 1975); *Cruz v. Skelton*, 502 F.2d 1101 (5th Cir. 1974); *Silver*, 403 F.2d 642; *Seiss v. McConnell*, 74 Mich. App. 613, 255 N.W.2d 2 (1977); *Jarrett v. Wills*, 235 Or. 51, 383 P.2d 995 (1963); *Estate of Armstrong v. Pennsylvania Bd. of Probation*, 46 Pa. Commw. 33, 405 A.2d 1099 (1979); *Reiff v. Commonwealth*, 23 Pa. Commw. 537, 354 A.2d 918 (1976).

34. *Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, \_\_\_, 564 P.2d 1227, 1233 (1977). Also, past decisions to equate the acts of judges with the acts of administrators are based on questionable reasoning. Note, *Civil Liability*, *supra* note 1, at 236.

35. *Grimm*, 115 Ariz. at \_\_\_, 564 P.2d at 1234.

less deference. Thus the "trust placed in the judgment of a judge is not the same as that of an administrative officer."<sup>36</sup> Therefore, as a consequence of these differences, it has been held that there is no logical reason to afford quasi-judicial immunity to parole board members.<sup>37</sup>

## B. *Qualified Immunity*

Assuming that a parole official in Virginia is not shielded by *quasi-judicial* immunity, a plaintiff still faces the obstacle of qualified immunity when alleging negligent release or supervision of a parolee. Traditionally, senior government officials such as the governor, judges, and members of the legislature have been insulated by absolute immunity.<sup>38</sup> This immunity has progressively expanded to include other governmental employees as well.<sup>39</sup> However, determining which government employees are entitled to this qualified immunity requires "line-drawing"<sup>40</sup> and it has been recognized that the doctrine is confusing and extremely difficult to predict.<sup>41</sup> Consequently, the Virginia Supreme Court has attempted to clarify the doctrine of qualified immunity in a number of recent decisions.

These decisions culminated in *James v. Jane*,<sup>42</sup> which enunciated guidelines for determining liability. In *James*, the defendants were fully licensed physicians at the University of Virginia Hospital, an agency of the Commonwealth of Virginia. They received compensation solely from the University of Virginia rather than from their respective patients. The plaintiffs brought suit for negligent care. The defendants contended that they were performing discretionary duties within the scope of their employment and were consequently entitled to qualified immunity.

In holding for the plaintiffs, the court articulated several factors to be considered in determining whether a public employee is af-

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36. *Id.* at \_\_\_, 564 P.2d at 1231.

37. *See id.* at 1233. The court held that the defendant parole board members did not have absolute immunity for a suit brought because a parolee injured the plaintiff.

38. *Messina v. Burden*, 228 Va. 301, 309, 321 S.E.2d 657, 661 (1984) (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 132, at 987-88 (4th ed. 1971)).

39. *Messina*, 228 Va. at 309, 321 S.E.2d at 661.

40. *Id.* at 309, 321 S.E.2d at 662.

41. *See Fox v. Custis*, 712 F.2d 84, 89 (4th Cir. 1983), *appeal docketed*, No. 850942 (Va. Aug. 15, 1986); *see also Groves v. Cox*, 559 F. Supp. 772, 774 n.8 (E.D. Va. 1983).

42. 221 Va. 43, 267 S.E.2d 108 (1980).



forded qualified immunity. These factors are as follows: (1) the nature of the function performed by the employee; (2) the extent of the state's interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion.<sup>43</sup>

In light of these factors, the court recognized that while the Commonwealth does have an interest in a patient's care, this interest is no stronger for patients in a state hospital than those in a private hospital. Furthermore, the governmental control over and involvement in a particular patient's care was minimal. This is because implicit in the defendant's employment was the understanding that patient contact "becomes . . . personal and confidential [between] doctor and patient, not the Commonwealth of Virginia and patient."<sup>44</sup> Therefore, the doctors were deemed to be responsible for their own negligent acts and thus did not enjoy qualified immunity.<sup>45</sup>

Interestingly, the court explicitly limited the holding in this case to the specific situation of a *physician* employed by the state of Virginia.<sup>46</sup> Therefore, it is implied that a case-by-case examination is required to determine liability. Fortunately, the opinion provides significant insight into the probable outcome of cases involving negligent release or supervision causes of action against parole officials.

