Maine Law Review

Volume 68 | Number 2 Article 5

January 2016

Brown v. Delta Tau Delta: In a Premises Liability Claim, How Far Should the Law Court Go to Assign a Duty of Care?

Toby Franklin
University of Maine School of Law

BROWN V. DELTA TAU DELTA: IN A CLAIM OF PREMISES LIABILITY, HOW FAR SHOULD THE LAW COURT GO TO ASSIGN A DUTY OF CARE?

Toby Franklin

BROWN V. DELTA TAU DELTA: IN A CLAIM OF PREMISES LIABILITY, HOW FAR SHOULD THE LAW COURT GO TO ASSIGN A DUTY OF CARE?

Toby Franklin[*]

I. INTRODUCTION

In 2015, Maine's premises liability law made an evolutionary leap. In Maine, the elements of a premises liability claim are the same as a negligence claim: duty of care, breach of that duty, causation, and harm to the plaintiff.[1] Since the late nineteenth century, the duty element had remained consistent and predictable: a property owner, possessor, or proprietor owes a duty of reasonable care to individuals who are lawfully on the premises.[2] As a result, premises liability defendants had always shared the common trait of owning, possessing, or managing the premises in question.[3] In *Brown v. Delta Tau Delta*, the Supreme Judicial Court, sitting as the Law Court, expanded premises liability to cover a business entity that did *not* own, possess, or manage the premises in question, but nonetheless knew the tort would happen.[4] The entity foresaw the tort, enjoyed a close relationship with the tortfeasor, and had sufficient control over the tortfeasor's actions.[5] Therefore, the entity had a duty of care.[6] The court reached these conclusions after examining the series of events leading to the claim. This note begins with a discussion of those events.

In September 2010, Elizabeth Brown was sexually assaulted while attending a party at the Delta Tau Delta fraternity house at the University of Maine at Orono (UMO).[7] She had been invited to the party by Joshua Clukey, a fraternity member.[8] Upon her arrival, Brown encountered Clukey, and asked him if she could store her purse in his room upstairs.[9] On the way upstairs, Brown and Clukey passed Tucker

---

* J.D. Candidate, 2017, University of Maine School of Law. The Author would like to thank Dean Jennifer Wriggins for her valuable guidance on this case note. The Author would also like to thank his colleagues on the Maine Law Review for their editorial insight, his friends and family for their ongoing understanding of the law school experience, and last but certainly not least, the Author would like to thank his wife, Michelle LeBlanc, for her endless patience and support.

1. Durham v. HTH Corp., 2005 ME 53, ¶ 8, 870 A.2d 577.

2. Stanton v. Univ. of Me. Sys., 2001 ME 96, ¶ 8, 773 A.2d 1045; Currier v. Toys 'R' Us, Inc., 680 A.2d 453, 455 (Me. 1996); Erickson v. Brennan, 513 A.2d 288, 289 (Me. 1986); Poulin v. Colby College, 402 A.2d 846, 848 (Me. 1979); Ferguson v. Bretton, 375 A.2d 225, 226-27 (Me. 1977); Schultz v. Gould Acad., 332 A.2d 368, 371 (Me. 1975); Isaacson v. Husson Coll., 297 A.2d 98, 103 (Me. 1972); Walker v. Weymouth, 154 Me. 138, 141, 145 A.2d 90, 92 (1958); Bernier v. Bournakel, 152 Me. 314, 317, 128 A.2d 846, 848 (1957); Lewis v. Mains, 150 Me. 75, 76-77, 104 A.2d 432, 433 (1954); Shannon v. Dow, 133 Me. 235, 240, 175 A. 766, 768 (1934); Robinson v. Leighton, 122 Me. 309, 311, 119 A. 809, 810 (1929); Parker v. Portland Publ'g Co., 69 Me. 173, 176 (1879).

3. *See generally*, cases cited *supra* note 2.

4. 2015 ME 75, ¶ 29, 118 A.3d 789.

5. *Id.*

6. *Id.*

7. *Id.* ¶ 3.

