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Students at Risk – Maintaining balance after Virginia Tech

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On April 17, 2007, Cho Seung Hui, a 23-year-old fourth year undergraduate at Virginia Tech shot and killed 32 students and teachers. This unfortunate event has caused the most well-tested university and college administrators to consider if they are properly managing the students in their community who are at risk of harming themselves and others.

As legal counsel to universities and colleges, we have first hand experience with the challenges faced by administrators and student affairs professionals who manage students at risk. It's not an easy task, nor is it a task that is particularly well-informed by legal guidelines. In fact, since Virginia Tech, many commentators have blamed human rights and privacy laws for impeding the university's effective judgement. We find these opinions unfortunate. Not only are they disempowering, they do not accurately reflect our privacy and human rights law. While striking the right balance between security and individual student rights is never easy to do, in our view it is possible to take all reasonable steps to ensure a secure campus while also demonstrating respect for individual student rights.

The duty of care jurisprudence is yet to provide specific guidance

The public questioning of Virginia Tech's actions began immediately following the incident. This is not surprising, but the natural search for accountability that has also followed similar incidents in the past has not led to a rich body of jurisprudence that articulates how administrators should meet their multiple legal duties. In fact, there are no Canadian cases about a school's duty to prevent students at risk from harming themselves and others.

In the United States there has been more litigation over claims of negligence brought by students and their family members, but to date, these claims have not been resolved in a manner that has provided significant guidance to administrators. In two well-known cases, American courts have held that school administrators without medical training owed a duty of care to suicidal students to whom they had been providing support. However, both cases settled shortly after the duty of care finding laid the foundation for real judicial scrutiny of the schools' decision-making. In 2005, a Massachusetts court held that MIT's dean of student affairs and a residence don owed a duty of care to a student who had committed suicide less than 12 hours after a team of administrators and psychiatrists had met to assess her condition. In 2002, a Virginia court made a similar finding in an action brought by the estate of a student who had committed suicide shortly after college officials had intervened in his personal difficulties, requiring him to sign a statement promising that he would not harm himself.

Despite these two cases, there remain some very significant legal arguments to be made about when a school's relationship with students who have been designated "at risk" becomes close enough to warrant the imposition of a common law duty of care. Institutions who are challenged may also argue (as argued by MIT) that there are policy reasons that weigh against the imposition of a duty of care that should be recognized in order to encourage schools to provide at risk students with support.

What would the reasonable administrator do?

These arguments, however, are for the lawyers and legal scholars. While there may be arguments against a legal duty of care, most administrators would accept that violent incidents like Virginia

Tech are human tragedies. So whether one views the risk of student violence from an institutional perspective or a human perspective, today's administrator should be more concerned about the next part of the legal test for negligence. Assuming there is a duty of care, what decision-making norms should be applied to meet the "reasonable university administrator" standard of care? What steps should Virginia Tech have taken in light of Cho Sueng Hui's violent writings and known history of mental health difficulties? Did it do enough to investigate recent bomb threats which may have been made by Cho in light of paraphernalia later seized from his dormitory room? Was the university's response to the first two shootings adequate given that Cho later resumed his rampage in a nearby building almost two hours later? It would not be surprising if claims are filed against Virginia Tech, but even if a court is given the opportunity to answer these questions, it won't be for a long time. What are school administrators to do in the current environment of heightened scrutiny created by incidents like the Virginia Tech event?

The simple answer: administrators should ensure systems are in place that encourage the exercise of sound judgement and due diligence. It is also critical, in our view, that these systems ensure that qualified mental health professionals are able to engage in routine risk assessments based on complete and valid information.

Again, some have claimed that the exercise of sound judgement is prohibited by privacy law (because it impedes access to relevant information) and by human rights law (because it restricts institutions' ability to take steps to control risk). A brief examination of the legal framework by which these individual rights are balanced against a *bona fide* security interest reveals the weakness of this claim. Below, we have discussed the legal aspects of managing scenarios in which there is an imminent risk of serious harm and scenarios in which the risk of harm is not imminent.

When there is imminent risk of serious harm

Assume that a visibly upset student makes a statement to her residence don that she's going to commit suicide and, in the circumstances, it is reasonable to deem the threat credible. Neither privacy nor human rights law would prohibit the

administration from calling the police to prevent harm.

The Ontario *Freedom of Information and Protection of Privacy Act* contains an exemption (common to most privacy statutes) that permits the non-consensual disclosure of personal information "in compelling circumstances affecting the health or safety of an individual." There is a similar exemption in the Ontario *Personal Health Information Protection Act, 2004* (which would apply if the threat was received by a health care practitioner engaged in providing health care to the student) and a similar medical confidentiality exemption recognized by the Supreme Court of Canada in its 1999 *Smith v. Jones* decision.

Also, the school would be in compliance with anti-discrimination legislation. Assume the don calls the police and the student is involuntarily confined. Even if the student's confinement is related to a mental disability, his or her right to be free from discrimination would likely be overridden by the public interest in protecting the student and others from harm.

