RECENT TORT LAW DECISIONS AND THEIR IMPLICATIONS FOR STUDENT RISK MANAGEMENT

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In recent decisions involving complaints filed by students and their families, courts have reinforced the need for colleges and universities to provide and promote a safe learning environment. For the most part, courts applied traditional theories of tort law to resolve those claims. The issue in many of these cases has been the degree to which colleges and universities owe a duty of protection to students and others as they participate in campus life.

Student claims filed against colleges and universities allege a variety of injuries and involve numerous legal theories. This paper will focus on three broad categories of cases: those that involve alcohol, those that involve allegations of negligent advising or supervision of students or student groups, and those that involve college student suicide. These areas have been selected because each year similar cases result in injuries and death to students and litigation for colleges and universities. They have also been selected because these areas lend themselves to positive risk management strategies that will decrease the likelihood of serious injuries, improve the educational environment, provide important educational opportunities for students to share responsibility for risk management, and reduce potential liability claims against institutions. The reader is

encouraged to review the materials in this volume authored by Kim Novak for a detailed discussed of effective student risk management strategies.

ALCOHOL

Numerous recent cases have involved circumstances in which injuries occurred as a result of, or coincident with, student drinking. In these cases, students were injured in numerous ways, including: car accidents, assaults, falling, drowning, and through the physical effects of excess consumption.

The first three cases involve students who were injured or died in car accidents following drinking at campus or fraternity related events. In each case, the student who was injured or died had been drinking. In two of the cases, other individuals who had been drinking caused the accidents. In the first two cases, the courts found that the university or fraternity involved owed a duty of care to the student. In the third case, the fraternity and sorority defendants were not liable due to a Kentucky state statute that created immunity from liability for social hosts that serve alcohol. In each case it appears that better management of the events (by the participants and others) could have prevented the injuries.

McClure v. Fairfield University[1] involved a student who was injured when he was struck by a car driven by another student. The accident occurred in an area between the university and a popular off-campus drinking destination called "the beach" at which both students had been drinking. The student alleged that the university was negligent because it failed to enforce rules regarding alcohol consumption and it failed to provide adequate transportation between the campus and the beach. The university moved for

[1] 2003 Conn. Super. LEXIS 1778 (Conn. Super., 2003).

summary judgment on the ground that it had no duty to protect a student returning from a private off-campus party that it did not sponsor or sanction.

The court denied the university's motion for summary judgment. It found that the university knew that students regularly drank at the beach, and opined that the strict non-alcohol policy on campus may have "encouraged students to go to the beach area in order to drink alcohol."[2]

The court also found support for a duty on the part of the university by virtue of the fact that the university had a "Safe-Rides" program in which student volunteers used university-owned vans to provide rides to students between the campus and the beach on Thursday, Friday and Saturday nights. The service, however, did not run if student volunteers were not available to drive. The court cited Restatement § 323 for the proposition that one may be held negligent if one voluntarily elects to provide a service for the protection of another, and the harm to be protected against results either from negligent performance of the service or from failure to exercise reasonable care. By offering the shuttle service, the court found that the university had assumed a duty to protect students traveling between the campus and the beach.

In *Carneyhan v. Thomas,*[3] a student who had been drinking at a fraternity event died in a single vehicle automobile accident following the event. The trial court granted summary judgment for the fraternity. The court of appeals agreed that the national fraternity was not liable under a theory of *respondeat superior* for the action of its chapter because no agency relationship existed in the absence of evidence that the national had any supervisory role over the social activities of its members.

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[2] *Id.* at 22.
[3] 2003 Ky.App. LEXIS 23 (Ky. App., 2003).

The appellate court found another basis, however, for holding that the national fraternity had a duty to the student. Drinking at the local chapter was a common activity and the national reasonably anticipated the sale of alcohol as a means for local clubs to produce income. In fact, the national sent literature to local chapters about how to maximize profit from selling alcohol. Because the risks associated with serving alcohol were clear, and the organization encouraged the sale of alcohol, it had a duty of reasonable care to control the activity. The court remanded the case for trial to determine whether the fraternity had met its duty.

