Law and Campus Violence

Darby Dickerson, John Marshall Law School
Chapter 9

LAW AND CAMPUS VIOLENCE

DARBY DICKERSON

Although the law can rarely be used to cure violence, it can be an important and effective part of the treatment regime. But to be used effectively, universities and their officials must learn to view the law as a tool that empowers them to use their professional judgment and discretion, and not a force to be feared and avoided. By understanding the law and messages that courts are sending to the higher education community, we can use the law as a positive force in our request to control campus violence.

NEGligence ACTIONS

Violence enters our campuses in myriad ways, but this chapter will address student-on-student violence, because students tend to be both the primary victims and perpetrators of on-campus crime. As noted in earlier chapters, students may pose a danger to others in different ways: some threaten to injure others, some intentionally injure others without warning, and others bully or stalk. When a student is injured or killed as the result of another student’s conduct, suits filed against the university frequently sound in tort.

A “tort” refers to a wrongful act or omission that injures another’s person, property, or reputation, and for which the injured party is entitled to compensation. A “tort” is a civil action—as opposed to a criminal action—and usually occurs when no contract on the subject exists between the parties. “Torts,” as an area of law, is sometimes informally referred to as “the law of accidents and injuries,” and encompasses a wide variety of situations including automobile accidents, slip-and-falls, defamation, product liability, and fraud. Two broad categories of torts are “intentional torts”—which include causes of action like assault and false imprisonment in which the alleged wrongdoing intends to cause harm to another—and “negligence,” in which the alleged wrongdoing did not intend to cause the harm suffered.

In the university situation-based, most tort actions are negligence: negligent supervision, negligent failure to provide security, and negligent failure to warn, to name just a few. In a negligence action, the plaintiff—often the injured student or the deceased stu-
dent's parents or estate—bears the burden of proving that (1) the university or its officials owed the plaintiff a duty, (2) that they breached that duty, (3) that plaintiff's injury was caused by an act or omission of the university or its employees, and (4) that the plaintiff suffered damages as a result of that act or omission.

“Duty” is an obligation, recognized by law, that requires a person to conform to a certain standard of care to protect others against unreasonable risks. Typically, the judge, not a jury, decides whether a duty to exist. In most instances, the standard of care requires that a person act like a reasonably prudent person would act under the same or similar circumstances. The second part of this standard—under the same or similar circumstances—is critical, because it means that actions taken under emergency circumstances will be viewed from that perspective. It is important not to conflate “duty” with “liability.” Duty is just one of four essential elements in the negligence equation. Without the other three, liability will not attach.

“Breach” means that the defendant—the person or entity sued—failed to conform to the standard of care. Thus, “breach” is the alleged misconduct. As noted above, under the breach element, the analysis focuses on whether the defendant acted reasonably under the circumstances. Accordingly, universities and their employees are not insurers of students’ safety. Instead, they must provide a reasonably safe environment for students and employees, and must act reasonably under the circumstances presented. Breach is usually fact-intensive and is a question for the fact-finder, which often is a jury.

“Cause” refers to two distinct subelements of a negligence claim. First, “actual cause” or “but-for cause” refers a factual link between the plaintiff’s act or omission and the defendant’s injuries. The separate concept of “proximate cause” involves a policy analysis about whether the defendant should be held liable or whether its actions were too remote to impose liability. That analysis includes asking whether the defendant’s conduct is “too attenuated.” As one law professor has explained: “So, if the plaintiff is injured in a fall from slipping on the vomit of a friend who was nauseated by a smelly plate of shrimp, the injurious consequences may simply seem too far outside the foreseeable risks of serving foul food to hold the restaurateur responsible for plaintiff’s harm.”

In addition, the unforeseeable acts of third persons, like criminals, may in some instances insulate the defendant from liability. So, too, may legislative actions. For example, in many states, social hosts are not liable for injuries caused by their intoxicated adult guests because state legislatures have concluded that “legal responsibility, as a matter of policy, should be borne alone by the intoxicated guest.”

“Damage” means the actual injury suffered by the plaintiff. In tort, plaintiffs typically seek money damages, although they may also seek other remedies, such as being reinstated, or enjoining or stopping wrongful conduct.

Two other critical concepts in any negligence action are reasonableness and foreseeability. In most contexts, courts hold that the university and its officials must use reasonable care to protect students from foreseeable danger. What constitutes reasonable care and foreseeable danger are fact-intensive questions; thus, the outcomes in cases differ, with some resulting in liability and others resulting in no liability.