8. *Id.*

9. Brief for Plaintiff-Appellant at 4, Brown v. Delta Tau Delta, 2015 ME 75, 118 A.3d 789 (No. PEN-14-139).

Adams, the president of Gamma Nu, the local fraternity chapter.[10] When Brown told Adams that she was going to Clukey's room, he laughed and told her that "she didn't want to do that," but refused to explain why.[11] After Clukey and Brown entered Clukey's room, Clukey prevented Brown from leaving, and sexually assaulted her.[12]

The next day, Brown told Adams about the incident.[13] Adams admitted to her that the fraternity had been concerned about Clukey's behavior lately, which included binge drinking, angry outbursts, property damage, and fights with other fraternity members.[14] These incidents were violations of the Delta Tau Delta rules and code of conduct,[15] but the record does not include citations from Gamma Nu for any of these violations. The week following Brown's report, Gamma Nu cited Clukey for the assault, expelling him from the fraternity.[16]

In 2012, Brown filed a civil complaint against the Delta Tau Delta national organization (DTD), and the Delta Tau Delta National Housing Corporation (DTDNHC), asserting premises liability, *inter alia*.[17] Unlike the defendants of many previous Maine cases, where one plaintiff would sue one premises owner, the Defendants in this case took the form of a more complex legal entity structure. DTD is a national organization that maintains a relationship with its members, and imposes a code of conduct on them, but does not own the fraternity house.[18] DTDNHC is a corporation that maintains no relationship with the members per se, but does own the fraternity house and leases it to Gamma Nu.[19] Gamma Nu is an unincorporated student association, serving as the DTD chapter at UMO.[20] In light of this organizational structure, the trial court held that under existing Maine premises liability law, neither DTD nor DTDNHC owed Brown a duty of care.[21] The court granted the Defendants' motion for summary judgment on all counts that had not been previously dismissed.[22] Brown appealed to the Law Court.[23]

Faced with a unique type of defendant, the Law Court chose to analogize a fraternity's duty toward its members' social invitees to a university's duty toward its business invitees.[24] Following precedent, the court defined the duty of care to include three factors: the foreseeability of the harm, how much control the organization had over its members, and the closeness of the relationship between the assailant and defendants.[25] However, as this was the first premises liability case in Maine with a national fraternity organization as a defendant, the court looked to

10. *Id.*
11. *Id.* at 4-5.
12. *Id.* at 5.
13. *Id.*
14. *Id.* at 5-6.
15. Brown v. Delta Tau Delta, 2015 ME 75, ¶ 4, 118 A.3d 789.
16. *Id.*
17. *Id.* ¶¶ 5-6.
18. *Id.* ¶ 5.
19. *Id.*
20. *Id.* ¶ 1 n.1.
21. *Id.* ¶ 7.
22. *Id.*
23. *Id.*
24. *Id.* ¶¶ 11, 27; Stanton v. Univ. of Me. Sys., 2001 ME 96, ¶¶ 8, 10, 773 A.2d 1045.
25. *Brown*, 2015 ME 75, ¶ 14, 118 A.3d 789.

persuasive authority to determine that the duty of care is "fact-intensive."[26] Applying the law to the facts, the court concluded that the establishment of sexual assault policies meant that DTD foresaw the assault; that DTD had sufficient control over the actions of Clukey through the fraternity's rules and code of conduct; and that DTD maintained a close relationship with Gamma Nu and its members, as DTD required all chapters to appoint representatives who would report back regularly to the national organization.[27] The Law Court reversed the grant of summary judgment for the claim of premises liability against DTD, and remanded the case to the trial court.[28] Then, the Law Court dismissed the claim against DTDNHC, the actual premises owner, holding that there was insufficient evidence in discovery to establish that the housing corporation had a duty of care toward Brown.[29]

In his partial concurrence, Justice Alexander agreed with the court's holding on DTD, but argued that the premises liability claim against DTDNHC should be allowed to continue to trial for two reasons. First, there were sufficient issues of material fact as to potential agency between DTD and DTDNHC.[30] Second, because DTDNHC owned the fraternity house where the assault took place, such a grant of summary judgment backpedals on existing law by absolving a premises owner of liability for harm sustained on the premises.[31]

This Note will address the outcome of *Brown* in three parts. Part II will review the evolution of Maine's premises liability common law, and how the policy considerations of sexual assault on campus have influenced that evolution. Part III will explain *Brown*'s relevant facts, procedural posture, the Law Court's holding and rationale, and the concurring and dissenting opinions. Finally, Part IV will demonstrate why the Law Court was correct to reverse the grant of summary judgment for DTD on the count of premises liability, but incorrect to affirm the grant for DTDNHC on the same claim.

