

DECEMBER 2000 LAW REVIEW

DUTY TO EDUCATE YOUTH ABOUT RISK OF SEXUAL ABUSE BY VOLUNTEERS?

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In determining agency liability for sexual molestation by its employees or volunteers, an agency may be held to a higher legal standard of care in the selection and continued retention of adults who are entrusted with the well-being of the children of the community. In particular, the agency may have a legal duty to properly screen applicants and continue to provide screening to determine if an employee or volunteer has been convicted of crimes involving moral turpitude. (See: "Molestation Liability Examines Scope of Employment & Foreseeability," NRPA Law Review, February 1997, *Parks & Recreation*).

In the past, it was very difficult to screen applicants for any history of crimes involving moral turpitude, particularly when the perpetrators of such crimes move to other states. The Internet, however, has made this process much easier to check "State Sex Offender Registries" (<http://www.prevent-abuse-now.com/register.htm>). In addition, the U.S. Justice Department, Office of Juvenile Justice and Delinquency Prevention has an April 1998 publication, *Guidelines for the Screening of Persons Working With Children, the Elderly, and Individuals with Disabilities in Need of Support*, which is available on the Internet (<http://www.ojjdp.ncjrs.org/pubs/guidelines/contents.html>). Similarly, the National Foundation to Prevent Child Sexual Abuse has a website with information and resources regarding criminal history record screening of adults seeking to work or volunteer with children (<http://www.childsexualabuse.org/>)

Obviously, as such information becomes more readily available through the Internet and utilized by communities, youth agencies will be expected to effectively implement this information and resources to screen applicants for employment and volunteer positions in youth programs.

In the *Juarez* opinion described herein, plaintiff alleged that he was abused by a youth volunteer who had been hired without conducting a proper background check. However, in this particular instance, the court found nothing in the volunteer's background which would have provided a specific warning that this particular individual posed an unreasonable risk to minors.

On the other hand, the court in *Juarez* found a legal duty may exist to take reasonable protective measures to protect children from the risk of sexual abuse by adult volunteers involved in youth programs. Such protective measures may include warnings, education and training for both the youth and their parents regarding the risk of sexual molestation.

KNOWLEDGE OF PROPENSITIES?

In the case of *Juarez v. Boy Scouts of America, Inc.*, No. A085271 (Cal.App. Dist.1, 2000), plaintiff Mario Juarez claimed he was repeatedly molested by his scoutmaster, Jorge Francisco Paz, while he was a member of Boy Scout Troop 255. The facts of the case were as follows:

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According to Juarez, the molestations occurred in 1990 when he was between 12 and 13 years old. The sexual acts were committed during officially sanctioned scouting events, such as overnight camping trips, and at Paz's home. However, Juarez did not reveal the molestations to anyone until 1993. After Juarez's revelations, Paz gave a statement to law enforcement authorities admitting he had engaged in sexual misconduct with Juarez as well as with numerous other minors. Paz was ultimately sentenced to 14 years in prison on the basis of a negotiated plea...

Paz was Juarez's scoutmaster for less than a year, from February 1990 until December 1990. The troop ceased to exist in January 1991. At the time Paz became a scoutmaster he had been employed by the Oakland Unified School District as an instructional aide for 18 years without incident. Moreover, there is nothing in the record indicating Paz had a prior criminal record or documented history of sexual misconduct. Nor did anything become known during Paz's service as assistant scoutmaster that should have raised questions about his fitness for that position.

Juarez specifically claimed the Scouts were negligent in: (1) hiring Paz without conducting a proper background check; (2) failing to monitor and supervise him so that young male scouts would be protected from sexual molestation; (3) failing to properly manage, oversee, and educate Troop 255; and (4) doing nothing to stop Paz from engaging in inappropriate sexual conduct with young male scouts even after they knew or should have known of his deviant propensities.