The key to managing this type of risk is to ensure that front-line staff members decide to contact the police based on a valid assessment of the imminence and seriousness of the potential harm. Non-medical staff can and must make this judgement call but should be properly trained and supported so they can ask students the right questions and ensure they do not apply stereotypical assumptions about individuals suffering from mental disabilities. Front-line staff must be made to feel confident in their ability to make the right decision or, at the critical moment, may refrain from making a necessary report.

Managing non-imminent risks is challenging but possible

The tension between a student's individual rights and the public interest in a secure campus is more apparent in the day-to-day circumstances in which support is provided to students at risk. Most students who suffer from a mental illness will pose no significant threat to themselves or to others. And no one – including a qualified mental health professional – can predict with certainty if and when a mentally ill student will commit an act of violence. Administrators are often put in a position where they must make decisions about

risk based on limited information and vague a sense of unease.

The challenge is exacerbated because neither privacy nor anti-discrimination statutes contain express provisions which enable institutions to deal with risks of harm that do not appear to be imminent. The FIPPA exemption we discussed above, for example, is clearly limited to circumstances which give rise to an imminent and serious risk. Generally speaking, the flow of information necessary for the proper assessment of non-imminent risks should be based on informed consent. Virginia Tech clearly had *some information* about Cho Sueng Hui's mental health. One question that should now be answered is whether it had *sufficient credible information* upon which to take protective action.

Anti-discrimination legislation also does not expressly allow schools to seek assessment information and place other controls on individuals suffering from mental illnesses. However, as we discuss further below, it has been interpreted to require individuals who are being accommodated in the educational environment to cooperate in the accommodation process. The duty to cooperate requires an individual to provide information necessary to facilitate accommodation, including information necessary to assess what reasonable measures may be used to control risks associated with accommodation.

As part of the dialogue that has followed the Virginia Tech event, commentators have expressed a need to expel students who suffer from mental illnesses. When accommodating a student on campus gives rise to safety risks that cannot be managed the student may be lawfully excluded from some or all aspects of campus life. However, schools should not make such decisions without first engaging in a rigorous problem solving approach based on sufficient credible information. Schools and other human rights defendants frequently fail to meet the "undue hardship" limit on the duty to accommodate because they make accommodation decisions based on assumptions that later cannot be sustained. When provided with limited information, schools should engage in a genuine process of assessment and accommodation based on the consensual flow of necessary assessment information.

Conclusion – Schools should assert their right to information

Did Virginia Tech have access to sufficient credible information about Cho Seung Hui? We do not have any valid basis to judge Virginia Tech nor is this our objective, but there are some noteworthy media reports on the information that was shared about Cho that are helpful points of discussion.

- An English professor who was privy to Cho's writings and expressed concerns was not aware that Cho had been hospitalized at a mental health facility in 2005.ⁱ
- The five students who lived in a dorm suite with Cho never expressed any concern to administrators about his potential for violence.ⁱⁱ
- The university did not have Cho under a program of psychiatric assessment. The director of Virginia Tech's campus counselling service said, "The University is not part of the mental health system nor the judiciary system, and we would not be the providers of mandatory counselling in this instance."ⁱⁱⁱ

These reports lead one to question whether Virginia Tech had an appropriate system in place to provide support and accommodation to students with mental health issues or to manage risks associated with the accommodation of such students on campus. When a student with a serious condition voluntarily seeks help or when there are reasonable grounds to propose that a student be directed into program for managing students at risk, it will often be reasonable to propose that the student consent to both a program of treatment (which is subject to the normal rules patient-doctor confidentiality) and a separate program of assessment and monitoring (in which information is shared based on consent between medical and non-medical professionals to promote valid and routine risk monitoring).

If the student rejects such a program the institution may require the student to withdraw from some or all aspects of campus life. In such a case, in order for the institution to limit its exposure to privacy and human rights complaints, the institution should be prepared to prove the reasonableness of the program. This can be done by adducing evidence of the specific risk raised by the student (based on whatever information he or she has provided) and describing how the

treatment, assessment and monitoring program is tailored to meet that risk. So long as the proposal is made in a genuine attempt to accommodate and is reasonable in the circumstances the school's legal duties pertaining to security, privacy and human rights will not be in conflict.

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Hicks Morley provides legal advice in respect of labour, employment, education, human rights, information and privacy and pension and benefits issues to a majority of universities and colleges in Ontario. If you would further information or our assistance in addressing the legal implications of your policies and procedures for managing students at risk please contact your regular Hicks Morley lawyer, Dan, Catherine or any of the following lawyers.

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ⁱ Marc Santora and Christine Hauser "Anger of Killer Was on Exhibit in His Writings" *The New York Times* (20 April 2007), online: <www.nytimes.com.>

ⁱⁱ Ian Urbina and Manny Fernandez "University Explains the Return of Troubled Student" *The New York Times* (20 April 2007), online: <www.nytimes.com.>

ⁱⁱⁱ *Ibid.*

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