In the third case, *Estate of Vosnick v. RRJC, Inc.,*[4] the parents of a student pledging a fraternity sued the fraternity and a sorority that sponsored a party at a local bar after their son was killed in an automobile accident. The decedent and a member of the fraternity (the driver of the car) participated in a hazing ritual at the bar that involved consuming large amounts of alcohol. Although the decedent was not of legal drinking age, the driver was. The Kentucky state court granted motions for summary judgment on behalf of the fraternity and sorority. In dismissing the claims against these parties, the court relied on the fact that the driver was of legal drinking age to find that the fraternity and sorority were not liable because they were protected by the state's social host immunity law.

The next several cases involve students who were injured or killed in connection with other activities during or following drinking. One student was criminally assaulted, one fell from a window, one drowned after jumping from high cliffs at a local swimming spot, and one was hospitalized after excessive alcohol consumption. Each of these victims had been drinking immediately prior to the incidents. The facts of each case

suggest that the magnitude of the harm could have been prevented or reduced had the students not been drinking.

Ostrander v. Duggan[5] involved a claim by a student who alleged that she was drugged and sexually assaulted by a member of a fraternity inside a house located adjacent to a fraternity chapter house but leased to 11 individual fraternity members. The student victim sued the individual member who assaulted her, the national fraternity, and the university. The district court granted summary judgment for the university and the national fraternity. The appeals court affirmed on the grounds that the student had not established that the university or the fraternity had the level of control of the adjacent house necessary for a premises liability claim. The court also found that the student failed to show that either party had actual knowledge of the sexual abuse or was deliberately indifferent to complaints of sexual violence.

In *Brakeman v. Theta Lambda Chapter of Pi Kappa Alpha,*[6] a student who was injured by falling out of an upstairs window at a fraternity party at a local bar, sued the fraternity on a theory of premises liability. Following a jury verdict for the student, the fraternity moved for directed verdict, arguing that it did not have control of the premises. The trial court denied the motion and entered judgment for the student. The court of appeals reversed. It held that the student failed to establish that the fraternity had the control necessary to be considered a possessor of the land, an element necessary for a finding of premises liability. It was influenced by the fact that the bar staff remained on the premises, the staff took the responsibility to determine whether drinkers were of legal age and they retained the discretion to shut down the party.

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[4] 225 F.Supp.2d 737 (U.S. Dist., 2002).
[5] 341 F.3d 745 (U.S. App., 2003.)

In *Rocha v. Galtys,*[7] the family of a deceased student sued after their 21-year-old son drowned. After drinking beer at a fraternity crawfish boil, he joined other fraternity members at a local swimming spot. Encouraged by other members, he dove from cliffs in to the water and drowned. His parents sued the fraternity for wrongful death. The trial court granted summary judgment for the fraternity, finding that it owed no duty to the student and did not find any evidence that the trip to the swimming spot was organized or planned by the fraternity. The court held that simply because a group of individuals who were members of an organization went together on a social outing, that alone did not make the outing an activity of the organization.[8]

In *Prime v. Beta Gamma Chapter of Pi Kappa Alpha,*[9] a student sued for medical expenses he incurred as a result of hospitalization following drinking at a fraternity event. The student had been encouraged but not required to drink. He drank until he lost consciousness and was taken to a local hospital with a blood alcohol level of .294. Fortunately, he did not suffer any permanent injuries. The trial court dismissed the claim against the fraternity as it was an unincorporated association and not a legal entity for the purpose of suit. It dismissed the claim against the individual members on the grounds that the student drank voluntarily. It dismissed the claim against the landlord of the fraternity house because no evidence was admitted to show that he knew of the excessive use of alcohol on the premises. The court of appeals affirmed.

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[6] 2002 Iowa App. LEXIS 1258 (Iowa App., 2002).
[7] 69 S.W.3d 315 (Tex. App., 2002).
[8] *Id.* at 323.
[9] 273 Kan. 828 (Kan., 2002).

