

Liability Article

Interstate Commission on Adult Offender Supervision Important Liability Considerations for State Officials

By

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NOTE: This paper is intended to provide the reader with a general overview of state employee liability considerations. It is not intended to be a conclusive study of the topic or to provide particular legal advice. Each state has differing and separate provisions governing state employee liability. The reader should consult with their assigned legal counsel or a state's attorney general to determine the extent to which their actions are protected by immunity or a state's liability risk fund.

State officials charged with managing both intrastate and interstate affairs under the Interstate Compact for Adult Offender Supervision (ICAOS) should be aware of several important liability considerations. For years, many state officials and employees (hereafter “state officials”) have worked under the misnomer that they and the state are immune from suit for injuries resulting from negligent actions on their part. However, as a general proposition, state officials do not enjoy absolute immunity from civil liability for their public acts. In recent years, the availability of the defense of sovereign immunity has been substantially reduced by state legislatures. In managing affairs under the ICAOS, therefore, state officials should be aware of the breadth, limits and types of immunity that may or may not apply to their conduct. Not every act of a state official is protected by immunity.

This paper seeks to explain some important immunity and liability principles, and provide some general guidance to state officials charged with administering the ICAOS. It should not be considered a conclusive discussion of the issues or of the extent to which a particular state or a particular action of a state official is covered by immunity or state insurance coverage. Each state is different. State officials are urged, therefore, to check with their respective legal counsel or Attorney General to determine the application of immunity principles in their states and the level of liability coverage available for particular acts, if any.

1. Types of Public Acts

The extent to which a state official may be liable for conduct resulting in injuries to others is generally defined by two “types” of public acts. Generally, state officials engage in either “discretionary” acts or “ministerial” acts, also known as “operational” acts. A discretionary act is defined as a quasi-judicial act

that requires the exercise of judgment in the development or implementation of public policy. Discretionary acts are generally indicated by terms such as “may” or “can” or “discretion.” Whether an act is discretionary depends on several factors: (1) the degree to which reason and judgment is required; (2) the nature of the official’s duties; (3) the extent to which policymaking is involved in the act; and (4) the likely policy consequences of withholding immunity.¹ In general, state officials are not liable for injuries related to discretionary acts because the states have not waived their sovereign immunity in this regard.² The public policy behind maintaining immunity is to foster the exercise of good judgment in areas that call for such, for example, policy development. Absent such immunity, state officials may hesitate to assist government in developing and implementing public policy.

By contrast, a ministerial act, also called an operational act, involves conduct over which a state official has no discretion; officials have an affirmative duty to comply with instructions or legal mandates or to implement operational policy. Ministerial acts are generally indicated by terms such as “shall” or “must.” A ministerial act is defined as an act “that involves obedience to instructions or laws instead of discretion, judgment or skills.”³ For example, a court clerk’s ministerial duties include entering judgments on the record of the court. The clerk has no discretion. Many states have waived sovereign immunity for the failure to perform or the negligent performance of ministerial acts. Consequently, the failure to perform a ministerial act or the negligent performance of such an act can expose state officials to liability if a person is injured as a result thereof. Whether an act is discretionary or ministerial is a question of fact. The nature of the act, not the nature of the actor, is the determining consideration. As one court has observed:

[T]he distinction between a ministerial and a discretionary act, and therefore the scope of the immunity granted a public official in any given situation, turns upon the specific character of the complained-of act, not the more general nature of the job. Under this standard it makes no difference that the official is required to perform discretionary acts if the complained-of act is more properly characterized as ministerial. This grant of qualified immunity, then, is really more in the nature of a transitory privilege rooted in the fear that a contrary rule would inhibit the judgment upon which good government rests. The single overriding factor is whether the specific act from which liability allegedly arises is discretionary or ministerial.⁴

¹ *Heins Implement Co. v. Mo. Hwy. & Trans. Comm’n*, 859 S.W.2d 681, 695 (Mo. Banc 1993).

² Discretionary governmental acts are immune from tort liability “to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.” *King v. Seattle*, 525 P.2d 228 (1974). The state and its employees are immune only if they can show that the decision was the outcome of a conscious balancing of risks and advantages. Discretionary immunity is narrow and applies only to basic policy decisions made by a high-level executive. For example, the decision whether to dispatch a police officer to the scene of a crime was not protected under discretionary immunity because it was not a basic policy decision by a high-level executive. Thus, discretionary immunity does not shield parole officers from claims alleging negligent supervision. While parole officers’ supervisory decisions require the exercise of discretion, the crucial point is that the discretionary immunity exception applies only to basic policy decisions. Parole officers’ supervisory decisions, however much discretion they may require, are not basic policy decisions. Such decisions are ministerial in nature.

³ *Black’s Law Dictionary*, 7th Ed. (West 1999).

⁴ *Miree v. U.S.*, 490 F.Supp. 768, 773 (1980).

Therefore, at any time, a state official can be engaged in both discretionary and ministerial acts. Again, it is the nature of the act not the state official's position or employment classification that determines the characterization of the act. It is important to note that although ministerial acts are generally considered "clerical" in nature, the terms actually embrace a wide range of activity involving the operations of government, not simply the movement of paper.

The distinction between discretionary and ministerial is a critical consideration for state officials charged with administering the ICAOS. There are acts within the context of the ICAOS that may be discretionary. State officials would generally not be liable for injuries resulting from such acts. ICAOS rules that can be characterized as imposing discretionary obligations on state officials include Rule 3.101 (eligibility for transfer), Rule 3.106 (expedited transfer), and Rule 4.103 (imposition of special conditions). By contrast, there are many acts under the ICAOS that are ministerial or operational in nature. Under ICAOS, both the terms of the compact and its properly enacted rules have the force and effect of statutory law.⁵ In such circumstances, state officials in the sending or receiving state do not have "discretion" as to whether to fulfill an affirmative duty. The failure to do so may result in liability for any injuries that occur.

