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# Nero v. Kansas State University: Implications for Housing and Other Student Affairs Professionals

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## INTRODUCTION

Student affairs professionals are facing increased pressures to conform to rapidly changing legal decisions affecting higher education. Government and court intervention in the business of higher education is on the rise due to societal and economic concerns related to public and private education (Johnson, 1992).

A fear of the resurgence of the doctrine of *in loco parentis* has housing administrators struggling with expectations prominent in the early years of American higher education (Smith & Fossey, 1995). Expectations center on the housing administrator's role in creating and maintaining environments that will limit legal entanglements and the repercussions of tort liability. In the daily management of college and university residence halls, administrators must juggle facilities, programs, personnel, and customers in an effective way to reduce risks (Moore, 1992).

Cases of negligence in sexual assault and harassment claims on college campuses receive greater attention than in the past. Today, campus administrators are focusing on safety and security issues in admissions literature, orientation sessions, and student programs. An expectation by students and employees that they will be protected on campus sets up the institution's liability (Steiner, 1989). The foreseeability of a

violent act on the campus increases the institution's risk of liability.

Contractual relationships between housing staff, students, and other customers further challenge the system (Gehring, 1993). Housing officers now have the added pressure of making decisions regarding their legal duty to protect students and to warn potential victims of possible dangers (Smith, 1989). Claims of failure to protect and warn victims in sexual assault cases are on the rise, not only on college campuses but in society at large (Palmer, 1993).

This article will describe the results of one such sexual assault case predicated on the "landlord/tenant responsibilities" of a housing department and its relationship to students. This case has raised many questions for the institution involved and for campuses across the country. Implications arising from these questions will be presented. Recommendations for planning also are presented to assist administrators in examining their own campus and housing department policies and procedures. This article is for information purposes only, and does not constitute legal advice regarding the subject matter covered. The reader should contact an attorney to obtain legal advice for specific situations.

## Facts of the Case

In June 1992, Kansas State University was sued by a housing resident who was sexually assaulted in a resident hall. The resident, Shana Nero, alleged that the University negligently allowed the male student who attacked her, Ramone Davenport, to continue to live in University housing after he was accused of raping another woman. This case illustrates the dilemma that institution administrators face when a student is accused of a crime but has not yet had a hearing on the charges (Nero v. Kansas State University et al., 1993).

In late April 1990, a female student (J. N.) accused Davenport of rape. J. N. reported that Davenport forced her to have sexual intercourse in his room late one night. Davenport said that the intercourse was consensual.

Immediately following J. N.'s report to law enforcement, University administrators transferred Davenport to an all-male residence hall. Davenport was instructed not to have any contact with J. N.

Criminal charges were filed against Davenport, but J. N. declined to bring a

complaint against him under the University's sexual violence policy. The criminal charges against Davenport were well-publicized because he was a member of the University's football team. Davenport pled not guilty to the criminal charges.

Nero arrived in Manhattan, Kansas, about the time that the alleged rape was reported and publicized. Campus housing was provided to Nero after she contacted the University and explained that she had arrived from Oklahoma with limited funds and without a place to stay.

Nero was provided housing in the only residence hall that was open at the time. With the closure of the residence halls at the end of the spring semester, campus housing for summer classes was consolidated into one residence hall. Nero and Davenport were among approximately 90 residents in the residence hall.

After residing in the residence hall for approximately two weeks and after becoming acquaintances, Nero was sexually assaulted by Davenport late one night, when they were together in a lounge area watching television. Nero reported that Davenport touched her and kissed her without her consent for several minutes. When University officials learned of Nero's report, Davenport was immediately evicted from campus housing.

Unlike J. N., Nero brought a complaint against Davenport under the University's sexual violence policy. After a campus hearing, a University committee concluded that Davenport's conduct violated the University's policy. Misdemeanor charges arising from the June incident with Nero were dismissed.

### Case Law and Findings

Nero filed her lawsuit in state court two years after the incident occurred. Although the district court awarded summary judgment to the University, the Kansas Supreme Court reversed the decision in 1993, and remanded the case for trial to determine whether the University breached its duty to Nero (Nero v. Kansas State University et al., 1993).

The Kansas Supreme Court decision in Nero signifies a change in how courts may decide the question of an institution's liability for sexual assault on campus. Although the case is legally binding only on Kansas courts, other courts across the nation may adopt the reasoning of the Kansas court when faced with similar questions of an institution's duty to protect students against sexual assault.

In Nero, the Kansas Supreme Court affirmed that liability could not be predicated on the outmoded doctrine of *in loco parentis*. However, the court found that the University acted as a landlord when it furnished housing to students. Because of this relationship, the court reasoned, the University owed a duty of reasonable care to Nero. Whether the University breached its duty is a factual question for a jury, the court concluded (Nero v. Kansas State University et al., 1993).

At trial, a jury was asked to determine whether Davenport's assault on Nero was foreseeable and whether the University took adequate steps to protect Nero from the attack. In response, the jury found the University to be 75% at fault for the assault, and awarded Nero significant monetary damages (Nero v. Kansas State University et al., 1993). Although the jury's decision was a painful lesson for the University, it is the Kansas Supreme Court decision that housing administrators should study.

