



around him — students, roommates, and strangers, young and old, both in Nacogdoches and Houston — many, many times. With what we all know now, it was probably a mistake for Dixon not to have been locked away long before Elizabeth Peavy’s tragic, senseless death.

But that mistake, if indeed it was one, was the State’s. If Dixon was a lost cause, it was for the State to decide to lock him up. It was the state district court that made the decision to commit Dixon to the custody of the Authority, and it was the Authority, a local governmental entity exercising powers delegated by the State Board of Mental Health and Mental Retardation,<sup>1</sup> that made the decision to place Dixon at Lakewood House, the “least restrictive habilitation setting”, the setting to which Dixon was statutorily entitled.<sup>2</sup> These decisions were made in the salutary hope that Dixon’s would not be another life wasted in prison, a hope the State has for all others in his shoes. At Lakewood House, Dixon was not an unusual case. He was, according to one social worker, “pretty much the same” as the other five mentally retarded boys placed in Lakewood House. He was “not the leading trouble-maker”, another testified. He was, in short, typical of many if not most mentally retarded juvenile delinquents who have found it beyond themselves to refrain from violence. To keep society perfectly safe from such potential malefactors, the State would have no choice but to incarcerate them — Dixon, to be sure, but also everyone else like Dixon. Texas has tried incarceration first and habilitation later, or never. Currently, its policy is to first try to habilitate.

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<sup>1</sup> See TEX. HEALTH & SAFETY CODE §§ 531.002(11), 533.035.

<sup>2</sup> See TEX. HEALTH & SAFETY CODE § 592.032 (formerly TEX. REV. CIV. STAT. ANN. art. 5547-300, § 15).

To that end, the State has chosen to employ private residential intermediate care facilities (“ICF-MR”) like Lakewood House, a neighborhood home owned and operated by Texas Home Management, Inc. Like all operators of such homes in Texas, THM was licensed by the State<sup>3</sup> and governed by a written contract with the Department of Human Services and by extensive state<sup>4</sup> and federal regulations.<sup>5</sup> The Court says that THM agreed to provide for Dixon’s “care, training, and treatment” and thereby to control him. To be exact, in the Department’s standard form contract, THM agreed

[t]o provide room and board, institutional services and medical and active treatment in accordance with the Department’s standards for participation and regulations published in the *Texas Register* applicable to the ICF-MR program to residents found by the Department to be eligible for such services . . . .

“Active treatment,” is a term defined by state regulations and means:

Continuous aggressive, consistent implementation of a program of habilitation, specialized and generic training, treatment, health services, and related services. The program must be directed toward:

(A) the acquisition or maintenance of the behaviors necessary for the individual to function with as much self-determination and independence as possible; and

(B) the prevention or deceleration of regression or loss of current optimal functional status. Active treatment does not include services to maintain generally independent individuals who are able to function with little supervision or in the absence of a continuous active treatment program.<sup>6</sup>

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<sup>3</sup> TEX. HEALTH & SAFETY CODE § 252.031.

<sup>4</sup> See 16 Tex. Reg. 714 (Feb. 8, 1991), 16 Tex. Reg. 3525 (June 25, 1991) (formerly codified as 40 TEX. ADMIN. CODE ch. 27 (1994)).

<sup>5</sup> See 42 C.F.R. pt. 483 (1994).

<sup>6</sup> 16 Tex. Reg. 714, 735 (Feb. 8, 1991) (formerly 40 TEX. ADMIN. CODE § 27.503 (1994)).

Nothing in the standard form agreement or in any of the voluminous state and federal regulations governing intermediate care facilities suggests in any way that such facilities must assume liability for residents' misconduct, thereby shifting those risks of habilitation from the State who has chosen to undertake them as a matter of policy to the private facilities it has employed to care for residents. Indeed, facilities are permitted to charge only for very specific services and none other, and are obliged to accept as full payment for all such services the amounts prescribed by set governmental schedules. Nothing in the contract or regulations permits a facility to charge for the risk that a resident will repeat the violent or unlawful behavior that landed him in the facility in the first place. There is no reason to think that intermediate care facilities for mentally retarded juvenile delinquents are any more willing to assume liabilities for which they are forbidden compensation than any other service provider would be. Certainly, the State could not force facilities to render care without compensation.

But by today's decision the Court does just that. It forces liability on intermediate care providers that are not and cannot be compensated for the risk of that liability. In so doing, the Court undermines the State's policy of habilitation of mentally retarded juvenile delinquents. Care providers unwilling to risk such liability will withdraw from the market, leaving the State with fewer providers from which to choose. Unless the risks of liability can be lowered, or the compensation for services increased, the ability of private facilities to provide necessary services impairs State policy.

