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Torts: Finding Negligence in Order to Compensate Crime Victims

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TORTS: Finding Negligence in Order to Compensate Crime Victims—*Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121 (4th Cir.), *cert. denied, sub nom. Folliard v. Semler*, 97 S. Ct. 83 (1976).

I. INTRODUCTION

Recently, much attention has been given to the indemnification of crime victims.[1] It is traditional to seek such indemnification through civil suits from the person or persons responsible for the actions of the perpetrator.[2] In *Semler v. Psychiatric Institute of Washington, D.C.*,[3] the United States Court of Appeals for the Fourth Circuit held that the mental hospital, the psychiatrist, and the probation officer in charge of John Steven Gilreath were civilly liable for the death of Natalia Semler, by failing to retain custody over Gilreath until he was released by court order from the psychiatric institute to which he was confined. The court held that the order created a duty to the public, which the defendants breached. The court, however, did not hold that a violation of the order was itself conclusive proof of negligence; rather, it held that proximate cause must be related to a violation through reasonable foreseeability of harm. In addition, the probation officer was found liable for breach of a ministerial duty, and therefore no foreseeability was required, according to the court. As a result, of these holdings several serious inconsistencies are apparent, and the decision will have important and adverse ramifications for the rights of defendants in future crime victim compensation cases.

II. FACTS

The plaintiff, Helen Semler, brought a wrongful death action to recover damages for the death of her daughter, Natalia, killed by John Steven Gilreath, a Virginia probationer who had been a patient of the Psychiatric Institute of Washington, D.C.[4] The original defendants—the Institute and Dr. Wadeson, the psychiatrist—filed a third party complaint against Paul Folliard, Gilreath's probation officer, seeking indemnification or contribution.[5]

Gilreath had been indicted for abducting a young girl in October, 1971. Pending his trial, he entered the Institute for psychiatric

1. Articles on indemnification of crime victims include: 55 A.B.A.J. 159 (1969); Kutner, *Crime-Torts: Due Process of Compensation for Crime Victims*, 41 NOTRE DAME LAW. 487 (1966).

2. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 348-49 (4th ed. 1971).

3. 538 F.2d 121 (4th Cir.), *cert. denied sub nom.* Folliard v. Semler, 97 S.Ct. 83 (1976).

4. Hereinafter referred to as the Institute.

5. 538 F.2d at 123.

treatment. In August, 1972, Judge Plummer of the Fairfax County Circuit Court in Fairfax, Virginia, after conferring with Dr. Wadeson, sentenced Gilreath to twenty years imprisonment on his guilty plea, but suspended the sentence on condition that Gilreath be confined to and treated at the Institute. Several times Dr. Wadeson recommended Gilreath for weekend and holiday passes, which were approved by Judge Plummer. Early in 1973, Judge Plummer authorized the probation officer, Paul Folliard, to grant weekend passes to Gilreath at the officer's discretion. In May, 1973, the judge approved the transfer of Gilreath to day-care status, which required Gilreath to spend days at the Institute, and permitted him to spend weekends with his parents. The probation officer then gave Gilreath several passes to investigate the possibilities of moving to Ohio, but failed to seek the judge's approval. Assuming that the Ohio probation authorities would accept Gilreath, the doctor notified the probation officer that Gilreath had been discharged from the Institute. The Ohio probation authorities refused to accept him, however, and he returned to Virginia. On Gilreath's return he was placed on outpatient status and participated in a therapy group twice a week. The probation officer knew of this arrangement, but did not report it to the judge. Gilreath killed the plaintiff's daughter on October 29, 1973.

The district court,[6] sitting without a jury, awarded the plaintiff $25,000 against the psychiatrist and the hospital, and required Officer Folliard to contribute one-half of the judgment. The United States Court of Appeals for the Fourth Circuit affirmed.

III. ANALYSIS

Although victim compensation is an end beneficial to society, the establishment of that end should take into consideration all the ramifications that the means to that end will produce, and should, therefore, be done in a clear and logical way. The Fourth Circuit Court of Appeals approached this case as one of first impression, and proceeded to find the defendants liable through the use of general tort law principles: a finding of duty, a breach of that duty, and a proximately caused injury.[7] The first question that the court discussed was whether the defendants owed the public, including the decedent, any duty.[8]

6. Jurisdiction in the federal courts rested on diversity of citizenship. 28 U.S.C. § 1332 (1970).

7. 538 F.2d at 124; Annot., 38 A.L.R.3d 699 (1971).

8. 538 F.2d at 124.