There are several examples of ministerial obligations imposed by ICAOS. Rule 2.108 provides that a receiving state must continue to provide supervision for a transferred offender who becomes mentally or physically disabled. While the level of supervision may be classified as a discretionary act – that is, one calling for the exercise of judgment – the requirement to continue to provide supervision is a ministerial or operational act. Officials in a receiving state cannot simply disregard the obligation to continue supervision merely because the offender becomes disabled. Other examples of ICAOS Rules that can be characterized as imposing a ministerial obligation include but are not limited to Rule 2.110 (transfer of offenders under the compact), Rule 3.102 (submission of transfer request), Rule 3.103 (acceptance of offender), Rule 3.105 (request for transfer for paroling offender), and Rule 3.1081 (notification to victim advocate authorities). Rule 4.101 arguably imposes both a discretionary duty and a ministerial duty on receiving state officials in that it mandates that a receiving state must provide supervision in a manner "determined by the receiving state and consistent with the supervision of other similar offenders." That supervision must be provided is mandated. The level of supervision is discretionary with receiving state officials so long as it is similar to that provided like offenders. Whether the level of supervision provided an out-of-state offender is "like" would give rise to both discretionary and ministerial obligations. The characterization of particular actions by state officials would be a fact

⁵ Interstate Compact for Adult Offender Supervision, Art. V. Because the ICAOS is a congressionally approved compact, under the rule of *Cuyler v. Adams*, 449 U.S. 433 (1981) the compact and its rules can be considered federal law and, therefore, enforceable on the states and its officials under the Supremacy Clause of the federal constitution.

question in any litigation that results from a failure to provide “like” supervision.

The important point is this: ICAOS imposes both discretionary and ministerial acts, some occurring simultaneously. For example, the decision to transfer someone to another state under the ICAOS may be considered a discretionary act as is the decision to accept the transfer. Therefore, injuries resulting from decisions relative to *whether* a probationer should be transferred would likely be protected by considerations for immunity. However, a sending state’s failure to comply with ministerial acts such as ensuring the proper exchange of mandated information can be characterized as ministerial in nature. Although a sending state’s official could not be liable for the decision to transfer, they could be liable for injuries that result from the failure to meet a ministerial obligation such as sending information mandated by the compact and needed by receiving state officials to make a proper assessment of the case. If a sending state transferred a known sex offender without providing proper documentation and information of this fact, as mandated by the rules of the ICAOS, there is a very good argument for holding state officials liable for any injuries that result from that failure. Therefore, a state official should not presume that *all* actions and decisions that flow from a discretionary act are likewise discretionary in nature and, therefore, protected.

In summary, the classification of acts as discretionary or ministerial is important in determining state and personal liability. Generally, immunity protects state officials from liability only for injuries resulting from discretionary acts, and this would extend to certain actions taken under the ICAOS. Where a state official’s ministerial or operational acts result in injury, most states have waived immunity and state officials can be held liable in their official capacity to the extent that their negligence was to blame. Additionally, public officials must be aware that even where the state has waived immunity and agreed to provide a defense to litigation and the payment of damages, the state is only obligated to pay up to the amount authorized by the state law.⁶ Unless there is a specific judicial or statutory prohibition, public officials may be held liable for damage awards that exceed the amount covered by the state. Finally, the vast majority of states will not provide either a defense or cover the payment of any damage awards to the extent that a state official’s conduct or act is deemed criminal or “willful and wanton” or malicious.⁷

⁶ Fla. Stat. § 768.28 (2003) limits the states liability in most circumstances to \$100,000 per person or \$200,000 per incident. There are some exceptions, which require a direct appropriation from the state legislature.

⁷ For example, Miss. Code Ann. § 11-46-5 (2003) provides, in part:
For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations.

If so characterized, the act is considered to have occurred outside the scope of employment and the official can be held personally liable for any damages.⁸ Whether an act is willful and wanton may be determined by the following factors:

- The existence of statutes, rules, regulations or policies mandating certain actions and a demonstrated pattern of ignoring the requirements;
- The consistency with which an agency follows or enforces its rules, regulations or policies;
- The foreseeability and gravity of the consequences that result from ignoring statutes, rules, regulations or policies;
- The malicious nature of the official's conduct.

2. Sovereign Immunity

The principle of sovereign immunity is rooted in English common law. It became a principle in American law purely as a function of colonial history and the adoption of the common law system. The principle rested on the proposition that the “King could do no harm.” Sovereign immunity is defined as “[a] government’s immunity from being sued in its own courts without its consent.”⁹ As a result of sovereign immunity, the state and its officials enjoy limited insulation from liability. It is important to note that sovereign immunity only protects the state and its officials for “official acts” - that is, acts that resulted from the direct performance of public duties so long as the performance is lawful. Thus, if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; a state cannot cloak an officer in its sovereign immunity.¹⁰ Sovereign immunity does not extend to the personal actions of state officials and generally only applies to discretionary acts by state officials. The intent of sovereign immunity is to protect the treasury, not necessarily to protect or vindicate the actions of state officials simply because they are state officials.

During the 20th century, many states and the federal government have enacted provisions waiving sovereign immunity and subjecting themselves to suit under limited circumstances. These circumstances are generally confined to the negligent performance of ministerial or operational acts that

⁸ Hoffman v. Yack, 373 N.E.2d 486 (Ill. 1978).