If a plaintiff is able to establish all four essential elements of negligence, liability will attach unless the defendant can prove a valid affirmative defense. Although a variety of defenses to negligence exist, one of the most common is that the plaintiff was contributorily negligent: that is, the plaintiff’s actions contributed to the injury or loss. Because tort law law, the constraints differ from state to state.
Because tort law is typically controlled by state law, the consequences of this defense may differ from state to state. However, many jurisdictions now hold that if a jury determines that the plaintiff is as or more culpable than the defendant, the plaintiff may not recover, or may recover only for the percentage of negligence assigned to the defendant.

LEGAL EVOLUTION

The law of negligence, as it relates to campus violence, has evolved over time. For decades, universities were immune from most negligence actions. Public universities were protected by the doctrine of sovereign--or governmental--immunity, and private universities were protected by charitable immunity. While remnants of immunity protection remain, the application has become extremely narrow.

Another concept that precluded negligence liability was causation. Traditional tort doctrine held that a tort could have only one legal cause, and that cause was the most culpable individual or organization. For instance, when a person was injured by an intoxicated individual, it was that intoxicated individual--and not the person who supplied or served the alcohol--who was culpable. Modern tort law, however, recognizes multiple causes of injuries, which means that universities and campus officials are more frequently named in lawsuits.

Following the decline of these protective concepts, we can view the evolution of negligence law regarding universities in three phases. The first phase focused on facilities--keeping buildings and parking lots "safe." During this phase, courts often concentrated on issues such as whether universities had appropriate campus safety departments and safety devices such as lights, fences, and locks. Later, the focus shifted to the university's knowledge regarding potentially dangerous persons on campus and its role in protecting one student from the aggression of other students. The current phase also involves student-on-student crime, but focuses heavily on issues such as violence associated with alcohol and other drug use, mental health, hate crimes, and sexual assault.

A landmark case from the first phase is Mullins v. Pine Manor College. In Mullins, a female student was raped in her dorm room by an unidentified assailant. In a shift from prior law, the Massachusetts Supreme Judicial Court held that the college had a duty to exercise reasonable care to protect students from the criminal acts of third parties. The court based this conclusion on a variety of grounds, including determinations that criminal behavior on campus was foreseeable and that the College controlled key aspects of campus safety, such as installing a security system, hiring security guards, setting a patrol policy, installing locks, and so forth.

In Nero v. Kansas State University—a case from the second period—the rule in Mullins was extended to require a university to reasonably protect students against the dangerous acts of other students. In Nero, a male student was accused of raping a female student in an on-campus, co-ed residence hall in which they both lived. Following the rape accusation and pending resolution of the criminal case, the University reassigned the male student to live in an all-male dorm on the other side of campus; the University also directed the student not to enter any co-ed or all-female dormitory. The student registered for spring intersession, and the University assigned him to a co-ed residence hall, which was the only dormitory open.
A few weeks later, he sexually assaulted Shana Nero, a female dorm resident. Nero sued the University in negligence for failing to protect her from the sexual assault or failing warning her about the male student and his past conduct.\textsuperscript{14}

The Nero court emphasized that a university can never insure students’ safety, but also concluded that a university “has a duty [to use] reasonable care to protect its students against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university’s control.”\textsuperscript{15} Because the University was aware of the prior rape charge, moved the perpetrator to an all-male dorm, and prohibited him from entering co-ed and all-female dorms, the court determined that the attack on Nero could have been foreseeable, and that the issue of foreseeability in this context was a jury question.\textsuperscript{16}

Although a university may have a duty to use reasonable care to protect a student from foreseeable harm, the student must also take reasonable steps for self-protection. In \textit{Lloyd v. Alpha Phi Alpha Fraternity}, the court dismissed a student's negligence action against Cornell University for injuries suffered during fraternity hazing.\textsuperscript{17} The case was dismissed, in part, because the student failed to alert the University about the alleged abuse and actually concealed the activity by lying to campus officials about the true source of his injuries. The court stated that if the University was unable to learn about the hazing through the individual student or others, “then it is contrary to common sense to think a duty could be imposed upon the University to protect persons against these unknown activities.”\textsuperscript{18}