The defendants argued that they owed a duty only to rehabilitate Gilreath by the court order. They contended that Virginia case law requires a sentence to "be certain, definite, and consistent in all its terms, and not ambiguous, and not open to any serious misapprehensions by those who execute it."[9] The order, they contended, did not inform the defendants that they owed a duty to the public. Also, several Virginia cases have explained the significance of court orders which, like the one in *Semler*, gave suspended sentences, probation, and psychiatric treatment.[10] They explain that such orders are to provide a probationer with the opportunity to repent, to reform, and to become rehabilitated. The court rejected these arguments, however, and stated that the factual situation surrounding the order indicated that the order was designed to protect the public from attack as well as to give Gilreath proper treatment. Thus, it was the wording of the order[11] through which the court found a duty. As support for its holding, the court cited the Restatement (Second) of Torts section 319, which imposes a duty of reasonable care on custodians.[12]

The court, however, did not state that a violation of the wording of the order was in itself conclusive proof of negligence. Instead, it held that reasonable foreseeability of harm was necessary to provide a connection between the court order and the proximate cause of the plaintiff's loss. There seems to be inconsistency in this stance, because the court, while holding that foreseeability was necessary to prove breach of duty and to demonstrate proximate cause, based its

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9. Hudson v. Youell, 178 Va. 525, 533, 17 S.E.2d 403, 406 (1941); Petitioner's Brief for Certiorari at 16-17, Folliard v. Semler, 44 U.S.L.W. 2439 (May 27, 1976).

10. Loving v. Commonwealth, 206 Va. 924, 930, 147 S.E.2d 78, 83 (1966), *rev'd on other grounds*, 388 U.S. 1 (1967); Wilborn v. Saunders, 170 Va. 153, 160-61, 195 S.E. 723, 726 (1938); Richardson v. Commonwealth, 131 Va. 802, 809-10, 109 S.E. 460, 462 (1921).

11. The only court order ever entered in this case was entered on August 18, 1972, and reads, in pertinent part:

> [I]t is Adjudged and Ordered that John Steven Gilreath do serve twenty (20) years in the Penitentiary House of this Commonwealth, at hard labor; but in mitigation of punishment, it appearing compatible with the public interest so to do, the Court does now suspend the serving of said sentence, conditioned upon the Defendant's good behavior and he shall be on active probation subject to the conditions set forth in P.B. Form 2 - Revised 5-71 for a period of twenty (20) years and further conditioned that the continued [sic] to receive treatment at and remain confined in the Psychiatric Institute until released by the Court.

Petitioner's Brief for Certiorari at 9, Folliard v. Semler, 44 U.S.L.W. 2439 (May 27, 1976). For the District Court's opinion, *see* Petitioner's Brief at App. 14-16, Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976).

12. RESTATEMENT (SECOND) OF TORTS § 319 (1965) provides: "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."

finding of foreseeability on dubious grounds. The determination that the harm was clearly and convincingly foreseeable was based on "expert psychiatric testimony."[13] A standard of reasonable care, however, is not judged by expert testimony but by a reasonable man standard in the case of Officer Folliard, and by the standards of other members of their profession in the community in the case of the psychiatrist. Besides this "expert testimony," no other indication that it was reasonably foreseeable that the violation of the court order would result in murder appeared in the holding. Thus, the interpretation of the court order to find duty to the public and proximate cause of injury, is difficult to reconcile with established standards of due care and of foreseeability.

Perhaps because of the nature of the court order the decision can be reconciled. The court order itself was held to impose a duty of due care,[14] which is analogous to statutorily defined duties of care; the difference is that the court order is created by judicial holding whereas the statute goes through legislative scrutiny. They are sufficiently similar, however, to offer a comparison.

Courts generally deal with statutory duties in one of three ways. Many courts follow the landmark decision of *Martin v. Herzog*,[15] which holds that although a statute defines the duty, proximate cause must still be proven by the plaintiff when that duty is breached. The case of *Daggett v. Keshner*[16] qualified *Martin* by explaining that while negligence is conclusively shown by the statute's breach, a degree of proximate causal connection must still be indicated, although the strength of that connection is not necessarily the same as that required in common law negligence.[17] Other courts have held that the existence of a statute shifted the burden to the defendants to disprove proximate cause.[18] Still other courts, as in *Whinery v. Southern Pacific Co.*,[19] have held that the breach

13. This expert testimony came from a Dr. Blinder, witness for the plaintiff, who conceded that he had never seen Gilreath, let alone examined him. Other psychiatrists, witnesses for the defense, testified that the change in Gilreath's status was a normal and sound medical judgment in light of his progress. Brief for Appellants at 7-9, Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976) (note that "appellants" in this brief refers to the Insitute and Dr. Wadeson).

14. 538 F.2d at 125.

15. 228 N.Y. 164, 126 N.E. 814 (1920). *Martin* held that the unexcused omission of statutorily required signals, such as traveling at night without lights, is negligence in itself. To say that such conduct is negligent, however, is not to say that it is always contributorily negligent. A causal connection must still be shown.

16. 284 App. Div. 733, 134 N.Y.S.2d 524 (1954).

17. *See* 40 CORNELL L.Q. 810 (1955).

18. *E.g.*, Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).

19. 6 Cal. App. 3d 126, 85 Cal. Rptr. 649 (1970). This presumption may be rebutted,

of statutory duty in and of itself establishes negligence and all that it comports; that is, duty, breach, proximate cause, and resulting injury. These treatments of a statutory duty may be compared to the language of the *Semler* court in its treatment of the court order:

> [T]he probation order imposed on the appellants the duty to protect the public from assaults by Gilreath because this danger was reasonably foreseeable when the order was entered. The breach of this duty, followed by the foreseeable harm on which it was predicated, in itself demonstrates proximate cause.[20]

This language would indicate that the court was treating the order as the court had treated the statute in *Whinery,* and was saying that the breach of the order in and of itself established negligence. If the court had acknowledged that this was its intention, the holding would have internal consistency.

