

Case Alert

Shaping the future of insurance law

Institutional duty to prevent sexual assault in other places

***SMA v John XXIII College (No 2)* [2020] ACTSC 211**

12 AUGUST 2020

AT A GLANCE

- The ACT Supreme Court has recognised that an institution can, in specific circumstances, owe a duty of care to take steps to protect the safety of intoxicated persons, including from the risk of criminal acts by a third party.
- In this case, a university college was found liable for the sexual assault of a resident by another resident that took place outside the college, after it ejected a number of intoxicated residents from a party.
- The college was found liable for the assault as had a broader, pastoral duty of care, a measure of control over the perpetrator, who was another college resident, and because the risk was foreseeable (given the college was on notice for its notorious drinking culture). The college was also found liable for how it conducted its investigation.
- Underwriters and institutions that exercise a 'pastoral role' over students, residents, patients, employees or other people should be aware of this decision.

BACKGROUND

In 2015 the plaintiff was a resident at St John's XXIII College (the college), a student residence at the Australian National University, Canberra.

On 6 August 2015 she attended a "Pub Golf" event at the college. This involved heavy drinking to the point of intoxication, including vomiting into bins specifically placed for that reason. At 9pm, the janitor encouraged the residents to move on from the college after speaking to the Head of College by phone.

After going to a different venue, the plaintiff was allegedly sexually assaulted by a male resident of the college (the perpetrator) in an alleyway. She was so intoxicated she had no memory of the incident, however she heard second-hand that the perpetrator was bragging about the encounter. She confronted the perpetrator who admitted, in a recorded conversation, that he had sex with her that night. He later retracted that admission.

The plaintiff reported the matter to the college and an investigation was conducted. At one meeting, the Head of College made some comments that upset the plaintiff, including, among others: “sometimes when boys are drunk they can be quite arrogant but are often underperformers” and “I’m not really sure that anything did happen”. The Head of College also expressed concern about how the plaintiff got so drunk. In the civil trial, the Head of College admitted those comments were made.

The plaintiff commenced civil proceedings against the college in the ACT Supreme Court. The matter proceeded to hearing in July 2020 before Elkaim J. It was alleged the plaintiff suffered a psychological injury by reason of the defendant’s negligence.

It was alleged that the college was liable for:

- having allowed the event to occur
- directing the students to leave the college, and
- the way in which the complaint was dealt with.

The college admitted it owed the plaintiff a duty of care, but disputed the scope of the duty.

The defendant’s case was, in part, that it did not breach its duty because “pub crawl” events were banned. However, on evidence led by the plaintiff, and after cross-examination of the Head of College, His Honour accepted that the college knew, or ought to have known, that residents attending the event were drinking to the point of intoxication. This practice was notorious within the college.

His Honour also accepted (to a civil standard) that the plaintiff was sexually assaulted by the perpetrator. An inference was drawn from the failure to call the perpetrator.

WHAT WAS THE SCOPE OF THE COLLEGE’S DUTY?

The defendant accepted that it had a duty of care, but argued that the scope of its duty was akin to that of an ‘occupier’. His Honour did not accept that submission given the college advertised that it took on a pastoral role with its residents, which was evidence accepted by the Head of College.

WAS THE COLLEGE NEGLIGENT IN ALLOWING THE EVENT TO PROCEED?

In response to this argument, the defendant relied on *CAL No 14 Pty Ltd v Motor Accidents Insurance Board*; *CAL No 14 Pty Ltd v Scott [2009] HCA 47 (CAL)*. In that case, the High Court found that a licensee did not breach its duty of care to a patron by preventing him from riding a motorcycle home. Among other reasons, it was recognised that to expand the scope of the licensee’s duty in this way would infringe on the autonomy of patrons.

Elkaim J accepted, following CAL, that the plaintiff was an adult, who drank voluntarily and attended the event on her own volition and choice. The college’s duty did not extend to preventing the plaintiff’s autonomous choices, such as attending the event.

WAS THE COLLEGE NEGLIGENT IN DIRECTING THE RESIDENTS TO LEAVE?

The position changed, however, by the time the college directed the residents to leave. The plaintiff by this stage was so intoxicated that her decisions were no longer ‘autonomous’. Importantly, she also did not make a decision to leave – she was ordered to leave. His Honour found that the college breached its duty of care by directing the students to leave because:

1. The plaintiff was intoxicated and vulnerable.
2. The harm of sexual assault upon an intoxicated young woman was foreseeable and, given “the well-known behaviour of intoxicated students”, that risk was not insignificant. The group of students being asked to leave contained, as a group, two elements of risk: “drunk young men and vulnerable and intoxicated young women”.
3. His Honour rejected the defendant’s argument relying on *Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61* that its duty should not extend to preventing criminal conduct of a third party. His Honour distinguished this case from *Modbury* on the basis that the perpetrator was not truly a “third party” but another resident over whom it had a measure of control.

Elkaim J held at [277] that: “Returning to the pastoral analogy accepted by [the Head of College] ... the shepherd was sending his flock in the direction of a cliff”.

His Honour accepted that the precaution of telling the plaintiff and others not to leave the college might have been ineffective. However, he held that the college had further options available to it other than simply instructing them not to leave, including sanctioning them with suspension or expulsion if they did leave.

WAS THE COLLEGE NEGLIGENT IN HOW IT CONDUCTED THE INVESTIGATION?

The defendant relied on *Sullivan v Moody* [2001] HCA 59 to argue that a duty to one party in an investigation could give rise to inconsistent obligations regarding the other party. His Honour rejected this argument on the basis that the plaintiff’s case was not that the perpetrator had been favourably considered relative to her, but rather that the way she was treated alone was negligent. It was also important that plaintiff came to the college seeking support and the pastoral care the college advertised.

His Honour accepted, considering the inappropriate comments made by the Head of College during the investigation, that the college had breached its duty of care to the plaintiff.

DAMAGES

His Honour accepted the plaintiff’s evidence from Dr Smith, psychiatrist, that the plaintiff suffered from PTSD and depression.

Since the incident, the plaintiff graduated in finance, worked for a time and then switched to studying medicine. She was doing well in her

studies at the time of trial. His Honour accepted that the change in the plaintiff’s intended career should not be entirely attributed to the defendant’s negligence. His Honour proceeded on the basis that the plaintiff’s career may be delayed by “say” five years due to the incident. Future economic loss was calculated on that basis.

He awarded the following damages:

General damages, and interest	\$94,500.00
Past and future medical expenses	\$8,000.00
Past and future economic loss	\$287,701.57
Exemplary and aggravated damages	\$30,000.00
Total	\$420,201.57

IMPLICATIONS FOR INSTITUTIONAL INSURERS

This decision recognises a broader scope of duty of care for institutions that exercise a ‘pastoral role’ over students, residents, patients, employees or other people. It is also significant as it extends an institutional duty to preventing criminal conduct of a third party where the institution has some measure of control over the third party.

In the wake of this decision, underwriters and brokers should encourage their institutional clients to review their policies and procedures for managing similar incidents, particularly where institutions are already on notice regarding cultural issues.



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For more information please contact us.



Greg Carruthers-Smith

Partner, Sydney

T: +61 2 8273 9965

E: greg.carruthers-smith@wottonkearney.com.au



Patrick Thompson

Senior Associate, Sydney

T: +61 2 8273 9820

E: patrick.thompson@wottonkearney.com.au

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