Here are two important findings of the court in Nero that administrators should know: A university owes student tenants the same duty to exercise due care for their protection as a private landowner owes its tenants. (Nero v. Kansas State University et al., 1993, p. 584)

A university has a duty of reasonable care to protect a student against certain dangers, including criminal acts against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control. (Nero v. Kansas State University et al., 1993, p. 584)

In another recent case against a university by a student who was sexually assaulted, a Washington appellate court held that the university had a duty to protect the student against the assault (Johnson v. State of Washington, 1995). In that case, a freshman was raped near her residence hall. Although the court acknowledged that a duty of care did not exist merely as a result of the student's status as a student, it held that the student was a business invitee to whom the university owed a duty of reasonable care.

Likewise, a Massachusetts Superior Court held that an institution owed a duty to protect a student from a sexual assault (Mullins v. Pine Manor College, 1983). The court in that case

held that the college had a duty to protect a freshman who was abducted from her locked dormitory room and raped in a nearby dining facility.

In Mullins, the court held that the college voluntarily offered security as one of many services provided to students, and that the reliance of students and their families on this service created a duty. The court also found that the attack against Mullins was foreseeable, despite the absence of any prior reports of assault on the quiet campus of 400 students.

The rationale in Mullins that the institution assumed a duty to protect the plaintiff was later adopted by the Massachusetts Supreme Court in Furek v. University of Delaware, et al., (1991). In Furek, a fraternity pledge was burned when lye was poured over his head as part of a hazing activity. The court found that the University's knowledge of hazing activities and repeated communications to students, including creation of a hazing policy, constituted an assumed duty to protect students against hazing (Furek v. University of Delaware et al., 1991).

A California appellate court also has held that a community college owed a duty to protect a student who was sexually assaulted near a parking lot (Peterson v. San Francisco Community College District, 1984). Although a lower court awarded judgment to the college, an appellate court reversed the decision, holding that a special relationship existed between the college, a possessor of land, and the student, a business invitee.

In contrast to the above cases, some courts have shown a reluctance to impose a duty on an institution to protect students from criminal acts of third parties (Savannah College of Art and Design, Inc., v. Roe, 1991; Nola M. v. University of Southern California, 1993; Leonardi v. Bradley University, 1993; Adams v. State of New York, 1994).

Although these cases are decisions favorable to housing administrators, a wise administrator will carefully study and consider Nero and Johnson. It is the reasoning of these cases that a plaintiff will argue, and a court may adopt, in a lawsuit against the administrator's institution.

## DISCUSSION

While exploring the Nero case, the immediate question asked is, what are institutional responsibilities for harm to persons in the campus community? Snow and Thro (1994) outline some

of the factors to be explored. Considering the preceding summary of facts and findings, the authors cannot provide a formula or solution for all campuses. Rather, the authors will provide a select number of questions, with brief comments, as a basis for discussion that may guide the administrator in determining responses to similar situations.

1. What, if any, duty is imposed upon colleges and universities to protect students in university housing from crimes perpetrated by other students? To the extent that a special relationship exists between a college or university and students who reside in housing facilities, a duty exists to exercise reasonable care to protect students from foreseeable harm. For example, in Nero, the Kansas Supreme Court held that the relationship between the institution and a person residing in a residence hall created a duty to protect the individual from a student. The relationship between an institution and a student, solely because of the student's status as a student, generally is not sufficient to create a special relationship.

2. If the duty is that of reasonable care, what is reasonable care? Under the rule in Nero, an institution has a duty to exercise reasonable care to protect persons from certain dangers, including criminal acts of another, if the criminal act is reasonably foreseeable and within the institution's control. Administrators are responsible for making judgments of what is reasonably foreseeable by reviewing all the information available to them and evaluating this information on a case-by-case basis. For example, do administrators have access to detailed police reports, confidential counseling files, or prior criminal record information when determining what is reasonably foreseeable?

3. Does an accusation of sexual assault alone make it possible for a reasonable fact finder to conclude that another sexual assault by an alleged assailant is reasonably foreseeable? The jury's decision in Nero suggests that the allegation of sexual assault is sufficient evidence for a fact finder to conclude that another sexual assault by the accused person is reasonably foreseeable. In light of these findings, housing administrators may want to explore other factors.

Do administrators refuse to continue to rent space in a campus residence hall to an accused student, despite the student's presumption of innocence, until proven guilty? A conservative administrator may refuse to rent space in a campus residence hall to a student accused of a

crime until that student is proven guilty or has had a hearing on the matter.

Is the accused entitled to an immediate student discipline hearing, despite concerns such action would compromise the accused's constitutional rights in a criminal proceeding? If the university is considering taking disciplinary action, the accused is entitled to a student disciplinary hearing. Such a hearing may implicate and compromise the student's right to due process, because any statement made in the campus disciplinary proceeding may be used to impeach the student, or the student's silence in a disciplinary hearing may be used as an admission in a criminal proceeding (Gabilowitz v. Newman, 1978).

