Torts: Liability of State to Members of Public Harmed by Convicts during Escapes Occasioned by Negligence of State Agents

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TORTS: LIABILITY OF STATE TO MEMBERS OF PUBLIC HARMED BY CONVICTS DURING ESCAPES OCCASIONED BY NEGLIGENCE OF STATE AGENTS.—Kennedy escaped from a minimum security prison farm in upstate New York during the temporary absence of the guard assigned to his work party. Armed with a knife, he forced Williams, a passing motorist, to drive him away from the farm. Williams died the next day of a brain hemorrhage caused by fright. The New York Court of Appeals, in Williams v. State, accepted a finding that the state was negligent in guarding and apprehending Kennedy and that Kennedy was responsible for Williams’ death. Recovery was denied Williams’ executrix, however, for want of duty by the state to Williams.

At common law, a sovereign could not be sued without its consent. Although this rule has been changed legislatively by 18 states and the Federal Government, the immunity waiver is strictly construed, and in most jurisdictions it applies only to suits in contract and in tort arising from the state’s proprietary functions. Some jurisdictions, such as California, further restrict the waiver by distinguishing between immunity from suit and immunity from liability. The California court holds that it is not enough for the legislature to waive the state’s immunity from suit in express contract and in negligence; the state also has an immunity from liability in its governmental functions which bars recovery unless there is a waiver as to liability also. A former state controller, noting that “California has not as yet seen fit to enact a statute assuming general tort liability . . .” urges that this state take “its place among modern governments and accept responsibility for damages caused by its torts . . .” If California moves in that direction, it undoubtedly will follow the trend set by New York, which waived its double immunity—from suit and liability—by the 1939 Court of Claims Act.

Williams v. State demonstrates, however, that even New York is still fettered by the common-law immunity. The case was one of first impression, leaving the court with little more guidance than the general principle that one who assumes control over the actions of another often is placed under a duty to protect third persons from the unreasonable risk of foreseeable harm from the ward. The New York court said in an earlier case that “the State—just as any other party—is responsible in the operation and management of its schools, hospitals and other institutions . . . for the hazards reasonably to be foreseen. . . .” This principle was applied in Weihs v. State, where liability was imposed on the state for an assault on a member of the public committed by a state mental patient after escaping.

The Court of Claims (trial court) in the principal case gave Williams’ executrix
judgment for $16,826.30, without discussing duty or proximate cause.\textsuperscript{14} The appellate division of the Supreme Court affirmed that judgment by a divided court.\textsuperscript{15} The dissent was based on a failure of the evidence to support findings of negligence by the state or of Kennedy's use of force against Williams. The minority judges also were reluctant to impose liability for negligence where the harm suffered was caused entirely by fright.

The Court of Appeals relied on \textit{Palsgraf v. Long Island R. Co.}\textsuperscript{16} for its unanimous decision denying liability and reversing the judgment for the claimant. The court stated there is no liability without duty and there was no duty to protect members of the public from the risk of exposure to Kennedy. There was no duty because Kennedy was being punished, not restrained, and his record was not such as to make his assault otherwise foreseeable.

The court distinguished the \textit{Weihs} case. There can be two bases for confinement—restraint and punishment—and they give rise to different duties toward the public. When the purpose is restraint, the court said, there is a duty to the public to protect it from harm. The primary duty of the jailer to the public is to see that the criminal pays his debt to society. In addition, however, the individual's known propensities must be considered. The criminal with a long record of violence could be the subject of both punishment and restraint. Such was not the case here, the court found. The mental patient in the \textit{Weihs} case was being restrained, further, he was known to be assaultive and prone to escape. The convict Kennedy was being punished (for a toy pistol robbery) and "... nothing in Kennedy's record... gave any indication that he was likely to wander from the prison and assault members of the public."\textsuperscript{17}

The distinction between punishment and restraint, as one method of determining duty to Williams, is valid within limits. But the court failed to recognize an important limitation. At all times during which the duty to restrain exists, the restrained person is a menace to society. He should not be exposed to the public until he is rehabilitated, and escape by him is an exposure before rehabilitation. Thus during the entire period of his absence from confinement, that is, until he is recaptured, he is a menace to the public. In contrast, one who is confined merely for punishment, and who does not have assaultive propensities, may not be such a menace once he has perfected his escape. But in effecting the escape, or upon being recaptured, assaultive actions are readily foreseeable. With possible freedom from confinement in the offing, the escapee is quite likely to use force and endanger the lives and property of those who stand in his way. The escape itself, aside from the purpose of confinement or the escapee's history, creates a foreseeable risk of harm to members of the public. (The same, of course, can be said about the reapprehension of the escapee.) In the instant case, it is significant that Kennedy used Williams in order to flee the prison; the assault was clearly related to the escape.

It matters little, then, that the purpose of Kennedy's confinement was punishment, or that his record was not one of violence. The foreseeable risk of harm to the public lies in the escape itself and is independent of the purpose of confinement or the individual's known propensities. Assuming that Kennedy's escape was foreseeable, the great risk of harm to members of the public, such as Williams, follows as a matter of course. The court did not dwell on the foreseeability of Kennedy's escape, undoubtedly for the reason that most anyone confined against his will

\textsuperscript{14} 204 Misc. 843, 126 N.Y.S.2d 324 (1955).
\textsuperscript{16} 248 N.Y. 339, 162 N.E. 99 (1928).
\textsuperscript{17} See note 1 supra at 556, 127 N.E.2d at 550.