California Supreme Court Decision Sharpens Focus on Threat Assessment and Management

By Jeffrey J. Nolan, J.D.

A March 22, 2018 decision by the California Supreme Court, *Regents of the University of California v. Rosen*, 2018 WL 1415703, S230568 (Sup.Ct.Cal. March 22, 2018), held that postsecondary schools have a duty to keep students safe from foreseeable criminal assaults that occur while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services. Given the facts of the case and the methods employed by colleges and universities to enhance campus safety, the decision will likely sharpen the focus nationally on the development, training and functioning of campus threat assessment and management ("TAM") teams.

The Facts

According to the Court's opinion, Damon Thompson transferred to the University of California at Los Angeles ("UCLA") in the fall of 2008. Between the end of that fall and October of 2009, Thompson was involved in a series of reported incidents that involved him complaining of auditory hallucinations and suicidal thoughts. At times he admitted to thinking about harming others, though he had no identified victim or plan. Thompson was seen at the university's counseling and psychological services office, and a third-party psychiatric evaluation diagnosed him as possibly suffering from schizophrenia and major depressive disorder. He was not compliant with pharmacological treatment options offered to him. Thompson was expelled from university housing for shoving another resident in June of 2009, and in September and October of 2009, he continued to report that he was hearing "malicious" and critical statements made by other students.

On October 6, 2009, Thompson told a chemistry lab teaching assistant that he heard fellow chemistry lab student Katherine Rosen and another student calling him "stupid". There was no evidence that any of the voices reportedly heard by Thompson were real. On October 8, 2009 Thompson stabbed Rosen in the chest and neck with a kitchen knife while the two students were in a chemistry laboratory. Rosen survived

the attack, and Thompson plead not guilty by reason of insanity to a charge of attempted murder. He was admitted to a state hospital and diagnosed with paranoid schizophrenia.

The Court's Decision

Ms. Rosen sued UCLA, claiming that the university negligently breached a duty to protect her from the attack, and arguing among other things that universities have such a duty because they have a "special relationship" with their students in the classroom, and that UCLA assumed a duty of care by undertaking to provide campus-wide security. A trial court agreed that Rosen's claims could move forward to trial, but an intermediate appellate court held that universities do not have such a special relationship with their students, and that UCLA had not undertaken such a duty given the facts of the case.

The California Supreme Court disagreed with the appellate court, ruling that colleges and universities do have a "special relationship" with students which requires them to exercise reasonable care to keep students safe from foreseeable criminal conduct that occurs while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services. Relying (as other state courts often do) on principles outlined in a national compendium of case law known as the Restatement (Third) of Torts, the court reasoned that: 1) college students are comparatively vulnerable and dependent on their colleges for a safe environment; 2) colleges have a superior ability to provide that safety with respect to activities they sponsor or facilities they control; and 3) the student-college relationship is reasonably bounded by how many students the college chooses to enroll, and how long the students remain enrolled (such that the "special relationship" recognized by the court would not apply to the "world at large"). The court cited decisions from the supreme courts of Massachusetts, Florida and Delaware to support its conclusion.

The California court also reasoned that its decision was supported by considerations of public policy, reflected in a rubric that included factors such as whether the type of harm was foreseeable, the policy of preventing future harm, and the extent of the burden that would be imposed on institutions if the duty were recognized. In analyzing these factors, the court noted that violent criminal attacks on campus were reasonably foreseeable, as evidenced by the 2007 shootings at Virginia Tech and the fact that colleges across the country had over the last decade created threat assessment protocols and multidisciplinary teams, consistent with the recommendations of Virginia-Tech-incident-related task force reports (such as the

International Association of Campus Law Enforcement Administrators' April, 2008 "Blueprint for Safer Campuses").

Regarding the policy of preventing future harm, the court considered whether the benefit of imposing the duty at issue was outweighed by countervailing questions such as whether the duty would discourage colleges from offering comprehensive mental health and crisis management services, would encourage colleges to suspend or expel students who display a potential for violence, or would discourage students from seeking mental health treatment. The court answered each of these questions in the negative, citing the protections of the Americans with Disabilities Act, the "sophisticated violence prevention protocols" adopted by colleges "in the wake of the Virginia Tech incident," and the "threat assessment and violence prevention protocols [that] are already prevalent on university campuses." In light of all that institutions were doing to prevent violence through threat assessment practices and other means, the court did not think that its recognition of a "special relationship"-based duty would "appreciably change this landscape."

On the question of whether the duty it recognized would impose an undue burden on colleges and universities, the court observed similarly that the duty would not significantly increase the cost of promoting safety on campuses, because "UCLA, like other colleges across the country, has *already* developed sophisticated strategies for identifying and defusing potential threats to student safety," by creating "multidisciplinary teams of trained staff members and professionals for this very purpose." The court concluded therefore that because institutions had already focused considerable attention on identifying and responding to potential threats, and presumably had funding sources available to do so, the proposed duty would not create an "unmanageable burden."

To be clear, the court *only* ruled that colleges and universities have a duty to protect students from foreseeable criminal activity in a curricular context. The court's decision did *not* conclude that UCLA actually failed to exercise reasonable care in the *Rosen* case, nor did it define the types of protocols or efforts (that is the "standard of care") that would be necessary to constitute reasonable care under the circumstances of that or any other case. The court sent the case back to a lower court for further litigation on those issues. The court emphasized specifically that UCLA would be free to argue in further proceedings that there was little more it reasonably could have done to prevent the assault.

National Implications of the Decision

Legal analysis, such as that employed by the California court, was anticipated in Nolan, J., Randazzo, M. and Deisinger, G., "Campus Threat Assessment and Management Teams: What Risk Managers Need to Know Now," University Risk Management and Insurance Association ("URMIA") Annual Journal, 105-122 (2011) at pp. 105-110, and in Nolan, J., "Addressing Intimate Partner Violence and Stalking on Campus: Going Beyond Legal Compliance to Enhance Campus Safety," Emerging Issues in College and University Campus Security, 4-49 (Aspatore, 2015) at pp. 26-33. While expressing the hope that this would not occur, the 2011 URMIA article predicted that courts could, based on principles outlined in the Restatement (Third) of Torts, recognize a "special relationship"-based duty on the part of colleges to keep students safe from criminal attacks, could find TAM to be a best practice and "standard of care" for duty purposes based on the IACLEA "Blueprint for Safer Campuses" and other publications, and could look to the fact that TAM teams were becoming customary in the higher education field to support a conclusion that TAM processes were necessary to satisfy the standard of care. The 2015 book chapter supplemented this analysis with references to further resources published by several federal government agencies in 2013 to the effect that TAM protocols are a best practice for enhancing safety in higher education and other contexts. The 2011 URMIA article also discussed the "negligent undertaking" theory of liability analyzed (and fortunately rejected) by the intermediate appellate court in the *Rosen* case.

Given the California court's reliance on nationally-persuasive Restatement (Third) of Torts principles, it would not be surprising if other courts around the country looked to the California court's decision in similar cases in the coming years. Colleges and universities can reasonably hope that other state courts might reject the California court's analysis or draw the scope of the duty recognized in the *Rosen* case more narrowly, but there is no question that the California court's analysis will be front and center in any dispute involving arguably foreseeable criminal behavior toward students on a college campus. Because the time for arguing that TAM is not necessary in the current environment has likely passed, institutions should assume that the development, training, and functioning of their TAM teams will be scrutinized closely if a violent incident occurs, and should continue to do their best to support and engage those teams to enhance safety on their campuses.

If you have any follow-up questions about the implications of the *Rosen* decision or related issues, please contact Jeff Nolan at jnolan@dinse.com.