Parole—The State Is Liable in Tort for the Personal Injuries Caused by a Parolee When the State was Negligent in not Expeditiously Picking up a Parole Violator.—*Wasserstein v. State* (N.Y. 1968).

The plaintiff was shot in the temple by a teenage boy which resulted in complete loss of plaintiff's sight. The assailant, a fifteen-year-old boy was in violation of his parole by being truant from his home and school, and a warrant of arrest was issued by the parole officer prior to the shooting. The plaintiff alleged negligence on the part of the State of New York in releasing assailant from a state reformatory and, more specifically, that the state was careless in its failure to properly supervise a previously adjudicated juvenile delinquent who had been sentenced as an incorrigible and subsequently placed on parole. The New York Court of Claims, *Held*, the state was negligent in its supervision of a juvenile parolee for failure to expeditiously pick up the juvenile as a parole violator, and this negligence was the proximate cause of claimant's blindness. *Wasserstein v. State*, 56 Misc. 2d 225, 288 N.Y.S.2d 274 (1968).

Based on the premise that parole is a matter of grace and not of right, discretion is left to the states as to the manner and terms which paroles may be granted or revoked.[1] The parole board has the right to impose such conditions as it feels proper, for when the prisoner accepts a parole he does so subject to its terms and conditions.[2] Furthermore, the parolee cannot later in a judicial hearing complain as to the fairness and propriety of the conditions of parole.[3] When the prisoner accepts the parole he remains in the legal custody of the parole board until the expiration of the maximum term specified in his sentence or until he is pardoned.[4]

Regarding the issue of statutory duty and proximate cause, the Supreme Court of Minnesota has stated:

> It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designated to prevent, and which were proximately produced by such neglect.[5]

In light of the Minnesota holding, the three questions which can be raised from *Wasserstein* are: was there a statutory duty, at what point did the parole

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1 Goldsmith v. Sanford, 132 F.2d 126 (5th Cir. 1942); Seward v. Heinze, 165 F. Supp. 137 (N.D. Cal. 1958); Curtis v. Bennett, 256 Iowa 1164, 131 N.W.2d 1 (1964), *cert. denied*, 380 U.S. 958 (1965); Lint v. Bennett, 251 Iowa 1193, 104 N.W.2d 564 (1960).

2 Kirkpatrick v. Hollowell, 197 Iowa 927, 196 N.W. 91 (1925); Authur v. Craig, 48 Iowa 264 (1878).

3 Curtis v. Bennett, 256 Iowa 1164, 131 N.W.2d 1 (1964); Woodward v. Murdock, 124 Ind. 439, 24 N.E. 1047 (1890).

4 Balkcom v. Sellers, 219 Ga. 662, 135 S.E.2d 414 (1964).

5 Osborne v. McMasters, 40 Minn. 103, 104, 41 N.W. 543, 543 (1889).

officer breach his statutory duty and was this the proximate cause of the injury?

When the prisoner is placed on parole, the state places a statutory duty on the parole officer to supervise him, and if the parolee violates any important conditions of his parole, the parole officer may issue a warrant for retaking.[6] This statutory duty requires expedition by the parole board in retaking a parolee when there is reasonable cause to believe that there has been a violation of parole conditions.[7]

It is generally recognized that courts regard paroles as an important and effective technique in the rehabilitation of those who have been imprisoned.[8] In *Swan v. State*,[9] the Maryland Court of Appeals concluded that a parolee is not expected or required to achieve immediate perfection and that parole officers should not search for unusual or irrelevant grounds to deprive the parolee of his freedom. Thus, in dealing with parole violators, the parole officer is caught in the dilemma of balancing the equities between the value of the parole in accordance with the rehabilitative aspects with the safety of the public. In *Wasserstein*, the court ruled that being truant was a major violation which warranted the retaking of the youth.

Concerning the issue of proximate cause, the court in *Wasserstein* analogized to *Daggett v. Keshner*,[10] where the court recognized the practical connection between the illegal sale of gasoline and a subsequent explosion and that but for the illegal sale the accident, in a realistic and recognizable sense, would not have happened. In *Daggett* and *Wasserstein*, the proximate cause was established by the violation of a statute. In *Wasserstein*, if the violator of the parole had been expeditiously incarcerated as the law requires, the subsequent criminal act could not have happened.

Concerning the issue of foreseeability with regard to proximate cause, the New York Court of Appeals has held that even if it was negligent to permit the escape of a prisoner who had been assigned to minimum security farm work as a privilege for a good record, the state could not have foreseen that the escape of the prisoner would have resulted in injury, and, thus, the state was not liable.[11] In *Wasserstein*, the parole officer, by ordering the reincarceration of the youth, found there was a reasonable likelihood of danger in permitting the parolee to remain at large. Thus, the *Wasserstein* case can be distinguished on the fact that the parole officer foresaw the danger.

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6 N.Y. CORREC. LAWS § 216 (McKinney Supp. 1967) provides in part:

> If the parole officer having charge of a paroled prisoner . . . shall have reasonable cause to believe that such prisoner has lapsed, or is probably about to lapse, into criminal ways or company, or has violated the conditions of his parole in any important respect, such parole officer shall report such fact to a member of the board of parole or to any officer of the division of parole designated by such board, who thereupon may issue a warrant for the retaking of such prisoner and for his temporary detention or return to a designated prison.

7 People *ex rel.* Lanza v. Jackson, 7 A.D.2d 782, 180 N.Y.S.2d 10 (1958).

8 People v. Nowak, 387 Ill. 11, 55 N.E.2d 63 (1944).

9 200 Md. 420, 90 A.2d 690 (1952).