Both to justify this anti-public-policy rule, and also apparently to try to limit it, the Court imposes two conditions on its application: a facility must reasonably know that a resident "presents

a danger to third parties,”<sup>7</sup> and a facility must have assumed responsibility for “control” of the resident. The first condition is always met. The “danger”, keep in mind, is not merely the risk that a resident will commit murder, something that is highly unlikely; “danger” includes the risk that a resident will harm *in any way*, something that for many residents is next to certain. THM can argue convincingly that it had no way of knowing that Dixon would commit murder, but it cannot thereby avoid liability, for it can never claim with a straight face that it had no idea that Dixon presented a danger to third parties. Within months after the district court found that Dixon was not dangerous, THM found that he was. All the time he was placed at Lakewood House, Dixon was never anything *other* than a danger to third parties. He regularly assaulted schoolmates, roommates, and others he encountered in Nacogdoches, cut one of them with a piece of glass, and pulled a gun on a man in Houston. It is no use for THM to argue that it had no reason to believe Dixon was murderous. The Court’s rule creates liability for all the harm Dixon caused if THM knew that Dixon was dangerous *to anyone*. Nor can it be expected that THM’s position is unique in this regard. Every intermediate care facility for mentally retarded delinquents is in exactly the same position. Every one of them knows full well that some if not all of their residents are dangerous to third parties. The very reason care is being provided is to try to reduce or remove that danger and restore the residents to acceptable community life.

It must be stressed that the Court’s rule would make THM liable not only for Elizabeth Peavy’s tragic death, but for every assault Dixon ever committed. This is a tragic and one would hope extraordinary case, but the rule announced applies whenever a facility knows that a resident

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<sup>7</sup> *Ante* at \_\_\_\_.

is dangerous. THM may be liable to the person Dixon assaulted with a gun, the person he cut with a piece of glass, the numerous people he assaulted, even to Dixon's mother for the damage he did to her car.

On the other hand, the Court's second condition, "control", can never be met with respect to intermediate care facilities if control means anything significant. The Court has not found a single word in the standard form contract that either authorized or obligated THM to control its residents, and in fact none exists. State regulations provided that "[n]o participating facility may . . . prohibit[] an individual from leaving the facility at will except as provided by state law".<sup>8</sup> All this means, the Court says, is that visits home are "generally favor[ed]" but not "expressly require[d]."<sup>9</sup> A state statute required that "[e]ach client has the right to live in the least restrictive habilitation setting and to be treated and served in the least intrusive manner appropriate to the client's individual needs."<sup>10</sup> This means, in the Court's view, that clients can be locked up if necessary. Federal regulations stated that every resident had "the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience"<sup>11</sup> and from "verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion."<sup>12</sup> This means, according to the Court, that unruly residents can be restrained or punished if appropriate. The summary judgment record establishes

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<sup>8</sup> 16 Tex. Reg. 3525, 3527 (June 25, 1991) (formerly 40 TEX. ADMIN CODE § 27.201 (c)(6)).

<sup>9</sup> *Ante* at \_\_\_\_.

<sup>10</sup> TEX. HEALTH & SAFETY CODE § 592.032 (formerly TEX. REV. CIV. STAT. ANN. art. 5547-300, § 15).

<sup>11</sup> 42 C.F.R. § 483.13(a) (1994).

<sup>12</sup> 42 C.F.R. § 483.13(b) (1994).

that Lakewood House had no security gates or locked doors. It was a four-bedroom, two-bathroom home in a residential neighborhood, like any other house on the block except that it had a staff member present around the clock. It was not designed to confine residents at least in part because confinement was illegal. On the contrary, state regulations mandated that facilities allow residents an unlimited number of “therapeutic visits”,<sup>13</sup> defined as three-day absences from the residence for therapeutic purposes, such as weekend trips to home and family,<sup>14</sup> and some extended, ten-day therapeutic visits.<sup>15</sup> Somewhat more broadly, federal regulations required facilities to “[p]romote frequent and informal leaves from the facility or visits, trips, or vacations”.<sup>16</sup> The Court dismisses state regulations requiring therapeutic visits as simply authorizing payment to the facility for periods when residents are away, but the words themselves cannot fairly be so limited.

THM could not confine Dixon to Lakewood House or even to Nacogdoches. Legally, THM could not even confine Dixon to his room and make him stay there. He could leave Lakewood House any time he wanted, and if he did, THM had but one alternative: to abandon hope for habilitation and release him because of “maladaptive behavior” — in the bureaucratic language of

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<sup>13</sup> 16 Tex. Reg. 3525, 3535 (June 25, 1991) (formerly 40 TEX. ADMIN. CODE § 27.519(b)(3) (“Each individual is permitted an unlimited number of therapeutic visits per calendar year.”).