ADVISING AND SUPERVISION

The cases in the next section allege that the college or university failed to properly supervise student activities. The cases arose in a variety of contexts: academic activities: campus housing, fraternity hazing, student organization or recreational activities, and a significant number arose in sports related incidents.

In *Fu v. State,*[10] a graduate student sued the university for injuries sustained in a lab explosion. The student argued that negligent supervision by his dissertation chair was the cause of the explosion. The university argued that the chair did not have a legal duty with regard to the explosion in question and that even if there had been a duty, it was not breached. The trial court found for the university and the student appealed. The appellate court held that the chair did have a duty to supervise, and that he breached that duty, but the court did not find adequate evidence on the issue of causation. The chair had not instructed the student to perform this experiment, and the student was aware of dangers associated with the experiment. The record supported the finding that the chair could not have foreseen that the student would conduct the experiment as performed, by carrying an unstable solution in a hazardous and reckless manner, disregarding applicable safety procedures and warnings.

In *Stockinger v. Feather River Community College,*[11] an injured student alleged negligence on the part of the college in planning and supervising an assignment in a class designed to train guides for horse packing trips. The assignment required groups of students to find suitable camping locations, to draw a map of them and to write a summary. Students were told they could walk, drive or ride horses; the instructor did not

[10] 263 Neb. 848 (Neb., 2002).
[11] 111 Cal.App.4th 1014 (Cal. App., 2003).

provide transportation for the off-campus project and did not control or supervise the groups. The student rode in the bed of a pick-up truck driven by another student and was injured when thrown from the truck during a collision. The appellate court affirmed summary judgment for the university, relying on a California law that limits liability of the community college district when students are not on school property. The law generally provides for immunity for off-campus activities of students but says that the community college may be liable if the student is or should be under the immediate and direct supervision of a district employee during the activity. The court held that as a general rule, a college may require college students to complete an off-campus assignment without assuming a duty of care with respect to the mode of transportation selected by the students."[12]

Severson v. Board of Trustees of Purdue University,[13] involved a freshman student who murdered a resident advisor. The parents of the deceased student sued the university, its board of trustees, four university employees and law enforcement agencies and officers who were investigating the student's alleged drug dealing. The court of appeals affirmed the finding of the trial court that none of the defendants were liable under the legal theories put forth by the plaintiff. The court concluded that none of the defendants had the duty to protect the student against the criminal acts of a third party. It did not find a duty owed under the theory of premises liability and it did not find that any of the defendants gratuitously assumed a duty to protect the resident assistant from the freshman.

[12] *Id.* at 1018.
[13] 777 N.E.2d 1181 (Ind.App., 2002).

In *Kenner v. Kappa Alpha Psi Fraternity, Inc.,*[14] a student initiate sued the national fraternity and others (but not his university) after he was beaten over 200 times with a paddle, causing him to suffer renal failure and seizures. The trial court held that the fraternity owed no duty to the initiate because its relationship to him was *de minimus*. The appellate court disagreed. It found a contractual relationship as a result of the initiate's payment of a membership fee. It also applied a duty analysis, looking at the social utility of the fraternity's efforts to stop hazing, the foreseeable nature of the harm, and the public interest in preventing injuries to initiates, and concluded that that the fraternity and the officials owed a duty to the student. The appellate court upheld the summary judgment for the fraternity, however, because the student failed to establish even a *prima facie* case of negligence because he did not provide any evidence to support that the fraternity breached its duty. The student established the necessary element of both duty and breach with respect to the chapter advisor, however, who admitted he attended a membership "interest meeting" but failed to discuss hazing or any of the fraternity's policies relating to hazing. Additionally, expert testimony opined that had the advisor been more involved in the membership process, the plaintiff would not have sustained his injuries.

In *Rigdon v. Kappa Alpha Fraternity,*[15] a guest at a fraternity party repeatedly punched a student in the face until she lost consciousness. The injured student sued the fraternity and the university for failing to provide adequate security. The trial court found, and the court of appeals agreed, that the because the student's injuries were caused by the unforeseeable criminal act of the second guest, that as a matter of law, neither the

[14] 2002 PA Super. 197 (Pa. Super., 2002).
[15] 256 Ga.App. 499 (Ga. App., 2002).

fraternity nor the university were liable for her injuries. The court held that earlier instances of misconduct at the party (e.g., someone threw a drink at the student) did not render this attack foreseeable.

