Appellate Reports

Court looks at standard of care that governs university's duty to protect its students from violence. Also, primary assumption of risk in school sports

By Jeffrey I. Ehrlich

Torts; duty of care owed by university to students; ordinary-person standard; immunity: *Regents of the Univ. of California v. Superior Court* (2018) __ Cal.App.5th __ (Second Dist., Div. 7.)

Katherine Rosen, a UCLA student, was severely injured by another UCLA student who had been receiving mental-health treatment from the University. She filed a negligence action, alleging that university personnel failed to take reasonable measures to protect her from the perpetrator's foreseeable violent conduct. The University moved for summary judgment, arguing that postsecondary schools do not owe their students a duty of care to protect them from third-party misconduct. After the trial court denied the motion, the University took a writ. The matter was ultimately heard by the California Supreme Court, which held that colleges and universities owe their students a duty of reasonable care to protect them from foreseeable acts of violence in the classroom or curricular activities. The Court remanded to the Court of Appeal to resolve other issues raised in the petition. The Court of Appeal denied the petition.

On remand, the court was tasked with resolving three issues: (1) the standard of care that governs the university's duty to protect its students from foreseeable acts of violence; (2) whether the defendants showed no breach of that duty as a matter of law; and (3) whether the University was immune.

Although the Supreme Court's opinion recognized that the University owed a duty of care, it left open the issue of "the appropriate standard of care for judging the reasonableness of the

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university's actions," and invited the parties to litigate that issue on remand. The Court of Appeal concluded that proper standard is the ordinary negligent standard of care, namely, "that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances." The court also found that Rosen had raised triable issues of fact on whether the University breached that standard, and that the University was not immune from suit.

With respect to immunity, the court rejected the University's argument that Rosen's claim was barred by Government Code section 856, which creates an immunity for injuries resulting from a public entity's determination "whether to confine a person for mental health or addiction." Rosen's negligence claim does not challenge the decision made concerning the confinement of her attacker; she instead seeks to impose liability based on other alleged acts of negligence.

The University also argued that the immunity for discretionary decisions also barred the plaintiff's claim. The court rejected this argument because the claim was not based on the University's discretionary acts of creating programs and protocols to identify and respond to threats of campus violence. Rosen does not challenge the adequacy of these protocols; she argues that the manner in which the university executed those programs with respect to her attacker was negligent. The immunity for discretionary decisions does not bar this type of claim.

Torts; primary assumption of risk; increasing inherent risk of sport; concussions: *Mayall v. USA Water Polo* (9th Cir. 2018) __ F.3d __.

Mayall sued USA Water Polo in a putative class action, alleging that the organization failed to implement concussion-management and return-to-play protocols for its youth leagues. Mayall's daughter was playing goalie in a youth water polo tournament, and after being struck in the face by the ball began manifesting concussion symptoms. She was put back in the game and received additional hits to the head. As a result, she suffered from extremely debilitating post-concussion syndrome. The district court dismissed the lawsuit for failure to state a claim under California law, and in particular found that the defendants failed to increase the risk of harm. Hence the claim was barred by the doctrine of primary assumption of the risk under *Knight v. Jewett* (1992) 3 Cal.4th 296. Reversed.

Plaintiff did not argue that the defendants were negligent for failing to prevent the initial blow to the plaintiff's daughter's face; she concedes that this injury was inherent in the sport of water polo. She argued, however, that the secondary injury that was incurred when her daughter received additional blows to the head after being put back into the game were not inherent in the sport. The court agreed. "We recognize that the California Supreme Court cautioned in *Knight* that § 1714(a) does not impose a duty of care that would 'alter fundamentally the nature of the sport.' . . . However USA Water Polo has, by its own actions, made clear that using a detailed concussion-management and return-to-play protocol does not alter that fundamental nature of water polo."

Torts; punitive damages; showing of financial condition; subpoena versus notice-to-attend: *Morgan v. Davidson* (2018) __ Cal.App.5th __ (Fourth Dist., Div. 2.)

When a dog owned by defendants Pena and Davidson came onto plaintiff Morgan's property and attacked his animals, Morgan captured the dog and refused to give it back to defendants, intending to hold it until Animal Control could impound it. Pena and Davidson attacked Morgan, repeatedly punching and kicking him. The trial court awarded Morgan compensatory damages of $109,000 and punitive damages of $100,000. Defendants attacked the punitive award on appeal, arguing that Morgan failed to prove their financial condition. Affirmed.