In response, the Scouts claimed they had no "prior knowledge or reason to know that Paz might be likely to sexually molest one of the scouts in Troop 255." As a result, the Scouts claimed that "Paz's sexual misconduct with Juarez could not have been foreseen." The trial court agreed and granted summary judgment in favor of the Scouts. In so doing, the trial court found no evidence to suggest that "defendants had notice of Paz's propensities, or that facts providing such notice were available to defendants." Juarez appealed.

NEGLIGENT HIRING/SELECTION?

On appeal, Juarez had argued that "the Scouts were liable for its negligence in the selection, supervision and retention of Paz." As noted by the appeals court, "an employer can be held liable for negligent hiring if he knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him." In this particular instance, the court characterized Juarez's "theory of negligent hiring" as encompassing "the particular risk of molestation by an employee with a history of this specific conduct." However, assuming that a such a legal duty existed under the circumstances of this case, the appeals court found "no information accessible to the Scouts that would cause them to suspect that Paz had a propensity to molest children."

[T]here can be no liability for negligent supervision in the absence of knowledge by the principal that the agent or servant was a person who could not be trusted to act properly without being supervised.

While the undisputed facts show with certainty that Juarez was seriously harmed by Paz's misconduct, those same undisputed facts establish that there was nothing in Paz's background and nothing that was made known to the Scouts during his tenure as scoutmaster to Troop 255 that could be deemed a specific warning that Paz himself posed an unreasonable risk to minors.

The appeals court, therefore, affirmed the trial court's grant of summary judgment in favor of the Scouts on Juarez's claim of negligent hiring, retention and supervision.

REASONABLY FORESEEABLE?

Juarez also claimed that the Scouts had an "independent responsibility to protect and educate the young men who participate in their programs." Specifically, Juarez asserted that the sexual molestations would have been prevented "if the adult leaders in his troop had received training on how to prevent and detect sexual abuse, and if he had been warned and educated about how to handle such a situation."

If the members of Troop 255 had been effectively educated and trained to recognize indicators of pedophile activities, they would have recognized suspicious activity by Paz, such as sleeping with scouts in their tents on overnight camping trips and having scouts spend the night at his apartment. Furthermore, education and training of the scouts as to how to "repel" adult sexual advances would have prevented the molestations...

[T]he Rules and Policies of the Boy Scouts of America, Inc. were not implemented at Troop 255, not understood by the primarily Spanish speaking parents, youth and troop leaders, and were completely ineffective at protecting Mario Juarez from sexual molestation by Paz.

Accordingly, the specific issue before the appeals court was "what, if any, legal duty the Scouts had to warn, train or educate Juarez (either directly or through his parent) about the risk of sexual abuse by adult male volunteers involved in the scouting program, and how to avoid or minimize such risk." As noted by the appeals court, "the foreseeability of harm to the injured party" is a "critical element" in determining "whether a particular defendant owed a tort duty to a given plaintiff." Moreover, the court acknowledged that "foreseeability supports a duty only to the extent the foreseeability is reasonable."

[A] duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated. Basically, the reasonableness standard is a test which determines if, in the opinion of a court, the degree of foreseeability is high enough to charge the defendant with the duty to act on it.

[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple

means, a lesser degree of foreseeability may be required. Thus, foreseeability is a somewhat flexible concept. If injury to another is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct, we must label the injury "reasonably foreseeable."

Applying these principles to the facts of the case, the court found it should have been "reasonably foreseeable to the Scouts that a child participating in scouting might fall prey to a sexual predator, with no documented history of such proclivities, who is serving as an adult volunteer in the child's scouting troop."

The Scouts acknowledge, as they must, the possibility exists that pedophiles will be attracted to scouting to gain legitimate access to young boys in order to seduce the more susceptible ones into sexual activity. The Scouts can hardly claim otherwise. Legal commentary notes that sex abuse in scouting "is more common than accidental deaths and serious injuries combined," with the Scouts reporting, on average, more than one incident of sexual abuse per week for the past two decades, and with many more cases going unreported. (Perfect for Pedophiles?, 76 Texas Law Review at page 144, footnote 8.)