⁹ Black's Law Dictionary, 7th Ed. (1999).

¹⁰ Ex parte Young, 209 U.S. 123 (1908).

result in an injury to a third party. For example, under the Federal Tort Claim Act, Congress has allowed the federal government to be sued in court for damages arising from the actions of its employees, but only if the law of the state in which the act occurred would hold a private person liable for injuries.¹¹

Many states have likewise adopted legislation that exposes the state to damages for the actions of its employees. To cover damage claims against state officials, most states have created “public risk funds,” (also known in some states as “legal defense funds”), which are in effect self-insurance policies created by statute. Presumably, these same statutes would extend liability coverage to state officials for any injuries that result from their actions under the ICAOS because the officials are acting on behalf of the state.

It is important to understand the difference between immunity and state liability absent immunity. A state official cloaked with immunity is not subject to suit for their official acts. If applicable, immunity acts as a complete bar to suit and, unless there is a specific statutory or judicial exception, requires dismissal of a lawsuit.¹² By contrast, where immunity is waived and risk coverage provided, state officials are subject to suit in their official capacity and the state *may be* obligated to provide both a defense and cover any damages assessed against the official.¹³ Because the state has agreed in this latter context to provide a defense and liability coverage, the extent of the state’s obligation is defined by both state law and the terms and conditions of the risk fund. The important principle is this: State legislatures are generally free to define the breadth and limits of sovereign immunity and the extent to which the state will pay damages arising out of official conduct. A state can retain its immunity from suit, extend immunity to state officials, set a limit on the maximum amount of damages it will pay, and even subject its employees to *personal* liability for certain egregious and malicious acts. A state may waive sovereign immunity for some acts while retaining sovereign immunity for other acts. Thus, it is important for state officials to understand the exact extent of any state waiver of immunity and the extent to which damages arising from official conduct will be covered by the state. Not every act of a state official is presumptively immune from suit nor is a state always obligated to provide coverage for acts of its employees. Additionally, the

¹¹ 28 U.S.C. §§ 2671-2680.

¹² *Shay v. Rossi*, 749 A.2d 1147 (Conn. 2000). However, as waiver of immunity is a legislative act, the legislature can define the scope and effects of sovereign immunity and the ability of a plaintiff to maintain a lawsuit even where sovereign immunity is asserted by a state official as a defense.

¹³ Whether coverage would be extended is determined by each state and its legal authorities. Some states have retained discretion as to whether to extend coverage. In Missouri, for example, the state Attorney General must authorize any payments from the legal defense fund. RSMo. § 105.711, et seq. (2003).

fact that a state has waived its sovereign immunity and agreed to be sued does not presumptively insulate a state official from personal liability. A state official covered by a state insurance program *may* still be held personally liable to the extent that the damages awarded by a court exceed the limits of coverage authorized by the legislature.¹⁴

In summary, three important points must be understood. First, a state official possessing *immunity* from suit cannot be held liable for the results of their official conduct. This immunity may also insulate a state official from personal liability. Immunity generally acts as an absolute bar to liability. Second, an official in a state that has waived its sovereign immunity and created a risk fund to cover liability costs has only that protection defined by state law and the terms and conditions of the public risk fund.¹⁵ A state official can be held personally liable, in some circumstances, for any damages that exceed state provided coverage. Finally, a state may set conditions on the waiver of immunity and exempt certain conduct from liability coverage or limit the extent of its liability obligations. For example, Alaska provides that a person may sue the state for various types of claims but also provides, however, that, “an action may not be brought if the claim (1) is an action for tort and is based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation is valid or is an action for tort and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused[.]”¹⁶ A state has wide latitude in determining the extent of its liability and state officials charged with implementing the ICAOS should understand the extent of their coverage.

3. Judicial Immunity for Non-Judicial Employees

The principle of judicial immunity is similar to that of sovereign immunity, but is more personal in that it specifically protects the exercise of a state’s judicial power by judges. Judicial immunity, therefore, protects judges and court employees against liability arising from judicial decisions and the judicial process. Like sovereign immunity attached to discretionary acts, its purpose is to foster

¹⁴ McGhee v. Volusia County, 679 So. 2d 729 (Fla. 1996) (absent statutory provision, a state official would be personally liable for that portion of a judgment rendered against him or her that exceeds the state’s liability limits).

¹⁵ For example, Arkansas has specifically provided that, “Counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state shall be immune from liability and from suits for damages, except to the extent that they may be covered by liability insurance.” Ark. Code Ann. 21-9-301 (2003).

¹⁶ Alaska Stat. § 09.50.250 (2004). Examples, but in no way conclusive, of other states waiving sovereign immunity for certain actions include Colorado (C.R.S. 24-10-106); Connecticut (Conn. Gen. Stat. § 4-160 (2003)); Delaware (10 Del. C. § 4001); Florida (Fla. Stat. § 331.328 (2004)); Georgia (O.C.G.A. § 50-21- 23); Hawaii (HRS § 662-2 (2003)); Maryland (Md. STATE GOVERNMENT Code Ann. § 12-104).

independent judgment, judgment that otherwise would be jeopardized by fear over potential lawsuits. Virtually any decision of a judge that results from the judicial process – that is the adjudicatory process – is protected by judicial immunity. With some limitations, this immunity extends to court employees and others, such as jurors, parole and probation officers, and prosecutors who are fulfilling the court’s orders or participating in some official capacity in the judicial process.