But in \textit{Love v. Morehouse College, Inc.}, one student was severely beaten by another in the dormitory shower.\textsuperscript{19} The perpetrator initiated the attack because he believed the victim was homosexual and had looked at him inappropriately. The injured student sued the College for negligence, alleging the College failed to use reasonable care to keep him safe because the attack was foreseeable and the College did not act. In addressing whether the College should have known about a hostile atmosphere against LGBT students, the court found that the College had failed to address the harassment of students believed to be LGBT; had fostered an atmosphere of hatred and violence toward LGBT students; had “approved and ratified the disparate treatment” of those students; and had failed to take disciplinary action against students who perpetrated anti-LGBT behavior.\textsuperscript{20}

\section*{TRENDS}

Judicial trends reinforce the notion that courts prefer for universities to act in ways that reflect their care for students’ well-being rather than in ways designed to circumvent legal liability. For example, in \textit{Mahoney v. Allegheny College}, the parents of a deceased student sued the College and a campus counselor for negligence following their son’s suicide.\textsuperscript{21} Specifically, the deceased student’s parents alleged that the College and its counselor had a duty to prevent the student’s suicide. The jury found the College and the counselor not liable. In confirming the jury verdict, the court determined that the College and the counselor had no duty of care to prevent the student’s suicide. In refusing to impose liability, the court emphasized the importance of a “humanistic” approach: “We believe the ‘University’ has a responsibility to adopt prevention, programs and protocols to safeguard persons against injurious actions.”\textsuperscript{22}

Another Professor Pe College of Sciences. To with issues of borders be concerned whether on that danger Courts have ternity plan off camp reported sitting resulted. Moreover, largely in a dangers—inside stalking—un safety and the physical

In addition alcohol and using to insist that are “evil science. The tance of his trained in the assigned to and professing them and different regarding can support the collaborate, from each other.

Another plan private difficult to consume if about a potentially or wit
out the alleged activity by the true source stated that if the

t student or oth-

t ase on these

Another judicial trend, as identified by Professor Peter E. Lake of Stetson University College of Law is the concept of “risk

scapes.” Today, courts are less concerned with issues of geography—where the campus borders begin and end—and more concerned about foreseeable pockets of risk, whether on or off campus. Courts recognize that danger can flow on and off campus. Courts have described situations where a frater-

nity prank started on campus, then shifted off campus. Similarly, the media have reported situations when off-campus drinking resulted in on-campus sexual assaults. Moreover, because today's students live largely in a virtual world with its own set of dangers—including cyberbullying and cyberstalking—universities can no longer focus safety and risk-management efforts just on the physical campus borders.

In addition, especially with regard to alcohol and other drug use, courts are beginning to insist that universities use techniques that are “evidence based” and supported by science. This trend highlights the importance of hiring individuals who have been trained in the in the area in which they are assigned to work, supporting regular training and professional development, and empowering them to use their professional judgment and discretion when handling issues regarding campus safety and security. It also supports the notion that campuses should collaborate, share data and results, and learn from each other.

Another trend is that campus safety trumps privacy. In today's environment, it is difficult to claim that a university acted rea-

sonably if it failed to share information about a potentially dangerous student internally or with appropriate law enforcement due to FERPA or similar privacy laws. Stated differently, it's always better to be defending a suit for violation of privacy than for wrongful death.

University officials should also monitor the concept of “special relationship” as it relates to the “duty” element in negligence because this concept is in flux. Historically, courts have held that a university does not have a duty to protect students from the criminal acts of third parties unless a “special relationship” exists either between the university and the victim, or between the university and the third party. Typically relying on the Restatement (Second) of Torts, courts have held that the university/student relationship is not per se special; instead, they analyze whether a university had a “special relationship” with an injured student based on a business/invitee relationship, a landlord/tenant relationship, or an assumed duty. Even when one of these special situations was found to have existed, courts did not consistently find that the university owed the student a duty of care. Accordingly, universities have not had clear guidance on this issue.

But the more recent Restatement (Third) of Torts: Physical and Emotional Harm “specifically designated an affirmative duty of reasonable care in section 40 that extends from the college to its students. This duty applies to risks created either by a student or third party.” Thus, the Restatement (Third) deems the university/student relationship a “special relationship.” The analytical shift was based in part on the drafters’ recognition that “[c]ourts are split on whether a college owes an affirmative duty to its students.”

The Restatement (Third) is not law. Instead, a state supreme court may choose to adopt it as the law in that jurisdiction. As jurisdictions begin to adopt the Restatement (Third) approach, it will not necessarily mean that universities will be found liable...
more frequently. Instead, it means that the analysis more frequently will shift from whether a duty exists to whether a breach occurred, and whether that breach caused the student’s injury. In a litigation context, injured students or their representatives will be able to satisfy the duty element more frequently. Because lack of duty is often a basis for summary judgment in favor of the university, universities may face more difficulty disposing of the case at an earlier stage and more frequently will need to weigh the costs and risks of settling versus proceeding to trial. Outside the litigation context, a shift in this area means that institutions of higher education should assume that a duty to act reasonably exists and develop strategies and systems to meet that duty.