Scanlan v. Texas A & M University[16] arose from the death of 12 students, and the injury of 27 others, in the collapse of a bonfire stack they were building. Bonfire victims and their representatives alleged that the university acted negligently and deprived the victims of substantive due process rights by acting with deliberate indifference to the state created danger that killed or injured them. The district court dismissed the claims against the university on Eleventh Amendment immunity grounds. The court of appeals reversed, holding that the district court erroneously deferred to the findings of a commission created by the university rather than presenting questions of material fact to a trier of fact. The case was remanded to the district court for further proceedings.

In *Texas A & M University v. Bishop,* a student sued for injuries he sustained while performing in a play. He was injured when stabbed with a real knife that was used as a prop. The district court granted judgment for the student, and the university appealed. The appellate court found evidence to support that the faculty advisors were paid employees and that the university encouraged faculty to serve as advisors for student organizations. The decision by the advisors to use a real knife involved professional or occupational discretion, not government discretion, so was not subject to governmental immunity.

The next four cases highlight the risks associated with athletics activities and the need for competent and careful supervision. In the first two cases discussed below, the plaintiffs alleged that the students received inadequate medical care following their

injuries. In the last two cases, the injuries were caused by other athletes acting inappropriately. Again, each case suggests that additional effective risk management could have prevented or better addressed the student's injury without adding unreasonable expense or compromising the activity.

In *King v. University of Indianapolis*[17] a student died after suffering heat stroke during football practice. His mother alleged that his death was due to negligent treatment by the defendant. The university responded that any negligence was not actionable because the student voluntarily assumed the risk of participating in football-related activities. The court held that although the student signed a form in which he assumed the risks inherent in football, he did not assume the risk of defendant's negligence. In addition, the court held that further factual inquiry was necessary to determine whether the student was aware of, appreciated and voluntarily accepted the specific risk involved.

In *Avila v. Citrus Community College District,*[18] a student athlete was hit in the head with a pitch during a baseball game. The hosting school did not summon medical assistance and took no action as a result of the injury. The student sued. The trial court held that the school was immune from liability under state law and that it owed no duty to supervise the game. The court of appeals reversed on both issues. The court found that the immunity statute did not extend to school sponsored and school supported sporting events. It also found in favor of a duty to protect students from foreseeable harm and that harm in this case was foreseeable from the lack of supervision at the game. It also found that the failure of the coaches to act to obtain appropriate medical care contributed to the injury.

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[16] 343 F.3d 533 (U.S. App., 2003).
[17] 2002 U.S. Dist. LEXIS 19070 (U.S. Dist., 2002).

In *Kavanagh v. Trs. Of Boston University,*[19] a player sued for injuries he sustained by being punched during an intercollegiate basketball game. He alleged that the university was vicariously liable for the conduct of its "scholarship athlete." The appellate court held that a scholarship athlete would not be treated as an employee or servant of the school for the purpose of *respondeat superior* liability. The court also dismissed the student's argument that the university has a special relationship under which it had a duty to protect him. The court held that the doctrine of special relationship could not be used to apply to the opposing school. It also found no evidence of foreseeability because the student who threw the punch did not have a history suggestive of violence, on or off the court.

Gilbert v. Seton Hall University[20] involved a claim by a student who was injured in a rugby match. The opposing team was an unsanctioned team whose members drank beer during the match. The court denied the motion of the opposing team's coach for summary judgment on the grounds that issues of fact remained regarding the team's unsanctioned status, the beer, the referee, and the field markings.

The above cases highlight the possible problems that may arise if students are not adequately supervised. The problems associated with students who engage in self-harm or who threaten to harm themselves provide a special challenge as they require colleges and universities to balance student independence and privacy against the need to intervene for the safety of the student and others.