The court's holding in *Brown* represents a necessary evolution of Maine's premises liability common law, and one that the court adeptly applied to the social problem of sexual assault on campus and the legal problem of a corporate structure designed to limit liability from such assault. To address these problems, the court narrowly expanded premises liability to ensure that, so long as the conditions of foreseeability, control and relationship were met, national fraternity organizations could be held liable for torts committed against social invitees to fraternity property. However, in line with precedent and Maine's law of alter ego liability,[32] the Law Court should have held that DTDNHC shared a duty of care with DTD. By affirming summary judgment for DTDNHC, the court left open an avenue through which a premises owner can escape liability.

---

26. *Id.*

27. *Id.* ¶¶ 27-28.

28. *Id.* ¶ 29. The Law Court vacated summary judgment for DTD, affirmed summary judgment on the remaining counts, and affirmed summary judgment for DTDNHC. *Id.*

29. *Id.* ¶ 1.

30. *Id.* ¶ 30.

31. *Id.* ¶ 36.

32. *See infra* Part IV.B.

II. LEGAL AND POLICY BACKGROUND

A. The Evolution of Maine's Premises Liability Common Law

In 1934, the Law Court heard *Shannon v. Dow*, the first Maine case to fully articulate a property owner's duty of care under the doctrine of premises liability.[33] In preparation for Fourth of July celebrations, a public garage owner had constructed a homemade cannon.[34] Unfortunately, the cannon exploded prematurely, severely injuring a customer.[35] When the customer sued the garage owner for negligence, the trial court held for the customer, and the garage owner appealed.[36] The Law Court affirmed, reasoning that while an invitee is "bound to exercise due care," the owner of a public space must also use "reasonable care" to keep the premises safe for invitees.[37] If there is any danger on the premises, the owner must warn the invitees of that danger.[38]

Nearly four decades later, the Law Court approached the issue of premises liability on college campuses with *Isaacson v. Husson College*.[39] A college student slipped on a patch of ice outside the dining hall at Husson College, falling and sustaining injuries.[40] The path outside the dining hall was unlit, and the college had posted no warnings about ice.[41] The trial court held for Husson, finding that despite any unsafe conditions, the college had no duty to remove the ice, and therefore the student could not recover.[42] The Law Court reversed, citing *Shannon*, and held that the college had a duty to oversee the safety of its walkways, especially during inclement weather, and to warn students of any unsafe conditions.[43]

In *Schultz v. Gould Academy*, the Law Court first extended Maine's common law of premises liability to sexual assault cases on a school campus.[44] An unidentified assailant broke into the girls' dormitory of a boarding school, and assaulted a sixteen-year old girl in her room on an upper floor.[45] Although the watchman on duty that evening had noticed a number of signs to indicate the presence of an intruder in the building, the watchman was not permitted to visit the victim's floor.[46] Prevented from investigating the problem in person, the watchman ceased his investigation and did not report the incident to a higher authority.[47] Schultz sued Gould Academy and won, but the trial court approved the Academy's motion to set aside a verdict in Schultz's favor, and Schultz subsequently appealed

33. Shannon v. Dow, 133 Me. 235, 175 A. 766 (1934).
34. *Id.* at 766, 175 A. 766.
35. *Id.*
36. *Id.*
37. *Id.* at 768, 175 A. 766.
38. *Id.*
39. 297 A.2d 98 (Me. 1972).
40. *Id.* at 100-101.
41. *Id.* at 106.
42. *Id.* at 101.
43. *Id.* at 106-107.
44. 332 A.2d 368 (Me. 1975).
45. *Id.* at 369-370.
46. *Id.* at 369 n.3.
47. *Id.*

to the Law Court.[48] The Law Court affirmed the original verdict, and introduced the concept of foreseeability into the duty analysis of a premises liability claim.[49] The court held that if the assault was foreseeable "in light of the evidence of an unwarranted intrusion," then the watchman's "failure to exercise reasonable care" made the school liable for any injuries sustained as a result of that failure.[50]

While *Isaacson* and *Schultz* established a school's duty of care toward its students, the Law Court did not address a fraternity association's duty toward its student members until *Hughes v. Beta Upsilon Building Association*.[51] The fraternity in question set up a field for an annual mud football game, and a student member sustained serious injuries after diving head first into the muddy field from the top of a high wall.[52] The trial court granted summary judgment to the fraternity, and the student appealed to the Law Court, which affirmed.[53] The court made two critical distinctions with *Hughes*. First, the court added the element of control to the duty of care analysis.[54] Second, the court distinguished the *power* of the fraternity to control its members from the *duty* of the fraternity to control those members.[55] The court reasoned that while the fraternity had the ability to stop the student member from diving into the field, it had no duty to exercise that control, because society did not recognize that this duty existed between a fraternity and its members.[56]