Another trend that emerged following the tragic shootings at Virginia Tech and Northern Illinois is heightened government regulation of campus safety. These efforts have included the Clery Act, the Campus SaVE Act, and the Violence Against Women Act at the federal level, and state laws such as the New Jersey Campus Sexual Assault Victim’s Bill of Rights and the Oklahoma Campus Security Act.  

Starting in 2010, the Obama Administration prioritized the issue of domestic and sexual violence on campus and placed greater emphasis on enforcing Title IX. Many students who are victims of sexual assault use campus Title IX procedures over court-based negligence actions. Some reasons for this choice may be the ease with which on-campus Title IX proceedings may be initiated, the fact that they are campus-based, and the fact that student-victims need not retain an attorney and incur legal costs to file a Title IX complaint. On the other hand, Title IX actions that proceed to court impose the higher standards “actual knowledge” and “deliberate indifference” on the school, whereas “negligence claims may succeed upon proof the defendant failed to act with reasonable care in light of the circumstances.”

One question is whether the post-Virginia Tech regulations and enforcement strategies will survive the Trump Administration. As of September 2017, it is too early to tell, but the Secretary of Education has announced that while the government “will continue to enforce [Title IX] and vigorously address all instances where people fall short,” she has also stated that “the system established by the prior administration has failed too many students.” She has announced that the Department of Education “will seek public feedback and combine institutional knowledge, professional expertise, and the experiences of students to replace the current approach with a workable, effective, and fair system.”

Although the Trump Administration may take a more hands-off approach to enforcement, colleges and universities should not assume that the era of governmental regulation will wane. Even if the federal government rolls back either regulations or enforcement, state and local governments may step in to fill that void. Thus, the era of heightened accountability and transparency is not likely to be erased.

**REASONABLE CARE**

Universities have a duty to exercise reasonable care to protect students and others on campus from foreseeable danger. “Reasonable care” is a flexible concept that requires a fact-finder, such as a jury, to balance the probability and potential seriousness of an injury against the burden of avoiding the harm, under the same or similar circumstances.
While the legal responsibility to provide a safe and secure environment is settled, what actions are reasonable under the circumstances will vary. For this reason, some try to anticipate the bare minimum that will be required. But instead of guessing about minimum legal requirements, institutions of higher education would be better served by creating a culture of caring, compliance, and shared responsibility.

Creating culture starts at the top. Campus leaders must both communicate and model their priorities. They should endeavor to hire individuals who are professionals in their fields, ensure these individuals engage in regular professional development to understand trends, and empower those individuals to exercise sound professional judgment. Empowerment includes providing them with sufficient human and financial resources, and supporting the professionals' reasonable decisions.

Campus leaders should also emphasize that campus safety is a shared responsibility and should ensure that students, faculty, and staff are educated—on a regular and ongoing basis—about risks and ways to reduce risks. Because students and personnel change regularly, leaders must also remember that recurrent training and review is critical. Leaders also should use their positions to personally communicate about campus safety and the concept of shared responsibility. They should encourage members of the campus community to report concerns, and should implement systems so that concerns can be received, reviewed, and, when appropriate, acted upon. Leaders should then publicly share how those concerns were addressed to encourage others to participate in keeping the campus safe.

On a similar note, leaders must also work to break down “information silos.” Given technology and the number of tragedies that have occurred on university campuses, courts and juries will likely find it unreasonable if a university has not developed ways to share, collate, and act on information regarding disturbing student conduct. Post-Virginia Tech, it is now standard for universities to have at-risk student concern or behavioral intervention teams to facilitate communication and action. Similarly, a campus that has not developed appropriate levels of cooperation with local law enforcement and the local mental-health system might be found not to have acted reasonably under the circumstances if a student with a documented, serious mental-health condition slips through the administrative cracks and later injures another person.35

And campus leaders must also be wary that the community does not become complacent. When the campus is operating smoothly, it can be easy to forget that the smooth operation is often due to a combination of hard work and luck. Conducting regular risk assessments, regularly reviewing policies and auditing policy compliance, and insisting on table-top drills and simulations can help maintain vigilance, promote campus safety, and highlight the key concepts of shared responsibility and reasonable care.