After the court found that defendants had acted with malice, fraud, or oppression, it scheduled an order-to-show-cause hearing on the defendant's financial condition. Morgan's counsel served defendants' counsel with a "notice in lieu of subpoena to compel attendance before the court," which requested production of nine items of financial information. Defendants did not produce the requested information. Section 1087 of the Code of Civil Procedure authorizes the service on a party's attorney of a written notice in lieu of a subpoena requesting that the party attend a court hearing. Such a notice has the same effect as the service of a subpoena. Accordingly, the defendant's failure to produce the requested information excused Morgan's obligation to provide proof of their financial condition in order to obtain a punitive-damage award.

Civil Procedure; § 998 demands; Probate Code §§ 550-555; decedent's insurer deemed a "party" to action for purposes of § 998, hence it's failure to accept the offer will trigger recovery of enhanced costs under § 998. *Meleski v. Estate of Holden* (2018) __ Cal.App.5th __ (Third Dist.)

Holden ran a ran light and injured Meleski. After filing suit against him, Meleski learned that Holden had died and had no estate. He did, however, have a $100,000 insurance policy with Allstate. Meleski amended her complaint to name Allstate under Probate Code section 550, which allows an action to establish the decedent's liability for which the decedent was covered by insurance to be continued against the estate without the need to join the decedent's personal representative. Under the statutory scheme, the decedent's estate is named as a party but the decedent's insurer is the entity served with the summons and complaint. Under the statute, unless the personal representative is joined, the judgment does not adjudicate rights by or against the estate,

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the amount of the recovery is capped at the policy limit, and the judgment is enforceable only against the insurance policy, not the estate. Meleski served a $99,000 offer to compromise under section 998 on Allstate. Allstate did not accept and the case wen to trial. Meleski recovered a judgment of $180,000. Meleski sought enhanced costs against Allstate under § 998 for $66,000. Allstate argued that under the Probate Code, its liability was capped at the $100,000 policy limit. The trial court agreed and refused to award costs. Reversed.

Section 998 allows an offer to compromise to be served on "any party." Allstate argued that it was not a "party" to the litigation within the meaning of section 998. Even though Holden's estate was named as a party, it was not really a party because Holden left no estate. "We consider Allstate a party for purposes of section 998 because "a person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." (Rest.2d Judgments, § 39.) Not only did Allstate have complete control of the litigation in this matter, it was also the only entity opposing Meleski that risked losing money in the litigation. . . . In actuality, Allstate is the party litigating the case, inasmuch as it alone is at risk of loss and controls the litigation."

Products liability; risk-benefit test; use of industry standards: *Kim v. Toyota Motor Corp*. (2018) __ Cal.5th __ (Cal.Supreme)

William Kim was severely injured after he lost control of his Toyota Tundra pickup truck and drove off an embankment. Together with his wife, Kim brought an action against Toyota for strict products liability, claiming that the pickup truck was defective because its standard configuration did not include vehicle stability control ("VSC"), which Kim claimed would have prevented the accident. At trial, the jury heard evidence that no vehicle manufacturer at the time included VSC as standard equipment in pickup trucks. The jury ultimately found in Toyota's favor and the Court of Appeal affirmed.

The Supreme Court granted review to decide whether evidence of industry custom and practice may be introduced in a strict products-liability action. The Court held that the answer depends on the purpose for which the evidence is offered. Evidence that a manufacturer's design conforms with industry custom and practice is not relevant, and therefore not admissible, to show that the manufacturer acted reasonably in adopting a challenged design and therefore cannot be held liable; under strict products-liability law, a product may contain precisely the same safety features as other products on the market and still be defective. But even though evidence of industry custom and practice cannot be dispositive of the issue, it may nevertheless be relevant to the strict products-liability inquiry, including the jury's evaluation of whether the product is as safely designed as it should be, considering the feasibility and cost of alternative designs. The Court held that, in Kim's case, the evidence was properly admitted for that limited purpose. It accordingly affirmed the judgment of the Court of Appeal.

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