

OREGON LAW UPDATE

No Prior Incident Required: Civil Liability for Criminal Acts of Third Parties (Part I)

case in point..

From the desk of Jeffrey D. Eberhard: It is a bedrock principle of premises liability law that businesses and individuals alike owe a duty to protect customers and guests from foreseeable harm, which may also include harm from foreseeable criminal conduct. In the following case, the Oregon Court of Appeals examined whether a fraternity could have reasonably foreseen that one of its members would sexually assault a female guest at a party.

Claims Pointer: In this case, the Oregon Court of Appeals held, by a 2 to 1 vote by the panel of judges, that that a trial court improperly granted a local chapter of a college fraternity's motion for summary judgment. The Court held that where a fraternity had knowledge that (1) sexual assaults are common on college campuses; (2) alcohol is a significant factor in college sexual assaults; and (3) that failure to prohibit guest access to fraternity rooms could contribute to sexual assault, a claim of foreseeability could go to the jury. This case significantly stretches the bounds of foreseeability in Oregon. As the dissenting judge in this case pointed out, up until now, at least some knowledge of the individual's propensity for violence or of specific prior incidences at the location where the harm occurred has been necessary for a court to find that criminal conduct is foreseeable. In this case, the court holds that general knowledge of criminal conduct is enough to make harm from that criminal conduct foreseeable to a possessor of the property.

NOTE: This summary covers only a portion of the Court of Appeals' decision. Next week, we will provide the conclusion of this two-part update.

Scheffel v. Oregon Beta Chapter of Phi Kappa Psi Fraternity, 273 Or App 390 (September 2, 2015).

On Halloween night, 2008, Cassandra, a student at Oregon State University ("OSU"), was sexually assaulted by Gregory Sako at a party hosted at Sako's fraternity, a local chapter of the Phi Kappa Psi Fraternity ("Phi Psi"). Phi Psi is a national fraternity with more than a hundred local chapters, including the "Beta Chapter" at OSU. While Phi Psi had the power to admit, suspend, and revoke local chapters, it left the management and operation of members up to local chapters.

Phi Psi required local chapters to review a risk management policy that set minimum standards for "Social Programming and Alcohol" and "Sexual Assault." The policy prohibits use of alcohol by minors. The sexual assault policy stated that alcohol "decreases inhibitions" and that "alcohol plays a prevalent role in sexual assaults." The policy also included a statistic that 97% of sexual assault cases brought against fraternities involve alcohol. Phi Psi required local members to take an online course cautioning them about alcohol use and sexual assault.

Sako became a member of Beta Chapter in 2008 at the age of 19. Although underage alcohol use was prohibited in the fraternity house, it was well known that minor members, including Sako, drank regularly in their private rooms. In October, 2008, Sako was drinking anywhere from 4 to 20 drinks on the weekends. OSU's Office of Greek Life recommended to fraternities that they prohibit access to private rooms; several sororities had

such policies. However, Beta Chapter had no policy on access of guests to private rooms.

On October 31, 2008, Beta Chapter and a sorority, Delta Chi, hosted a party at Beta Chapter's fraternity house. Beta Chapter hired security guards, required guests to check-in outside alcohol with the bar, required the bartender to check IDs and only allowed one drink per person at any given time. It also required that female and male bathrooms be designated on separate floors and that access to private rooms be limited to Beta Chapter members and guests.

By the time of the party at 9 p.m., Sako was heavily intoxicated and the president of Beta Chapter, Gerritz, sent him to his room. Gerritz stopped by Sako's room several times to make sure he was alright. Although the party was scheduled to go until midnight, Gerritz decided to shut the party down just before 11 p.m. because a large group of uninvited guests had brought alcohol just outside of the fraternity house.

At some point during the time that Gerritz was closing down the party, Sako returned to the dance floor without Gerritz's knowledge and met Scheffel, a Delta Chi guest. Scheffel followed Sako to his room where he sexually assaulted her.

Scheffel filed suit against Beta Chapter and Phi Psi. Scheffel alleged that Beta Chapter was negligent under a theory of premises liability or because the harm was generally foreseeable and that Beta Chapter failed to protect Scheffel from assault. Scheffel's claims against Phi Psi were

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based on a theory that it was liable because Beta Chapter was its agent and that Phi Psi was itself negligent for failing to supervise Beta Chapter. In this update, we will only discuss Scheffel's claims against Beta Chapter.

Beta Chapter argued: (1) that it did not owe a duty to protect Scheffel; (2) that it could not have possibly foreseen harm to Scheffel; and (3) that it took reasonable precautions to protect its guest. The trial court granted the motion. Scheffel appealed.

Beta Chapter made the same arguments on appeal. The Court of Appeals rejected all of Beta Chapter's arguments by a 2 to 1 vote of the judges. First, the majority opinion (the Court) held that Beta Chapter owed a duty to act reasonably to keep Scheffel and other guests safe from harm even if it did not know of the specific danger that Sako posed. Second, the Court held that in the context of both premises liability and ordinary negligence claims, Beta Chapter's general knowledge—that sexual assaults are common on college campuses and that alcohol is a common factor contributing to sexual assaults—was enough for the issue to go to the jury. Beta Chapter insisted that it could not have possibly foreseen that Sako would sexually assault Scheffel.

Beta Chapter insisted that without any knowledge of Sako's propensity for violence or of prior incidences of violence at the fraternity or by its members, it could not have foreseen harm to Scheffel or any other guest. The Court rejected that argument, stating that general knowledge of alcohol-related violence is sufficient to make sexual assault a foreseeable consequence of allowing an underage college male to become intoxicated.

The dissenting judge wrote a lengthy opinion criticizing the majority opinion. It laid out the history of opinions discussing foreseeability of criminal acts. He then applied recent Oregon cases, including *Piazza v. Kellim*, which demonstrated that for criminal conduct to be foreseeable, at least some prior evidence of violence by a particular person or at a particular

place is necessary. The dissent criticized the Court's reasoning that general knowledge of sexual assaults was enough to make Scheffel's harm foreseeable to Beta Chapter.

The Court also rejected Beta Chapter's argument that it acted reasonably enough to be dismissed at summary judgment. The Court explained that while Beta Chapter did take significant precautions to protect its guests by controlling consumption of alcohol, allowing only invited guests, and providing professional security, it still failed in other regards. According to the Court, Beta Chapter failed to prohibit access to private rooms, which was a common practice among sororities and was recommended by the Office of Greek Life. Based on those facts, the Court concluded that a jury could find that Beta Chapter failed to exercise reasonable care. Even though Beta Chapter did more than would be expected to prevent the assault, the Court essentially said, "maybe they could have done more"—more than, in our opinion, one would expect for the prevention of criminal assault.

Ultimately, the divided Court held that general knowledge of the risk of alcohol-related sexual assaults on college campuses was sufficient evidence to create a question for the jury, defeating summary judgment. Tune in next week for a summary of the Court's remaining holdings in this important case.



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