**SUGGESTIONS**

In today's environment, institutions of higher education should consider reviewing “reasonable care” through an enterprise risk-management lens where campus leaders identify and assess the various risks, develop strategies to avoid or mitigate the risks, implement those strategies, and—in an ongoing, iterative process—then evaluate and improve those strategies.36

To use the law in an effective way to help fight the virus of campus violence, a university should focus on the risks most likely to
occur. Every campus is different, and—given most institutions' limited resources—each must focus on the most likely risks that could result in the most serious injuries. For most schools, this means focusing significant resources on high-risk alcohol and other drug use and providing a variety of mental-health services.

It also means focusing on campus housing. Data shows that most campus assaults occur in campus housing.37 Studies also suggest "that those most vulnerable to sexual assault are freshmen early in the first semester and that most victims know their assailant."38 Addressing this situation requires that universities analyze their Clery Act data (including information about underreporting) and meaningfully raise awareness by informing and educating the campus community about that data.39 These steps would involve posting pertinent Clery Act information on the campus housing website40 and developing customized training programs for students about both dangers associated with dorm living, and domestic and sexual violence, and steps they can take to reduce those risks.41

Residential life is an area of shared responsibility. The university has superior knowledge about prior incidents, sets the rules, hires and trains residence staff, and controls the physical structure (e.g., types of locks, cameras, and other security, types of students assigned to different housing facilities, etc.). But students have the ability to take reasonable precautionary measures (e.g., not propping outside doors open, locking their doors, following safety rules, notifying appropriate individuals about needed repairs, setting and maintaining personal boundaries, etc.). When universities train students about the rules, risks, and reduction strategies, shared responsibility can help students stay safe.

More generally, universities should strive to create a culture in which everyone on campus understands that he or she plays a role in health and safety. In this regard, universities should provide regular training and empower individuals to report concerns and suggest improvements. Without continual encouragement, many will be reluctant to raise difficult issues and questions.

Universities also must stay abreast of changes in the ever-evolving riskscape—including the new apps, online communities, and virtual worlds where students interact with each other and the institution. Threats of violence can often start online, and online taunts can cause students to engage in self-harm or harm to others.42 The law always lags behind technology, so universities sometimes feel paralyzed when a new technology bursts onto the scene. The rule of thumb is: if you can do it in the real world, you can do it in the virtual world, and vice versa—if you can't do it in the real world, you can't do it in the virtual world. Find the closest "real world" analogy, and adapt those policies and procedures to the new "virtual world" issue.

Finally, universities should encourage faculty and staff—all educators—to act based on their professional judgment, training, and discretion, instead of acting solely to avoid legal liability. If universities and their staff focus on the institution's mission and core values—as opposed to duty or litigation avoidance—they will tend to make the right decisions and create a culture and environment that is reasonably safe for students to live and study.
NOTES

2. Id. at 1675.
3. Id. at 1684.
4. Id. (citing Crankshaw v. Piedmont Driving Club, 156 S.E.2d 208, 209-10 (Ga. App. 1976)).
5. Id. at 1684-85.
6. Id. at 1676.
8. Id. at 337.
9. Id. at 335.
11. Id. at 771.
12. Id.
13. Id. at 772.
14. Id.
15. Id. at 780.
16. Id.
18. Id. at *7.
20. Id. at 626-27.
22. Id. (Emphasis added.)
23. E.g., Knoll v. Board of Regents of the University of Nebraska, 601 N.W.2d 757 (Neb. 1999).
25. Id. at 369. “Restatements,” or “Restatements of the Law,” are influential legal sources published by the American Law Institute that “describe[e] the law in a given area and guide[e] its development.” *Black’s Law Dictionary* (10th ed. 2014). “Although the Restatements are frequently cited in cases and commentary, a Restatement provision is not binding on a court unless it has been officially adopted as the law by a jurisdiction’s highest court.” Id. Restatements are highly persuasive because they are developed carefully, over a period of years, with extensive input and critique from leading judges, academicians, and practicing attorneys.
27. Brewer, supra n. 24, at 378.
29. See infra n. 25 (explaining Restatements).
30. Griffin, supra n. 26, at 392-93 & nn. 84-85.
34. Id.
36. See Griffin, supra n. 26, at 395-98.
38. Id. at 32 (footnotes omitted); see also id. at 36.
39. See id. at 47.
40. Id. at 48.
41. See id. at 41-42 (discussing the Shifting Boundaries training that had success in middle schools).