It is important to understand, however, that not everything a judge or court employee does is protected by judicial immunity. The United State Supreme Court has repeatedly held that judicial immunity only protects those acting in a judicial capacity and does not extend to administrative or rulemaking matters.¹⁷ The acts of judges or court employees that are purely administrative or supervisory in nature are not protected by judicial immunity. Such non-judicial acts may give rise to liability, particularly to the extent that they violate federal civil rights laws such as 42 U.S.C. 1983 and their state counterparts. Examples of actions generally not protected by judicial immunity include employment decisions, budget decisions, and, as discussed below, the supervision of offenders under some circumstances.

Generally, probation and parole officers possess absolute judicial immunity where their actions are integral to the judicial process. For example, a probation or parole officer generally has immunity from liability for injuries suffered by another that result from the preparation of a pre-sentence investigation report. “Courts have extended absolute judicial immunity from damage actions under 42 U.S.C. § 1983 not only to judges but also to officers whose functions bear a close association to the judicial process.”¹⁹ In determining whether an officer’s actions fall within the scope of absolute judicial immunity, courts “have adopted a ‘functional approach,’ one that turns on the nature of the responsibilities of the officer and the integrity and independence of his office. As a result, judicial immunity has been extended to federal hearing officers and administrative law judges, federal and

¹⁷ *Forrester v. White*, 484 U.S. 219, 229 (1988) (“[A] judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.”) *See, also*, *Antoine v. Byers & Anderson*, 508 U.S. 429 (1993) (The function of the court reporter to record a verbatim transcript of trial proceedings did not require the exercise of discretionary judgment and was not, therefore, functionally comparable to the function of a judge. Court reporters were not protected by the doctrine of judicial immunity.)

¹⁸ 42 U.S.C. 1983 provides, in part, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”

¹⁹ *Demoran v. Witt*, 781 F.2d 155, 156, 157 (9th Cir. 1985).

state prosecutors, witnesses, grand jurors, and state parole officers.”²⁰ The purpose behind extending judicial immunity to probation and parole officers in the context of investigations is quite simple: the preparation of a presentence investigation report is integral to the exercise of independent judgment by a judge and, therefore, the court fulfilling its judicial duties impartially.²¹ Judicial immunity does not, however, protect a court, its employees or others cloaked with such immunity from injunctive relief.²²

In recent years, courts have clarified and, in some cases, restricted the extension of judicial immunity to probation and parole officers. Generally, the protections afforded to such officers apply to the extent that the officer’s activities are “integral” to the judicial process. As a result, several courts have held that actions such as supervision – distinguished from investigation – are administrative in nature and not a judicial function entitled to judicial immunity.²³ The placement of juveniles by a probation counselor is an administrative function and the court’s mere knowledge of a placement is, without more, insufficient to convert an administrative act into a judicial act.²⁴ Quasi-judicial and judicial immunity shield against claims arising from the performance of a quasi-judicial function; they do not shield an official from any claim whatsoever just because that official sometimes performs judicial or quasi-judicial functions. Therefore, the function performed and not the person who performs it is the focus of the inquiry as to whether probation or parole officers have judicial immunity for acts performed in the course of supervision.

Probation and parole officers have been denied quasi-judicial immunity from suits for actions taken outside any judicial or quasi-judicial process. For example, in *A.L. v. Commonwealth*,²⁵ a thrice-convicted child molester obtained employment as a teacher at a middle school, in violation of the terms of his probation. The child molester’s probation officer never made any inquiry as to where he was employed. Parents whose children were subsequently molested sued the Commonwealth. The Supreme Court held that quasi-judicial immunity was available only if the probation officer “acted pursuant to a judge’s directive or otherwise in aid of the court. . . . Any claim to immunity which the Commonwealth might have asserted ceased when [the probation officer] failed to aid in the enforcement of the conditions of . . . probation.”²⁶ Parole and probation violations present additional issues concerning the extension of

²⁰ Id.

²¹ *Acevedo v. Pima Cty. Adult Probation*, 690 P.2d 38 (Ariz. 1984).

²² *Pulliam v. Allen*, 466 U.S. 522 (1984); *Dorman v. Higgins*, 821 F.2d 133 (2nd 1987).

²³ *Acevedo*, *supra*, note 20

²⁴ *Faille v. S.C. Dep't of Juvenile Justice*, 566 S.E.2d 536 (S.C. 2002)

²⁵ 521 N.E.2d 1017 (Mass. 1988).

²⁶ Id. at 1025.

judicial immunity. In *Ray v. Pickett*,²⁷ a probationer sued his probation supervisors alleging they had violated his constitutional rights by intentionally falsifying a report to secure a parole violator's warrant. The probation officers claimed that quasi-judicial immunity barred the suit. The court disagreed finding that the probation officer did not perform an adjudicatory function by filing a report with the parole commission. The court found that the effect of filing a report was merely to trigger an inquiry by another officer that may or may not have lead to an administrative proceeding. The officer was not acting as closely with the court as in the pre-sentence investigation report process and, therefore, was not cloaked with judicial immunity.

In summary, probation and parole officers may be entitled to absolute or quasijudicial immunity to the extent that their actions are intimately tied to the judicial process and the officer is acting either in furtherance of that process or is engaged in enforcing the orders of the court. Judicial immunity generally does not protect parole and probation officers from liability for negligent supervision because, in many contexts, administrative and supervisory activities are not connected with the performance of a judicial function.²⁸ Moreover, any possible claim to immunity can be lost when a parole or probation officer ignores the specific directions of a court.²⁹ In the context of ICAOS, it would be difficult to extend judicial immunity to compact commissioners and administrators who are engaged primarily in administrative tasks. Judicial immunity may apply, in some jurisdictions, to those involved in the investigation and supervision of offenders, but only to the extent that officials are operating under a valid court order or in a quasi-judicial capacity.