Most recently, in *Stanton v. University of Maine System*, the Law Court considered the holdings from *Schultz* and the similar Massachusetts case of *Mullins v. Pine Manor College*.[57] In *Stanton*, a student athlete visiting UMO was sexually assaulted by a fellow student she had met at a fraternity party.[58] Although the trial court held there was no established duty of premises liability for a business invitee such as this student, the Law Court disagreed, incorporating the relationship element into the duty analysis: "[A] duty founded on premises liability exists between a student and a college."[59] The court further held that "the law of Maine is that the owner of premises owes a legal duty to his business invitees to protect them from those dangers reasonably to be foreseen."[60] Citing past examples of on-campus sexual assault from *Schultz* and *Mullins*, the court held that this incident was reasonably foreseeable.[61] The court reasoned that the college's measures to protect the students were lacking, in that there were no safety trainings, meetings with resident advisors, or posted signs.[62]

---

48. *Id.* at 369.
49. *Id.* at 370, 372.
50. *Id.* at 371.
51. 619 A.2d 525 (Me. 1993).
52. *Id.* at 525-526.
53. *Id.* at 525.
54. *Id.* at 527.
55. *Id.*
56. *Id.*
57. Stanton v. Univ. of Me. Sys., 2001 ME 96, ¶ 10, 773 A.2d 1045. *See also* Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983) (holding that a college owed a duty of care to protect its students against criminality, in the wake of an on-campus sexual assault by an unidentified intruder).
58. *Stanton*, 2001 ME 96, ¶¶ 2-3, 773 A.2d 1045.
59. *Id.* ¶ 8.
60. *Id.* (quoting *Schultz*, 322 A.2d at 371).
61. *Id.* ¶ 10.
62. *Id.*

The modern doctrine of premises liability in Maine began with *Shannon*, establishing the rule that the premises owner has a duty of care to keep the premises safe for any invitees, notwithstanding that the invitees must also exercise due care.[63] The Law Court first applied the doctrine to a university's duty in *Isaacson*, a classic application of the doctrine in the form of a slip-and-fall case.[64] Then in *Schultz*, the court considered premises liability in the context of sexual assault, and decided to add the element of foreseeability to the doctrine, given that the tort of assault was more nuanced than a fall on an icy pathway in winter.[65] The *Schultz* court also held that a university had a duty of care to its students, who held the status of business invitees.[66] The court defined the limit of the duty of care in *Hughes*, when a student made a completely unexpected decision that led to grave injury.[67] In *Hughes*, the court also added the elements of control and relationship.[68] Finally, in *Stanton*, the court referenced *Schultz* and *Mullins*, acknowledging that sexual assault on a college campus could always be considered a foreseeable tort.[69] By the time that the court heard arguments in *Brown*, the state of the law was such that a university in Maine had a duty of care to protect its students against the tort of sexual assault due to the tort's foreseeability, the university's close relationship with its students, and the university's ability to control the behavior of those students.

B. The Foreseeability of Sexual Assault on University Campuses

The existing body of legislation and research supports the court's conclusion that sexual assault on campus is a visible problem, and one that is readily foreseeable. Federal legislation such as the Clery Act[70] has reflected the growing awareness of the problem of sexual assault on campus. Congress passed the Clery Act in response to the rape and murder of Jeanne Clery, a nineteen-year old female college student, in her dorm room in 1986.[71] Formally known as the Student Right-to-Know and Campus Security Act of 1990, the statute requires United States higher education institutions that receive financial aid from the federal government to track and report annually on the previous three years of campus crime statistics.[72] Since the bill first passed in 1990, Congress has continued to expand the Clery Act to meet the growing awareness of violence on campus, including sexual assault.[73] In 1992, Congress

63. Shannon v. Dow, 133 Me. 235, 240, 175 A. 766, 768 (1934).

64. Isaacson v. Husson Coll., 297 A.2d 98, 106-07 (Me. 1972).

65. Schultz v. Gould Academy, 332 A.2d 368, 370-72 (Me. 1975).

66. *Id.*

67. Hughes v. Beta Upsilon Bldg. Ass'n, 619 A.2d 525, 526 (Me. 1993).

68. *Id.* at 527.

69. *See* Stanton v. Univ. of Me. Sys., 2001 ME 96, ¶ 10, 773 A.2d 1045.

70. 20 U.S.C. § 1092(f) (2012).