10 284 App. Div. 733, 134 N.Y.S.2d 524 (1954).

11 Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955).

If the fact situation in *Wasserstein* were to arise in Iowa the result should be similar. Iowa law provides that the parole board shall have the power to establish and enforce rules and conditions under which paroles may be granted.[12] In Iowa when the prisoner is placed on parole he is under the supervision of a director with assurance that there is a sufficient number of parole agents to properly supervise all paroles.[13] The state places a duty on the parole agent to properly supervise the parolee and to make recommendations to the parole board for the revocation of a parole.[14] Regarding revocation of paroles the Iowa Supreme Court has stated:

> When the statutory provisions directing the board of parole to make investigations and authorizing it to find a breach of its rules and act to revoke the convict's parole in its discretion are considered in their context, we think it clear, as a matter of statutory construction, that the board was empowered to act upon the information which it had received from the various reports and investigations and to revoke the parole of the prisoner without a notice of hearing.[15]

Upon a finding that the parole board should revoke a parole, an order of the board of parole certified by its secretary is sufficient warrant for any peace officer to take into custody or return to the penitentiary any parole violator.[16]

Based on the duty imposed on the parole board to investigate, supervise and revoke paroles, any violation without legal excuse of a statute which prescribes care required under certain given conditions constitutes negligence per se.[17] Upon finding that there was a breach of duty, it can generally be said that the issue of proximate cause is for the jury.[18] Although proximate cause for the most part is a jury question, the Iowa Supreme Court has held that proximate cause is the natural, continuous and direct cause from which the injury follows and it is not necessary that this injury was foreseeable.[19]

Based on the premise that there is a statutory duty imposed on the parole board to investigate, supervise and revoke paroles, if an Iowa court would find that the proximate cause of a claimant's injury was established by the violation of a statutory duty on the part of the parole board then that court should follow the *Wasserstein* case holding the state liable in tort.

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12 IOWA CODE § 247.6 (1966).

13 IOWA CODE ANN. § 247.5 (Supp. 1968).

14 *Id.*

15 Curtis v. Bennett, 256 Iowa 1164, 1170, 131 N.W.2d 1, 4 (1964).

16 IOWA CODE § 247.11 (1966); 1922 OP. IOWA ATT'Y GEN. 316.

17 Herman v. Muhs, 256 Iowa 38, 126 N.W.2d 400 (1964); Kroblin Refrig. X Press, Inc. v. Ledvina, 256 Iowa 229, 127 N.W.2d 133 (1964); Cunningham v. Court, 248 Iowa 654, 82 N.W.2d 292 (1957); Florke v. Peterson, 245 Iowa 1031, 65 N.W.2d 372 (1954).

18 Cronk v. Iowa Power & Light Co., 258 Iowa 603, 138 N.W.2d 843 (1965).

19 Christianson v. Kramer, 255 Iowa 239, 122 N.W.2d 283 (1963); Chenoweth v. Flynn, 251 Iowa 11, 99 N.W.2d 310 (1959).

Res Ipsa Loquitur—Plaintiff Need Only Show Defendant to be in Control of Instrumentality at Time of Negligent Act in Order to Avail Himself of Res Ipsa Loquitur.—*Boyer v. Iowa High School Athletic Ass'n* (Iowa 1967).

Plaintiff, a paid spectator at a tournament basketball game under the management, supervision and direction of defendant Iowa High School Athletic Association, brought a negligence action for damages, relying on the doctrine of res ipsa loquitur. The damages were sustained immediately after the game when a section of collapsible bleachers, which were filled with spectators, either folded back toward the wall or collapsed, throwing plaintiff to the floor. The District Court entered judgment on a jury verdict for plaintiff, and the association appealed on the grounds that it did not have exclusive control over the bleachers sufficient to warrant a finding under the doctrine of res ipsa loquitur. On appeal to the Iowa Supreme Court, *Held,* affirmed. The exclusive control element necessary for the application of res ipsa loquitur is satisfied where defendant had exclusive control of the instrumentality at the time of the negligent act, although not at the time of injury. *Boyer v. Iowa High School Athletic Association,* —*Iowa*—, 152 N.W.2d 293 (1967).

Since its inception,[1] the doctrine of res ipsa loquitur[2] has burdened the courts with several problems related to its scope and application. One such problem has been the proper determination of the degree of control the defendant must exercise over the instrumentality causing the injury.[3] The origin of the problem stems from an English opinion by Chief Justice Erle whose classical explanation stated that management of the injury producing instrumentality must be under the control of defendant or his servant.[4] The control element became firmly embedded in American tort law when Dean Wigmore included control at the time of the injury as part of his formula for the application of res ipsa.[5] However, as Dean Prosser has stated, "[u]nhappily the proof of facts by facts is not capable of reduction to a formula; it has an inconvenient habit of depending always upon the facts."[6] For a time the formula method was strictly adhered to, Dean Prosser to the contrary notwithstanding, and resulted in some astounding applications of res ipsa.

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1 Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

2 Black's Law Dictionary 1470 (4th ed. 1951).

3 Prosser, *Res Ipsa Loquitur in California,* 37 Calif. L. Rev. 183, 196 (1949).

4 "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendants, that the accident arose from want of care." Scott v. London & St. Katherine Docks Co., 3 H. & C. 596, 159 Eng. Rep. 665, 667 (1865).

5 "(2) Both inspection and user must have been at the time of the injury in control of the party charged. (3) The injurious occurrence must have happened irrespective of any voluntary action at the time by the party injured." J. Wigmore, Evidence § 2509 (1st ed. 1905).

6 Prosser, *Res Ipsa Loquitur in California,* 37 Calif. L. Rev. 183, 187 (1949).