4. Qualified Immunity³⁰

Although courts have held that the acts of probation and parole supervision are not automatically entitled to absolute immunity, several courts have recognized that officers perform a difficult job under exacting conditions. They are routinely asked to make decisions that can significantly affect both an offender's liberty and the safety of members of the public. Completely stripping officers of immunity would make them more concerned with avoiding lawsuits than doing their jobs. In general, there simply is "no constitutional right to be protected by the state against . . . criminals or madmen," because there is

²⁷ 734 F.2d 370 (8th Cir. 1984).

²⁸ *Taggart v. State*, 822 P.2d 243 (Wash. 1992).

²⁹ *Acevedo v. Pima County Adult Probation Dep't*, *supra* note 20.

³⁰ The term "qualified immunity" is defined as immunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional, statutory or regulatory rights and provisions. Unlike sovereign immunity, which protects the state, qualified immunity protects the individual; it cannot be asserted on behalf of the state or political subdivision of the state but rather must be asserted on behalf of each individual. *Tenenbaum v. Williams*, 193 F.3d 581 (2nd Cir. 1999).

no “constitutional duty [on the state] to provide such protection[.]”³¹ At the same time, adequate supervision must be provided because of the dangers violent offenders present. Therefore, courts have recognized that parole and probation officers may possess “qualified immunity” to the extent that they act outside any judicial or quasijudicial proceeding.

Qualified immunity is more narrowly defined than either sovereign immunity or judicial immunity; its application depends in large measure on the circumstances in which an official’s actions occurred. There are parameters and limitations to qualified immunity. A state official may be covered by qualified immunity where they (1) carry out a statutory duty, (2) act according to procedures dictated by statute and superiors, and (3) act reasonably.³² Parole and probation officers, therefore, enjoy qualified immunity from liability for allegedly negligent parole supervision if their actions are in furtherance of a statutory duty and in substantial compliance with the directives of superiors and relevant statutory and regulatory guidelines. The immunity requires only that an officer’s conduct be in substantial compliance, not strict compliance, with the directives of superiors and regulatory procedures.³³ It is important to note that not all courts agree with this standard and several courts have held probation or parole officers liable under the principle of negligent supervision. Therefore, a probation or parole officer cannot rest on presuming that every act they perform is protected by some principle of immunity, be it sovereign, judicial or qualified.

5. Negligent Supervision Considerations

Several factors go into determining whether a state and its officials are liable under a theory of negligent supervision.³⁴ Some of the factors a court may consider in determining whether a state official is liable for negligent supervision are:

- 1) Misconduct by a non-policymaking employee that is the result of training or supervision “so reckless or grossly negligent” that misconduct was

³¹ *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982).

³² *Babcock v. State*, 809 P.2d 143 (1991). *See, also* *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982) (Trial court erred in finding that requesting or transmitting records and providing standard medical care pertaining to the parole decision were not actionable under Federal Tort Claim Act. Statute placed on parole board a non-discretionary duty to examine the mental health of parolee. Where government assumed the duty of providing psychiatric treatment to offender it was under a non-discretionary duty to provide proper care.)

³³ *Taggart v. State*, 822 P.2d 243 (Wash. 1992).

³⁴ The technical legal definition of negligent supervision is “An agent who, by promise or otherwise, undertakes to act for his principal under such circumstances that some action is necessary for the protection of the person or tangible things of another, is subject to liability to the other for physical harm to him or to his things caused by the reliance of the principal or of the other upon his undertaking and his subsequent unexcused failure to act, if such failure creates an unreasonable risk of harm to him and the agent should so realize.” Restatement (Second) of Agency § 354 (1958).

“almost inevitable” or “substantially certain to result.”³⁵

- 2) The existence of special custodial or other relationships created or assumed by the state in respect of particular persons. A “right/duty” relationship may arise with respect to persons in the state’s custody or subject to its effective control and whom the state knows to be a specific risk of harm to themselves or others.³⁶ Additionally, state officials may be liable to the extent that their conduct creates a danger from which they fail to adequately protect the public.³⁷
- 3) The foreseeability of an offender’s actions and the foreseeability of the harm those actions may create. Even in the absence of a special relationship with the victim, state officials may be liable under the “state created danger” theory of liability when that danger is foreseeable and direct.³⁸
- 4) Negligent hiring and supervision in cases where the employer’s direct negligence in hiring or retaining an incompetent employee whom the employer knows, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others.³⁹ Liability may be found where supervisors have shown a deliberate indifference or disregard to the known failings of an employee.
- 5) The obligation of state officials to fulfill ministerial acts, which are not open to discretion. For example, an officer can be held liable for failing to execute the

³⁵ *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194 (6th Cir. 1987).

³⁶ *Withers v. Levine*, 615 F.2d 158 (4th Cir.), cert. denied, 449 U.S. 849 (1980) (prison inmates under known risk of harm from homosexual assaults by other inmates); *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979) (inmate under observed attack by another inmate); *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973). Cf. *Orpiano v. Johnson*, 632 F.2d 1096, 1101-03 (4th Cir. 1980), cert. denied, 450 U.S. 929, 101 S. Ct. 1387, 67 L. Ed. 2d 361 (1981) (no right where no pervasive risk of harm and specific risk unknown); *Hertog v. City of Seattle*, 979 P.2d 400 (Wash. 1998) (City probation officers have a duty to third persons, such as the rape victim, to control the conduct of probationers to protect them from reasonably foreseeable harm. Whether officers violated their duty was subject to a factual dispute.).

³⁷ *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993).