As a result, the appeals court rejected the Scouts' argument that "the harm that befell Juarez while he was participating in Troop 255 activities was unforeseeable."

REASONABLE PROTECTIVE MEASURES?

Having found sexual molestation was foreseeable, the appeals court considered whether the Scouts owed a legal duty of care to take "reasonable protective measures to protect Juarez from the risk of sexual abuse by adult volunteers involved in scouting programs, such as warning, training or educating him (either directly or through his parent or adult volunteers) about how to avoid such a risk."

According to the appeals court, the Scouts were "justified in believing that reasonable prevention methods will not prove sufficient to halt sexual abuse in each and every case." On the other hand, the appeals court found "empirical support for the proposition that sexual abuse of children can be mitigated through implementation of programs designed to educate young people and their adult caretakers about sexual abuse." In particular, the appeals cited the following "Scouting literature" which recognized that "the best line of defense to protect children from sexual exploitation is educating them, their parents, and the adult volunteers on how to avoid such harm":

Despite the Scouts' current litigation posture of disavowing the existence of such a causal link, their own publications tout the effectiveness of their "Youth Protection Program" in preventing sexual assault. In a staff orientation booklet produced by the Scouts in 1987 entitled "Child Sexual Abuse, How to Deal With It," it is written:

Perhaps the best way to prevent sexual child abuse is to educate children as to the existence and dangers of child abusers and to encourage them to 'yell and tell.' . . . Councils should use our available child abuse materials to train youth members how to respond to this threat." In the Scouts' "Youth Protection Guidelines," readers are told: "Another way to protect our youth from the potential abuser is to educate them.... The [Scouts] makes youth protection materials available to members and their parents on a continuing basis."

As a result, the appeals court agreed with Juarez that "the absence of information about the warning indicators of impending molestation along with the absence of critical advice as to how to rebuff a sexual advance," in this particular instance, created a sufficient "causal link" between the Scouts omissions and the acts of sexual molestation. Further, the appeals court found that it would not be "too onerous" a burden to impose on the Scouts a "legal responsibility to incorporate into their program information designed to prevent a significant risk of harm to the youths it serves." On the contrary, the court found the recognition of such "a legal duty of care will have beneficial consequences for the community as a whole, which vastly outweighs the slight burden imposed on the Scouts."

Juarez points out that the Scouts have a highly developed and effective delivery system in place to ensure that its program, uniforms, equipment, and handbooks get into the hands of individual scouts. Juarez claims that in light of this delivery system, it would not have taken heroic measures for the Scouts to see that the critical component of its "Youth Protection Program" reached the members of Troop 255. In supplemental briefing, Juarez argues "the record shows that whatever materials [the Scouts] may have had in its arsenal of abuse prevention programming--including Spanish-language print materials--it failed to deploy them in Troop 255," and in this case, such "a haphazard delivery system simply was not good enough."

A 1991 publication by the Scouts acknowledges that, "[b]ecause of the unique role of the Boy Scouts of America in the development of millions of young boys each year, it is important for the BSA to understand this societal problem [of child sexual abuse] and know the steps to combat it."

In so doing, the appeals court rejected the Scouts' contention that "any duty would apply not only to their organization but also to all defendant organizations in future cases that confront the same risk of harm to children, regardless of the differences in the surrounding circumstances."

The Scouts present impassioned arguments about the inherent difficulty in defining a workable duty of care, warning that fulfilling such a duty would impose substantial costs and undue administrative burdens on charitable organizations that work with children, which would inevitably decrease the level or quality of the important services they provide.

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In response, we wish to make special note that the reach of this opinion is only intended to extend as far as the record before us today. If we have not yet made it abundantly clear, deciding the question of duty mandates a case-by-case fact and policy analysis. We do not intend our decision to serve as a manifesto by which lower courts are to impose duties of care upon all forms of charitable organizations engaged in volunteer youth programs, requiring them to take steps to prevent or minimize the chance that group leaders will engage in intentional misconduct against the youths participating in their programs.