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[18] 111 Cal. App. 4th 1014 (Cal. App., 2003).
[19] 440 Mass. 195 (Mass., 2003).
[20] 2001 U.S. Dist. LEXIS 21833 (U.S. Dist., 2001).

SUICIDE

Mental health professionals, advocacy organizations, and recent news reports have done much to draw attention to the tragedy of college student suicide. In 2000, an M.I.T. student took her life. The lawsuit filed by her parents has received national attention but has not yet been resolved.[21] Recent suicides at N.Y.U. have also received coverage in the press.[22] These stories received national coverage, raising the questions of the appropriate roles of students, families and universities in reducing the risk of these incidents. A recent lawsuit arising from a student suicide at Ferrum College is instructive both in terms of the court's ruling on a preliminary motion and on the reported tone of the parties' settlement.

Schieszler v. Ferrum College[23] arose from the suicide of a freshman student in his residence hall room. The student's aunt sued the college, a dean, a counselor, and a resident assistant for negligence. The student had some conduct issues during the fall semester, resulting in required anger management. During the spring semester, the student had an argument with his girlfriend. He told her that he planned to hang himself with his belt. This was reported to the resident assistant and the campus police. Upon investigation, they found him in his room with bruises on his head. The dean of student affairs intervened and required the student to sign a statement that he would not hurt himself.[24]

A few days later the student wrote another note to a friend telling him to tell his girlfriend that he would always love her. This was reported to the girlfriend, who told the

[21] The Chronicle of Higher Education, E. Farrell, *A Suicide and Its Aftermath: An MIT Sophomore's Death underscores the Balancing Act between Student's Privacy and Administrators' Obligations.* 5/24/2002.
[22] New York Times, *In College and In Despair,* 10/26/2003.
[23] 236 F.Supp.2d 602, 2002 U.S. Dist. LEXIS 25852 (W. Dist. Va. 2002).

university representatives. They refused to allow her to return to the student's room and the university took no further action. After the girlfriend reported another note that said "only God can help me now," university representatives went to the student's room and found that the student had hung himself with his belt.[25]

The student's aunt and guardian filed a wrongful death suit against the college, the dean and the resident assistant. She alleged that they knew that the student was likely to harm himself and were negligent in failing to take adequate precautions to prevent his death. The college defendants moved for summary judgment on the grounds that as a matter of law they could not be liable because the student's suicide was an unlawful act, they had no legal duty to prevent the student's death, and his death by suicide was not foreseeable.

The court rejected the college's motion for summary judgment. It found that the case should go forward for additional fact-finding on the issues of duty, breach and proximate cause. Before the case reached a decision on the merits, however, the parties settled. One of the reported terms of the settlement was that the parties agreed to shared responsibility

This case highlights a new trend in cases involving suicide. No longer can colleges or universities deny any duty to students who are in distress. Notably, however, the court specifically mentioned that in addition to failing to supervise the student after he had made threats of self-harm, the college also failed to notify the student's guardian. The issue of parental notification has been in the center of the controversy in the recent

[24] *Id.* at 605.
[25] *Id.*

discussions of college student suicide.[26] In developing risk management strategies for assist students in distress, colleges and universities would be well-advised to include a conscious and thoughtful consideration of parental notification in appropriate cases. If parental notification is not appropriate or desirable given individual circumstances, perhaps the student can assist in notifying another adult or professional who can provide personal support and who is in a position to provide information to the institution about the student's condition outside of school. The model of shared responsibility works the best when the parties engage in meaningful communication regarding student high-risk behavior.

CONCLUSION

Increasingly courts are finding that colleges and universities have a duty to students to provide a safe and healthy educational environment. Many institutions have adopted policies and taken important steps toward managing the risks inherent in student life. The cases discussed above reinforce the need to take a comprehensive and holistic approach to managing risk. The time for asserting a model of shared responsibility is not during the lawsuit or after a student is injured or killed. This dialogue must begin at the earliest stages of event consideration and planning.

[26] *See also,* Stetson Law Review, P. Lake and N. Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-inflicted Injury,* Vol. 32(1), 125-157.