With regard to the act of releasing a prisoner, there is a strong argument that qualified immunity would apply. Under the *James* analysis, the court held for the plaintiff predominately because of the lack of a strong state interest. Here, however, the state has a strong interest in the public's safety and, presumably, parole boards consider the consequences of release to prevent jeopardizing that safety. Unlike *James*, where the state's interest was not greater merely because a state hospital was involved, the opposite applies with the release of a parolee. As custodian of an individual in prison, the state obviously has a strong interest in isolating the criminal from society. This interest does not subside simply because the prisoner is released on parole. Parole is "not a release of

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43. *Messina*, 228 Va. at 313, 321 S.E.2d at 663 (citing *James v. Jane*, 221 Va. 43, 53, 267 S.E.2d 108, 113 (1980)).

44. *James*, 221 Va. at 50, 267 S.E.2d at 112.

45. For a general discussion, see Note, *supra* note 9.

46. *James*, 221 Va. at 55, 267 S.E.2d at 114.

the prisoner from all disciplinary restraint, but [merely] an extension of the prison walls . . . ."<sup>47</sup>

Secondly, in addition to the imperative state interest involved, the parole board exercises complete discretion in determining whether to grant a release.<sup>48</sup> Admittedly, the amount of discretion involved is not always determinative of immunity.<sup>49</sup> However, the state's interest combined with the wide discretionary powers accorded the parole board would likely result in qualified immunity.<sup>50</sup>

A cause of action for the negligent supervision of a parolee might give the plaintiff a better chance of relief under Virginia law. While there are some jurisdictions that equate the decision to release a prisoner with decisions made in the course of supervision, there seems to be a trend towards treating parole supervision as a ministerial act unprotected by qualified immunity.<sup>51</sup> Illustrative of this trend is the Fourth Circuit case of *Semler v. Psychiatric Institute*.<sup>52</sup> In *Semler*, the plaintiff brought an action against a psychiatric hospital and a psychiatrist to recover for the death of her daughter who was killed by an out-patient probationer. Defendants filed a third-party complaint against the probation officer for indemnification. The probationer, Gilreath, was originally on judge-ordered day-care status, meaning he was under the supervision of the institute all day and under the supervision of his parents at night. The probation officer had the discretion to grant weekend passes as he deemed appropriate. The doctor at the institute removed Gilreath from this day-care status and enrolled him in a semi-weekly therapy group. The probation officer knew of this arrangement but failed to notify the judge to gain approval. Subse-

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47. *Alvarado v. McLaughlin*, 486 F.2d 541, 544 (4th Cir. 1973) (quoting *United States v. Nicholson*, 78 F.2d 468, 469-70 (4th Cir. 1935)), *vacated sub nom. McLaughlin v. Prieto*, 418 U.S. 903 (1974).

48. VA. CODE ANN. § 19.2-313 (Repl. Vol. 1983) states: "The Virginia Parole Board shall have discretion to release such person upon a determination that he or she has demonstrated that such release is compatible with the interests of society and of such person and his or her successful rehabilitation to that extent."

49. *James*, 221 Va. at 53, 267 S.E.2d at 113.

50. *Cf. Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973) (there was both a strong state interest and a demand that the defendants exercise wide discretionary power). *Lawhorne* was overruled in *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983).

51. *See, e.g., Rieser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977); *Semler v. Psychiatric Institute*, 538 F.2d 121 (4th Cir.), *cert. denied sub nom. Folliard v. Semler*, 429 U.S. 827 (1976).

52. 538 F.2d 121.

quently, Gilreath killed the plaintiff's daughter.

The court rejected the defendant probation officer's argument that his supervision of Gilreath was a discretionary act protected by qualified immunity. The court noted that "[u]nder 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."<sup>53</sup> The probation officer's responsibility to obtain approval from the judge before changing the parolee's status was a ministerial act and consequently not entitled to immunity.<sup>54</sup> What is significant about this case is the court's distinction between the discretionary act of release and the ministerial act of supervision. The court stated that "[a] probation officer's basic policy decisions are discretionary and hence immune, but his acts implementing the policy must be considered on a case-by-case basis to determine whether they are ministerial."<sup>55</sup> In light of this distinction, the arguments supporting qualified immunity for a parole officer alleged to have negligently *supervised* a parolee are beginning to weaken in Virginia.

### C. *Duty of Care*

Simply because a parole official is not insulated from liability by quasi-judicial or qualified immunity does not necessarily guarantee that the plaintiff will recover. The plaintiff has the additional burden of proving that the parole official owed an actionable duty of care to the victim and that the parole official's alleged negligence proximately caused the victim's injuries.<sup>56</sup>

In Virginia, whether a parole officer owes a duty to the victim is a question of law.<sup>57</sup> This determination often hinges primarily on

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53. *Id.* at 127 (citing *Lawhorne*, 214 Va. 405, 200 S.E.2d 569).