Should the accused student be summarily expelled, setting an example for other students? A student may be expelled only after he or she is afforded notice of the charges of misconduct and is provided an opportunity to respond to those charges. Therefore, a student who is summarily expelled would have grounds to assert a claim against the university that his or her due process rights were violated.

Can the accused student be confined to a particular location or facility with restricted movement on campus? Restrictions may be imposed against an accused student. However, disciplinary sanctions may be imposed only after the student is afforded some measure of due process such as notice of the charges and an opportunity to respond. Dismissal, or interim and long-term suspensions generally require a greater means of due process.

Should other potential victims be warned? What are the implications of the Family Educational Rights and Privacy Act (FERPA)? Should the university warn students about accusations? The Student Right-to-Know and Campus Security Act directs that the campus community must be informed when certain criminal offenses are reported to selected administrators at the institution. Administrators must decide if more specific information regarding an accused crime will be communicated and to whom communication will be directed. FERPA prohibits disclosure of a student's educational records. Recent amendments to the Act clarify that university police reports that are maintained for law enforcement purposes are not subject to FERPA.

4. Under the Campus Security Act, what security measures should be enacted to protect female students in a housing unit where there has

been a reported sexual attack? The act stipulates that an institution must warn all students, when a timely report is received of the occurrence on campus of sex offenses and other crimes described in the act. If known, the identity of the accused, should be reported to the campus community.

5. Does the Kansas Supreme Court's decision in Nero revive the doctrine of in loco parentis? Higher education administrators will inevitably face significant challenges as they address future questions involving the protection of students on their campuses. The Kansas Supreme Court expressly states in the Nero opinion that it is not reviving the doctrine of in loco parentis. However, an institution has a duty to protect students when a special relationship exists between the institution and its students.

## RECOMMENDATIONS

Nero v. Kansas State University continues to be a source of discussion for student affairs administrators. Following are some recommendations housing professionals and other student affairs staff might want to consider in relationship to their institution.

Although the Nero case involved sexual assault, there are many other crimes against persons as well as property crimes that may involve an institution's duty to protect students. The institution must review its obligation in light of the law in its jurisdiction. Concurrently, administrators must delineate between crimes against persons and crimes against property and the priorities given to institutional response to each.

Promotional material should be closely reviewed. What do the campus view books or other promotional publications say about security and safety, as well as measures taken in response to reported violations? What are students and parents told in pre-admission programs or orientation activities? The answers to these questions are especially important given realities of activities on a college campus. Fortunately, most courts agree that special relationships are not created between an institution and its students simply because of the university-student relationship.

Administrators may want to review contracts with students. Housing contracts should be reviewed annually by the institution's legal counsel. Shur (1983) outlines some of the issues student affairs practitioners may want to consider

in establishing contract policy and procedures including writing disclaimers, discouraging verbal agreements, and practicing good faith decision making. Special consideration should be given to contract language pertaining to due process and the housing relationship.

Examining the roles of each unit within the college or university environment is paramount. Administrators, faculty, and staff should review their channels of communication and protocol for response when crises strike. Of primary importance in a review process, is the relationship administrators and other staff have with the institution's internal or external legal resources. Counseling center staff, crisis or hotline intervention personnel, police and security personnel, faculty advisors, college/university media experts, and so forth, all should be prepared to respond when action is necessary.

Institution officials also may want to review their local civil procedures in establishing possible parallels with their own internal judicial procedures. Practicing similar policies related to the Student Right-to-Know and Campus Security Act might help courts in reviewing cases by measuring similar standards of action. A difficult case may exist when a student faces criminal charges but there is no campus disciplinary hearing.

The notion of due process may vary from institution to institution. Clearly, some distinctions will arise between public and private institutions. Clearly defining the vague notion of due process by the institution is important. Communicating this definition to students, staff, and administrators may reduce conflicts when policies and procedures are enacted on the campus. A valuable discussion on what constitutes due process in the context of educational institutions is presented by Ardaiole (1983).

The Nero case also presents intriguing questions concerning roles and methods in determining the duty to warn students and when those warnings should occur. Administrators must make complex decisions concerning the balance between reasonably protecting students without jeopardizing individual privacy rights. Posters, want ads, newspaper police reports, and hall meeting discussion groups are all examples of notification tools that may be used on campuses to warn student victims. The challenge will be for administrators to make judgments on drawing-the-line case by case. The notion of duty to warn also is not exclusive to residence hall environments. There may be a duty to notify all

students on the campus of another student accused of a criminal act.

Administrators also must be aware of other populations affected by developing case law in this area. Summer conference groups, family and apartment housing residents, and year-round guest service customers are just a few of the nonstudent populations that are impacted. Crimes against or involving faculty and staff as the accused, are also issues to be considered. Also, crimes committed by nonstudent third parties on the campus is an issue that should be on the minds of administrators. Administrators may want to audit the various client bases that use campus facilities and services and create action plans targeted for these customers.

In today's rapidly changing society, there is much for administrators to consider in order to provide a safe, fair, and responsible environment for students, faculty, staff, and campus visitors. Clearly, a careful review of campus protocol and policies and thoughtful planning can make a positive difference in the outcome and aftermath of even the most disagreeable circumstances.

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