³⁸ *Green v. Philadelphia.*, 2004 U.S. App. LEXIS 4631 (3rd Cir. 2004). The state-created danger exception to the general rule that the State is not required to protect the life, liberty, and property of its citizens against invasion by private actors is met if: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

³⁹ *Wise v. Complete Staffing Services, Inc.*, 56 S.W.3d 900, 902 (Tex.App.--Texarkana 2001).

arrest of a probationer or parolee when there is no question that such an act should be done.⁴⁰

In summary, state officials charged with implementing the ICAOS and providing supervision for offenders may enjoy immunity from suit under several doctrines. However, the extent of that immunity is generally defined by state law, the nature of the acts, the facts and circumstances surrounding an incident and the extent to which the actor exercised reasonable care and sound judgment. Probation and parole officers supervising transferees under the ICAOS do not have a lesser duty to supervise and control offenders simply because they were transferred from another state. The failure to maintain adequate control and supervision of such persons may give rise to claims of “negligent supervision” and, therefore, liability.

6. Conclusion

State officials charged with implementing the ICAOS and providing supervision and control of offenders are not insulated from liability simply as a function of being state officials. While state officials may enjoy various forms of immunity and liability coverage, these protections are not absolute. The degree to which immunity may or may not apply is generally defined by each state. Thus, state officials should be aware of the extent to which immunity may apply and the extent to which their particular state, after waiving immunity, is prepared to provide a defense and pay any damages. It is important to always remember the old axiom, “Bad facts make bad laws.” The more egregious the conduct of state officials, the more likely it is that they will be found responsible for the consequences of their action or inaction.

⁴⁰ Taylor v. Garwood, 2000 U.S. Dist. LEXIS 9026 (D.C. Penn. 2000)

Appendix

Summary of Cases

This Appendix is a non-exclusive collection of cases where courts have discussed the application of “negligent supervision” or otherwise held parole and probation officers or the state liable for injuries resulting from their failure to follow mandated rules or provide appropriate supervisions.

Cases finding that liability may be imposed:

Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976): Mother brought an action against psychiatric institute, a physician, and a probation officer, seeking recovery for the death of her daughter, who was killed by a probationer that had been a patient at the institute. Mother alleged that appellants were negligent in failing to retain custody over the patient until he was released from the institute by order of the court. The court concluded that the state court's probation order imposed a duty on appellants to protect the public from the reasonably foreseeable risk of harm imposed by the patient. The court held that the breach of the state court's order by the defendants was the proximate cause of the daughter's death.

Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska, 1986): A newly released offender shot and killed his teenaged stepdaughter and her boyfriend, and raped, beat and strangled to death another woman. Relatives of the murdered persons sued the state of Alaska, claiming the state was negligent in failing to impose special conditions of release, to supervise offender adequately on parole, in allowing offender to return to a small, isolated community without police officers or alcohol counseling, and in failing to warn his victims of his dangerous propensities. The Supreme Court affirmed in part and reversed in part, holding that the offender's victims and his actions were within the zone of foreseeable hazards of the state's failure to use due care in supervising parolee. The state had a legal duty to supervise offender and the authority to impose conditions on parole and to re-incarcerate offender if these conditions were not met. The state was obligated to use reasonable care to prevent parolee from causing foreseeable injury to other people. *See, also* Bryson v. Banner Health Systems, 2004 Alas. LEXIS 54 (Alaska 2004) (Private treatment center liable for injuries caused by known rapist with extensive history of alcohol-related crimes who attacked other program participants. As part of the treatment, center encouraged all members of the group to contact and assist each other outside of the group setting. Center knew that the rapist had an extensive criminal history of alcoholrelated crimes of violence, including sexual assaults. The rapist relapsed into drinking while being treated and attacked fellow patient. Court correctly held that the center owed the victim an actionable duty of due care to protect her from harm in the course of her treatment, including foreseeable harm by other patients.)

Acevedo v Pima County Adult Probation Dept., 690 P.2d 38 (Ariz. 1984): Action brought against county probation department and four officers for damages suffered as a result of the alleged negligent supervision of a probationer. The court held that probation officers were not protected from liability by judicial immunity. It was alleged that the children of the plaintiffs had been sexually molested by the probationer, who had a long history of sexual deviation, especially involving children. Probation officers permitted the probationer to rent a room from one of the plaintiffs knowing there were five young children in the residence and despite the fact that as a special condition of probation the probationer was not to have any contact whatsoever with children under the age of 15. The court noted that whether a particular officer was protected by judicial immunity depended upon the nature of the activities performed and the relationship of those activities to the judicial function. A non-judicial officer was entitled to immunity only in those instances where he performed a function under a court directive and that was related to the judicial process. Not all supervising activities of a probation officer are entitled to immunity

because much of the work is administrative and supervisory, not judicial in function. The court concluded that judicial immunity could not be invoked because the officers did not act under a court's directive and, in fact, had ignored the specific court orders.

Johnson v State, 447 P.2d 352 (Ca. 1968): Action brought by foster parent against the state for damages for an assault on her by a youth placed in her home by the youth authority. Plaintiff alleged that the parole officer placing the youth failed to warn her of the youth's homicidal tendencies and violent behaviors. Court held that placement of the youth and providing adequate warnings was a ministerial duty rather than a discretionary act. Therefore, the state was not immune from liability. The court determined that the release of a prisoner by the parole department would be a discretionary act, whereas the decision of where to place the probationer and what warnings to give constituted only a ministerial function for which liability could attach.