<sup>14</sup> *Id.* at 3534 (formerly 40 TEX. ADMIN. CODE § 27.519(a)(3) (“Therapeutic visit — An individual’s absence from a facility for as many as three consecutive days for therapeutic purposes.”).

<sup>15</sup> *Id.* at 3534-3535 (formerly 40 TEX. ADMIN. CODE § 27.519(a)(3), (b)(1) (“The individual program plan must provide for therapeutic or extended therapeutic visits or both”, the latter being defined as “[a]n individual’s absence from a facility for as many as 10 consecutive days for therapeutic purposes.”).

<sup>16</sup> 42 C.F.R. § 483.420(c)(5) (1994).

the state regulations<sup>17</sup> — in effect returning him to the juvenile court for punishment.<sup>18</sup> This authority given THM to continue to try to treat Dixon or else give up is what the Court calls “control” for which THM may be liable.

We have never before called something like THM’s authority over Dixon “control”. We have held that an employer who sends an intoxicated employee home has exercised such control over him so as to be liable for any accident he causes along the way,<sup>19</sup> and a vacuum manufacturer who requires salesmen to go into homes has exercised control over them so as to be liable for their sexual assaults of homeowners.<sup>20</sup> But we have also held that a taxicab company does not exercise such control over its drivers so as to be liable for their shooting other motorists.<sup>21</sup> And closer to the facts of the case before us, we have held that a physician does not exercise such control over a patient’s treatment as to render him liable to hospital employees for the patient’s violence,<sup>22</sup> nor does a psychiatrist exercise such control over a patient as to render him liable for the patient’s murder of his stepfather.<sup>23</sup> The Court dismisses these last two cases as “not analogous” because both involved

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<sup>17</sup> 16 Tex. Reg. 3525, 3540 (June 25, 1991) (formerly 40 TEX. ADMIN. CODE § 27.707(c)(3)).

<sup>18</sup> See former TEX. FAM. CODE § 55.03 (e) (previously designated (d)), originally enacted, Act of May 24, 1973, 63rd Leg., R.S., ch. 544, § 1, 1973 Tex. Gen. Laws 1460, 1482, and repealed as amended by Act of May 24, 1999, 76th Leg. R.S., ch. 1477, § 14, 1999 Tex. Gen. Laws 5067, 5075 (amending acts omitted). See now TEX. FAM. CODE §§ 55.31 -44.

<sup>19</sup> *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983).

<sup>20</sup> *Read v. Scott Fetzer Co.*, 990 S.W.2d 732 (Tex. 1998).

<sup>21</sup> *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523 (Tex. 1990).

<sup>22</sup> *Van Horn v. Chambers*, 970 S.W.2d 542 (Tex. 1998).

<sup>23</sup> *Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999).

doctor-patient relationships. The question remains: if a doctor is not liable for his patient's assault of hospital employees allegedly due to the doctor's failure to prescribe the appropriate treatment for the patient, treatment that would have kept the patient from violence, how can it be that an intermediate care facility is liable for a resident's violent conduct when the facility had no legal right or practical way to stop the resident?

The Court concludes that THM did not establish its lack of a duty as a matter of law, though the material facts are not in dispute here. THM's staff kept detailed notes on Dixon's daily activities. All the misconduct the Court recites is taken from THM's notes. From THM's records, not only *could* a jury find that THM should have known that Dixon was dangerous, no jury could reasonably disagree. Dixon hurt people and broke the law, repeatedly. THM's only control over the situation was to continue to try to habilitate Dixon or abandon him to the penal system. In choosing the former, THM was following the policy of the State of Texas that called for removing mentally retarded youths from the criminal justice system and placing them with private homes in the least restrictive settings appropriate. Intermediate care facilities, whose only purpose is to restore young lives, do not make the State's policy and cannot fairly be made responsible for its unattained hopes.

The concurring opinion would hold that THM had a duty to report Dixon's misconduct to the State and that a fact question remains whether it did so. The opinion seems not to notice that almost everything we know about Dixon's misconduct preceding the murder, recited in both the Court's opinion and the concurring opinion, was contained in THM's detailed reports to the State. It is not clear what else THM should have reported. Furthermore, the opinion points out that the

State undertook to make its own review of Dixon's progress every 180 days. There is nothing before us to suggest that the State did not know full well what progress Dixon had made and what problems persisted.

On this record, should THM reasonably have foreseen that Dixon would commit murder? Absolutely not, no more than Elizabeth Peavy should have foreseen that she might be assaulted at a convenience store. This case is about the loss of two lives, not just one. Elizabeth Peavy is dead. Dixon stood trial for capital murder and was convicted and sentenced to life in prison. Neither loss was the fault of a home for retarded boys. Today's decision does not redress tragedy; it repeats tragedy.

I would affirm the trial court's summary judgment. Accordingly, I respectfully dissent.

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Nathan L. Hecht  
Justice

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