54. A ministerial act is "one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done." *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945) (quoting *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468 (1861)).

55. *Semler*, 538 F.2d at 127 (citing *Johnson v. State*, 69 Cal. 2d 782, \_\_\_, 447 P.2d 352, 362, 73 Cal. Rptr. 240, 250 (1968)).

56. In *Trimyer v. Norfolk Tallow Co.*, 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951), the court stated: "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 no sufficient ground for a negligence action."

57. *Chesapeake & Potomac Telephone Co. v. Bullock*, 182 Va. 440, 445, 29 S.E.2d 228, 230

the degree of foreseeability that a particular individual would be endangered by the release of a prisoner.<sup>58</sup> For instance, in *Thompson v. County of Alameda*,<sup>59</sup> an incarcerated juvenile indicated that he would harm a child residing in his neighborhood upon release. Subsequent to his release, the juvenile did, in fact, sexually assault and murder a five-year-old boy. The court held that the murdered child was not within the class of foreseeable victims and consequently the parole officer was not liable. The court reasoned that unless the potential victim could be identified with specificity, policy reasons demanded that parole boards have no duty to warn nonspecific victims.<sup>60</sup> These policy considerations included preventing the increased costs of parole operations and overly cautious parole decisions. There was also fear that a duty to warn the public generally would hamper rehabilitation efforts.<sup>61</sup>

Similarly, an exception has developed to the rule that a duty of care is owed only to the general public "where a special relationship has been established between the governmental unit and the plaintiff."<sup>62</sup> In *Semler*,<sup>63</sup> the court noted that a special relationship was created by the state court's probation order, which provided a dual purpose for the type of probation that the criminal was to receive. The order specified that the structured treatment at a psychiatric institute was designed to help the probationer as well as protect young girls from a foreseeable risk of attack. This type of court order imposed a duty on the parole officer to protect the public.<sup>64</sup> Because the court in *Semler* focused on the significance of the judge's order imposing a duty to protect, one could argue that without such an explicit order a parole official in Virginia would not owe a duty to any particular individual.<sup>65</sup>

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(1944).

58. *Semler v. Psychiatric Institute*, 538 F.2d 121 (4th Cir. 1976) (quoting *Trimyer*, 192 Va. at 780, 66 S.E.2d at 443), cert. denied sub nom. *Folliard v. Semler*, 429 U.S. 827 (1976)); see also *Reiser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977); *Thompson v. County of Alameda*, 27 Cal.3d 741, —, 614 P.2d 728, 732-33, 167 Cal. Rptr. 70, 74-75 (1980); Note, *Holding Governments Strictly Liable*, supra note 1, at 907, 915-20.

59. 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70.

60. *Id.* at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77.

61. *Id.* at 756, 614 P.2d at 737, 167 Cal. Rptr. at 79.

62. *Reiser*, 563 F.2d at 478.

63. 538 F.2d 121.

64. *Id.* at 126.

65. See also *Martinez v. California*, 444 U.S. 277 (1980) (The victim's injuries, which were a consequence of a prisoner being released on parole, were too remote to hold the parole officer liable.).

## IV. CONCLUSION

Increasingly, critics are voicing concern over the failure of parole rehabilitation and the suggestion that parole does nothing more than prematurely release dangerous convicts from prison.<sup>66</sup> In response, some jurisdictions have limited the immunity once afforded parole officials.<sup>67</sup> However, the status of Virginia law concerning parole officials "remains exceedingly difficult and unclear."<sup>68</sup> Notwithstanding, state decisions such as *Harlow v. Clatterbuck*<sup>69</sup> and *James v. Jane*<sup>70</sup> seem to indicate that the chances of a plaintiff recovering for a parole official's negligence are slim. The barriers of qualified immunity and, in particular, quasi-judicial immunity appear to be well on their way to becoming insurmountable obstacles to recovery in Virginia.

*Diane Miller Lowder*

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66. Note, *Holding Governments Strictly Liable*, *supra* note 1, at 907 n.104 and accompanying text; Note, *Civil Liability*, *supra* note 1, at 238 n.66-67.

67. See *supra* note 5 and accompanying text.

68. *Fox v. Custis*, 712 F.2d 84, 89 (4th Cir. 1983), *appeal docketed*, No. 850942 (Va. Aug. 15, 1986).

69. 230 Va. 490, 339 S.E.2d 181 (1986).

70. 221 Va. 43, 267 S.E.2d 108 (1980).