Sterling v. Bloom, 723 P.2d 755 (Id. 1986): A car operated by probationer whose blood alcohol was .23 percent by weight, struck plaintiff's motorcycle while under legal custody and control of Idaho Board of Corrections. A special condition of his probation was that probationer was not to drive a motor vehicle except for employment purposes for the first year of probation. The court held that under state law, every governmental entity was subject to liability for money damages whether arising out of a governmental or proprietary function, if a private person or entity would be liable for money damages under the laws of the state. 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. The key to this duty is not the supervising individual's direct relationship with the endangered person or persons, but rather is the relationship to the supervised individual. Where the duty is upon government officials, it is a duty more specific than one to the general public.

Mianecki v. Second Judicial Dist. Court, 658 P.2d 422 (Nev. 1983), cert. dismissed 464 U.S. 806 (1983): Convicted sex offender on probation for the sexual assault of a boy in Wisconsin relocated permanently to Nevada with approval. Offender moved in with the parents and child, who were uninformed of the offender's history. The offender victimized the child. Parents sued alleging that the Wisconsin and the employee, who approved the offender's travel permit, violated the Interstate Compact for the Supervision of Parolees and Probationers. The complaint also alleged negligence. Nevada Supreme Court concluded that Wisconsin and the employee were not immune from suit in Nevada. If the acts complained of had been committed by Nevada Department of Parole and Probation, sovereign immunity would not have barred suit against the state. Nevada as the forum state was not required to honor Wisconsin's claim of sovereign immunity. In addition, the law of Wisconsin was not granted comity, as doing so would have been contrary to the policies of Nevada.

Hansen v. Scott, 645 N.W.2d 223 (N.D. 2002) cert denied, 537 U.S. 1108 (2003): Daughters brought an action in connection with the murder of their parents by the parolee who had been transferred to North Dakota for parole supervision by Texas officials. The daughters alleged that the employees of Texas authority failed to notify North Dakota officials about the inmate's long criminal history and dangerous propensities. Daughters sought to hold the employees liable on their wrongful death, survivorship, and 42 U.S.C.S. § 1983 claims. The court held that the claims against the employees stated a prima facie tort under N.D. R. Civ. P. 4(b)(2)(C) and thus the exercise of personal jurisdiction over the employees was proper because the employees' affirmative action of asking North Dakota to supervise their parolee constituted activity in which they purposefully availed themselves of the privilege of sending the parolee to North Dakota. The employees could have reasonably anticipated being brought into court in North Dakota, and the exercise of personal jurisdiction over the employees comported with due process.

Reynolds v. State, Div. of Parole & Community Servs., 471 N.E.2d 776 (Ohio 1984): The victim was assaulted and raped by the prisoner while the prisoner was serving a prison term for an involuntary manslaughter. The prisoner had been granted a work release furlough. Under Ohio Rev. Code Ann. § 2967.26(B), the prisoner was to have been confined for any periods of time that he was not actually working at his approved employment. Victim contended that the state was liable for the injuries suffered because the state breached its duty to confine the prisoner during the non-working period when he raped the victim. The court found that, although the victim was unable to maintain an action against the state for its decision to furlough the prisoner, the victim was able to maintain an action against the state for personal injuries proximately caused by the failure to confine the prisoner during non-working hours as required by law. Such a failure to confine was negligence per se and was actionable.

Jones-Clark v. Severe 846 P.2d 1197, (Ore. App. 1993): Probation department had a duty to control court probationers to protect others from reasonably foreseeable harm. Even though officers could not act on their own to arrest a probationer or to revoke probation, they were in charge of monitoring probationers to ensure that conditions of probation were being followed, and had a duty to report violations to the court.

Doe v. Arguelles, 716 P.2d 279 (Utah 1985): Plaintiff sued the state and parole officer on behalf of 14-year-old ward who was raped, sodomized, and stabbed by juvenile offender while he was on placement in the community, but before he had been finally discharged from the Youth Detention Center (YDC). State supreme court concluded that the state and officer could be held liable for injuries to the extent that the officer's conduct involved the implementation of a plan of supervision, not policy decisions. However, under state law plaintiffs must show officer acted with gross negligence to establish personal liability.

Bishop v. Miche, 943 P.2d 706 (Wash. C.A. 1997): Parents of a child killed in a car accident with a drunk driver sued the drunk driver for wrongful death and the county for negligent supervision by a probation officer. Plaintiffs alleged that had the probation officer properly supervised the driver and reported his probation violations, the driver would have been jailed and their son would not have been killed. The court held that although the county could not be held liable for the sentencing error, there were fact issues with respect to plaintiffs' negligent supervision claim. The court stated that the probation officer had sufficient information about the driver to cause her to be concerned that he was violating his probation terms and also to cause her to be concerned that he might start drinking and driving again.

Cases rejecting liability:

Martinez v. California, 444 U.S. 277 (1980): Parole officials released a known violent offender who subsequently killed the decedent. The family sued the state alleging reckless, willful, wanton, and malicious negligence and deprivation of life without due process under 42 U.S.C.S. § 1983. The Supreme Court held that California statute granting immunity was not unconstitutional. The Court further held that the US Constitution only protects citizens from deprivation by the state of life without due Process of law. The decedent's killer was not an agent of the state and the parole board was not aware that decedent, as distinguished from the public at large, faced any special danger. The Court did not resolve whether a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole for purposes of 42 U.S.C.S. § 1983 liability.

Weinberger v Wisconsin, 906 F. Supp 485 (WD Wis. 1995): Probation officers were not liable for injuries caused by drunken probationer collision with plaintiff's car based on a failure to arrest probationer a night earlier when found driving under the influence (DUI). Officers should to revoke probation. However, it was decision of judge to allow probationer to remain out of custody pending disposition of petition that left probationer able to drive and reoffend. Failure of probation officers to arrest probationer did not proximately cause injuries.