Because we expect our analysis to carry this caveat implicitly, and now explicitly, we do not share the Scouts' concern that imposition of a duty will work a grave hardship on others whose programs, experience with abuse of minors, and other factors we identify as important to the issue of duty are not examined by us today.

SPECIAL RELATIONSHIP

As noted by the appeals court, liability for negligence is generally "not imposed for the failure to assist or protect another, absent some legal or special relationship between the parties giving rise to a duty to act." The appeals court, however, recognized that "[g]enerally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. Accordingly, the appeals court acknowledged the fact that a number of courts have found "a special relationship, giving rise to a duty to protect children against a known risk that they might be sexually molested." In particular, the appeals court took note of a state court opinion which had "described the special relationship between the child participant and youth organization in terms particularly pertinent to this case":

The mission of youth organizations to educate children, the naivete of children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and the members such that the youth organizations are required to exercise reasonable care to protect their members from the foreseeable conduct of third persons." (*Evans v. Ohio State Univ.* (Ohio App. 1996) 680 N.E.2d 161, 181 (Lazarus, J., concurring in part and dissenting in part.)

Similarly, in this case, the appeals court held that "a special relationship existed between the Scouts and Juarez giving rise to a duty to protect him from harm caused by the criminal conduct of third parties."

EVIDENCE OF NEGLIGENCE

As described by the appeals court, "[a]n action for negligence additionally requires a showing that the defendant breached a legal duty owed to the plaintiff, and that the breach was a proximate or legal cause of the plaintiff's injuries." Applying this principle to the facts of the case, the appeals court found sufficient evidence for a jury to determine that "the Scouts failed to take reasonable protective measures to protect him from the risk of sexual abuse by adult

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volunteers involved in scouting programs, and that the failure to take such steps exposed him to an increased danger of sexual molestation."

Juarez presented evidence opposing the summary judgment motion indicating that while a praiseworthy "Youth Protection Program" was created by the Scouts, they failed to take reasonable steps to see that the information in the program was likely to be communicated to the scouts, parents, or adult leaders of Troop 255. For example, [scoutmaster] Aguilar received only limited information of the type contained in the "Youth Protection Program," and he was not active in the troop during the time Juarez was a member. Aguilar's replacement as scoutmaster, Robles, received no training and was completely unaware of the availability of the "Youth Protection Program" materials. Apparently, no one at the local council, a constituent body of the Scouts established to provide training and guidance to the troops within its jurisdiction, ever spoke to Robles. Although Robles was aware that Paz sometimes took the troop on overnight camping excursions by himself, and sometimes slept in the same tents as the boys, Robles received no information that such activities were prohibited in the scouting program.

The troop was comprised of Spanish-speaking boys, most of whom were recent immigrants to this country. The troop meetings were conducted in Spanish. Yet the members of this troop were provided with English-language copies of the "Boy Scout Handbook." Although the handbook was available in Spanish, neither the boys nor their parents were even advised of such. No one showed them the film "A Time to Tell" or provided the other materials comprising the Scouts' "Youth Protection Program." They were not told of the availability of these program materials...

Our opinion that questions of fact exist should not be construed as resolving the negligence issue in favor of Juarez. Rather, on the basis of the evidence, Juarez is entitled to an opportunity to prove the merits of his case at a trial. While the evidence may ultimately establish there was no breach of the Scouts' duty or that any breach was neither a cause-in-fact nor legal cause of any damages, we conclude that the record, at this point, does not conclusively eliminate the possibility of the Scout's liability.

Accordingly, the appeals court concluded that summary judgment was improperly granted to the Scouts. The appeals court, therefore, reversed the summary judgment in favor of the Scouts and remanded (i.e., sent back) the case to the trial court for further proceedings to address the issue of the Scouts' alleged negligent failure to take "reasonable protective measures to protect Juarez from the risk of sexual abuse by adult volunteers involved in scouting programs."