Nevertheless, the court maintained that proximate cause must be separately established and that the common law principles of negligence were necessary to prove the case.[21] It indicated that like some statutory duty cases, proximate cause had to be proven. But, the application of common law principles did not satisfy the required proof of proximate cause, because reasonable foreseeability of harm was not present. The nature of the duty in *Semler* depended largely on the reasonable foreseeability of harm, and that foreseeability was the required link between the duty and the proximate cause.[22] If, then, due care had been exercised by the psychiatrist and the hospital, as the court admitted by affirming the trial court's finding of no malpractice, reasonably foreseeable risk of harm does not follow. Therefore, neither proximate cause nor actionable negligence had been established. Thus, neither through the application of statutory principles, nor common law principles can consistency in *Semler* be found.

The same question of reasonable foreseeability and proximate cause was raised in the court's treatment of Gilreath's probation officer, Paul Folliard. Folliard was held liable for the same breach of duty for which Dr. Wadeson and the Institute were held liable.[23] The court, however, had to surmount the additional hurdle of sovereign immunity for public officials, which it did by applying the

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but if it is not, plaintiff has met his burden of proof.

20. 538 F.2d at 126.

21. *Id.* at 124; Trimeyer v. Norfolk Tallow Co., 192 Va. 776, 780, 66 S.E.2d 441, 443 (1951).

22. 538 F.2d at 124. *See* Harper and Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886, 898 (1934).

23. 538 F.2d at 127.

ministerial duty versus the discretionary duty test.[24] The court held that Folliard's failure concerned a ministerial act, that is, seeking court approval, and therefore, he was not entitled to immunity.[25] While determining that Folliard's required duty was ministerial may have been proper, the result is that a probation officer could negligently make a recommendation for release and get a court order without considering the mental condition of the probationer, yet not be held liable because his act would be discretionary. The purpose of asserting that, because of a technical breach of duty, Officer Folliard should be personally liable, while for otherwise actionable negligence he would be automatically immune, seems unjust and unrealistic. Folliard should at least have been permitted to argue that his negligence was not the proximate cause of the injury, or that he could not have reasonably foreseen harm.

IV. CONCLUSION

Although the court's purpose in trying to compensate crime victims was laudable, that goal should have been accomplished through clear reasoning. Inherent inconsistencies developed in the *Semler* case, however, in that the court imposed on the defendants a duty to the public, but failed to show breach of that duty by the standard of reasonable care. Even analogizing statutory duty to the duty imposed by the court order demonstrated inconsistent treatment by the court. With regard to the liability of the probation officer, the application of ministerial duty to find liability denies a defendant an opportunity to contest the finding of proximate cause or the use of the standard by which it was found.

Perhaps *Semler* is an anomaly which future courts will distinguish on its unique facts. The case, however, has ramifications for future situations, presenting hardships to doctors who will confine patients beyond the necessary time because of red tape or fear that negligence actions will be brought whenever a released patient acts in an aberrant manner. Probation officers will be held back from encouraging their charges to rejoin society because they may be held personally liable for wrongly judging a person capable of release.

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24. *Id.* As the court defined it, a ministerial duty is one which the officer must perform in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority (here the court order), without regard to, or the exercise of, his own judgment upon the propriety of the act being done. A discretionary duty is one in which the officer must exercise his own judgment.

25. Lawhorne v. Harlan, 214 Va. 405, 407, 200 S.E.2d 569, 571 (1973); *see* Bellamy v. Gates, 214 Va. 314, 316-17, 200 S.E.2d 533, 535 (1973); Dovel v. Bertram, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945); 67 C.J.S. *Officers* §§ 112, 127 (1950).

As in the *Semler* case, these considerations must be applied to the general purpose of giving a suspended sentence, probation, and psychiatric treatment by court order; that is, for the purpose of providing the probationer with the opportunity to repent, to reform, and to become rehabilitated. These purposes are impossible to achieve if a probation officer is hampered in his discretion, or a psychiatrist hampered in his treatment. The technical breach of a court order should be punished by contempt proceedings,[26] but unless a gross abuse of discretion on the part of the defendants is shown, they should not be held liable.[27] Crime victim compensation is indeed a worthy goal, but it should be determined by legislative enactment, not by judicial interpretation of individual facts. As precedent the *Semler* case will be used to sanction the gross discrepancies which will arise between the price of compensation to a victim and the price paid by society for adequate psychiatric treatment and probationary supervision of the criminally mentally ill.

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26. 60 C.J.S. *Motions and Orders* § 67 (1969).

27. Garcetti and Suarez, *The Liability of Psychiatric Hospitals for the Acts of Their Patients*, 124 AM. J. OF PSYCHIATRY 961, 966 (1968).