Pate v. Alabama Bd. of Pardons & Paroles, 409 F. Supp. 478 (M.D. Ala. 1976), affirmed without opinion, 548 F.2d 354 (5th Cir. 1977): Plaintiff sued for damages from the state when minor daughter was allegedly raped and killed by a parolee of the Alabama Board of Pardons and Paroles. Plaintiff alleged that granting of parole and subsequent supervision was either negligent or done in a willfully and wantonly manner. Court held that the board of pardons and paroles was immune from suit by virtue of the Eleventh Amendment and the doctrine of official immunity. Court held that individual parole officers should be granted same immunity accorded judges notwithstanding allegations of misfeasance, nonfeasance and malfeasance in the conduct of their supervision of parolee.

McCleaf v. State, 945 P.2d 1298 (Ariz. Ct. App. Div. 1 1997): Probation officer did not act with “actual malice” in connection with allegedly negligent supervision of probationer. Because manner of supervision was a discretionary act, officer was immune from liability for pedestrian who was struck and killed by probationer, who was driving while intoxicated and without driver's license. Probationer had told the officer that he was not using alcohol or drugs and officer saw no signs of such use. Nothing in the record indicated that officer in any way encouraged or condoned probationer's drinking or drunken driving.

Department of Corrections v. Lamaine, 502 S.E.2d 766 (Ga. 1998): Conduct of parole officer in supervising parolee, who was on conditional release after 10 years in prison for aggravated rape and sodomy convictions and while out raped and killed fellow restaurant employee, was not reckless. There was no proof that the officer was aware of a risk so great that it was highly probable that the injuries would follow or that he acted with conscious disregard of a known danger.

Anthony v. State, 374 N.W.2d 662 (Iowa 1985): Plaintiffs filed action against the state for injuries caused by a sex offender whom the state released to work in the community without imposing any conditions on his release. The court found that the state had breached no duty to plaintiffs because the decision to adopt a work release plan for a prisoner was a discretionary function. State law barred negligence claims against the state for the failure to exercise or perform a discretionary function. Furthermore, the state had not breached a duty of care under a negligent supervision theory for the same reason. Additionally, the evidence concerning implementation was not so strong as to compel a finding of negligence as a matter of law. Finally, there was no duty to warn because there was no threat to an identifiable person.

Schmidt v. HTG Inc., 961 P.2d 677 (Kan. 1998), cert. denied, 119 S. Ct. 409 (U.S. 1998). Probation officer's failure to report violations by probationer who injured child while driving under influence of alcohol was not liable for damages. Officer did not take custody of probationer sufficiently to create a duty to protect the public. Statutory duty to report probation violations was owed to court and not to general public.

Lamb v Hopkins, 492 A.2d 1297 (Md. 1985): Probation officer who had probationer arrested on warrant for violating terms of probation did not have actual ability to control probationer by preventing his release which resulted in additional crimes. Even assuming that officer had provided available information about other pending charges against probationer to the court at revocation hearing, decision whether to revoke probation was within control of court, not probation officer.

Johnson v. State, 553 N.W.2d 40 (Minn. 1996): The trustees of victim, who was raped and murdered by parolee who had failed to report to a halfway house, initiated a wrongful death action against the state and halfway house. The court held that statutory immunity and official immunity barred the trustees' claim because the decision to release the prisoner was a protected discretionary function. The court further found that the immunities protected the state and county for the alleged failure of its agents to determine whether the parolee had arrived at the halfway house because imposing this liability would undermine public policy clearly manifested by the legislature to provide for the release of parolees into the community. The court found that the halfway house was not negligent in that it had no legal duty to

control the parolee; the halfway house neither had custody of the parolee nor had it entered into a special relationship with him due to his failure to arrive at the halfway house.

Hurst v. State Dep't of Rehabilitation & Correction, 650 N.E.2d 104 (Ohio 1995): Parolee was declared absent without leave. Pursuant to the policy of the Department of Rehabilitation and Correction, parole officer waited 30 days before drafting a parole violator-at-large (PVAL) report, which was never entered into the computer networks. Parolee was arrested for his participation in the beating death of decedent. The executor of decedent's estate brought an action against state alleging wrongful death, negligence, and negligence per se. The court held that the only affirmative duty imposed upon state officials was to report the status of a PVAL and to enter this fact into the official minutes of the Adult Parole Authority. There was no statute or rule that imposed a specific, affirmative duty to enter the offender's name on any computer network. Therefore, the plaintiffs failed to establish the existence of a special duty owed the decedent by the state and the public duty rule applied to bar liability on the part of the Adult Parole Authority.

Kim v. Multnomah County, 909 P.2d 886 (Ore. 1996). Action brought against probation officer alleging gross negligent supervision with reckless disregard for safety of others. Plaintiff alleged officer's unreasonably heavy caseload, failure to make home visit, and failure to recognize mental condition of perpetrator was worsening. Court held that probation officer did not create dangerous condition or cause death of son and that the officer was immune from liability for damages resulting from negligence or unintentional fault in performance of discretionary duties.

Zavalas v. State, 809 P.2d 1329 (Ore. App. 1991): Parole officer enjoyed judicial immunity in action by mother of eight-year-old child, despite allegations that the officer was negligent in failing to supervise sex offender who was subject to a condition that he refrain from knowingly associating with victims or any other minor except with written permission of the court or officer. Plaintiffs could not establish evidence that the officer knew parolee was violating probation nor did terms of probation prohibit parolee from living next to families or children's playground. Officer was carrying out the court's direction to supervise parolee and level of supervision exercised by him was within authority granted by court.