71. *Id.* § 1092(f)(18). *See also* Pennsylvania v. Henry, 706 A.2d 313, 317 (Pa. 1997) (affirming the conviction of Josoph Henry for the murder of Jeanne Clery).

72. *Clery Act History by Year (1989-2012)*, CLERY CENTER FOR SECURITY ON CAMPUS, http://clerycenter.org/legislative-history (last visited Jan. 29, 2016).

73. *Id.* After 1990, Congress continued to expand the Clery Act as it relates to sex crimes. *Clery Act History by Year (1989-2012)*, CLERY CENTER FOR SECURITY ON CAMPUS, http://clerycenter.org/legislative-history (last visited Jan, 29, 2016). In 1998, Congress amended the Act to expand categories and location-based reporting of crimes. *Id.* In 2000, Congress added information on how students could access information about any registered sex offenders who may reside on campus. *Id.*

passed an amendment to the Clery Act in the form of the Campus Sexual Assault Victims' Bill of Rights.[74] The amendment requires colleges and universities to develop sexual assault prevention programs in order to remain in compliance with the Clery Act.[75]

A body of academic research further defines the extent of the problem. In 2000, the National Institute of Justice conducted a survey of 4,446 college women, in which they reported that over the course of their first semester, 2.8 percent of these students had experienced a rape or attempted rape.[76] Extrapolating the results, the survey estimated that this number could climb to twenty to twenty-five percent over the course of a college career.[77] Seven years later, the National Institute of Justice funded a more detailed Campus Sexual Assault Study, which produced the result that 13.7 percent of 5,466 surveyed female undergraduates "had been victims of at least one completed sexual assault since entering college."[78] Most recently, in 2015 the American Association of Universities published the results of a study involving over 150,000 students at twenty-seven colleges or universities.[79] From this study, approximately twenty-three percent of female undergraduates reported experiencing nonconsensual sexual contact by force or incapacitation during their undergraduate careers.[80] Around the same time, a Washington Post-Kaiser Family Foundation poll produced similar results, that twenty percent of college women reported a sexual assault during their college careers.[81]

Finally, the link between sexual assault and alcohol consumption has also been documented. A longitudinal study from 1995-2013 found that forty-seven percent of sexual assaults on college students were associated with alcohol use.[82] Similarly, a 2007 study revealed that the highest sexual assault risk situation for female undergraduates is after they become involuntarily intoxicated.[83] Studies such as these show that alcohol use among undergraduates on campus is linked to an increased risk for sexual assault.

---

74. *The Federal Campus Sexual Assault Victims' Bill of Rights*, CLERY CENTER FOR SECURITY ON CAMPUS, http://clerycenter.org/federal-campus-sexual-assault-victims'-bill-rights (last visited Jan. 29, 2016).

75. 34 C.F.R. § 668.46 (2009). These programs are designed to "[s]top dating violence, domestic violence, sexual assault, and stalking before they occur through the promotion of positive and healthy behaviors that foster healthy, mutually respectful relationships and sexuality, encourage safe bystander intervention, and seek to change behavior and social norms in healthy and safe directions." *Id.* § 668.46(j)(2)(iv).

76. BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000).

77. *Id.*

78. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 6-1 (2007).

79. DAVID CANTOR, ET AL., AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT vi (2015).

80. *Id.* at 23.

81. *See* Nick Anderson, Scott Clement, *College Sexual Assault: 1 in 5 College Women Say They Were Violated*, THE WASHINGTON POST, http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/ (last visited June 12, 2015).

82. LYNN LANGTON & SOFI SINOZICH, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 8 (2014).

83. DEAN G. KILPATRICK ET AL., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 3 (2007).

III. THE *BROWN* CASE

A. Factual Background

1. DTD Organizational and Regulatory Structure

DTD is a non-profit organization that represents the fraternity at the national level.[84] DTDNHC is a non-profit organization that holds DTD's property, and leases fraternity houses to local chapters.[85] These chapters include Gamma Nu, UMO's chapter of DTD.[86] DTD regulates chapters "through risk management policies, a member code of conduct, and oversight by chapter consultants and alumni advisors.[87] DTD's by-laws include national Member Responsibility Guidelines (MRGs).[88] Those MRGs include DTD's "Policy on Alcohol and Substance Abuse" and a policy on sexually abusive behavior.[89]

DTD also has a structured organizational hierarchy. Local chapters like Gamma Nu have an alumni advisor, who serves as a deputy for DTD.[90] One of the advisor's responsibilities is to monitor a local chapter and report on the chapter's level of compliance with the by-laws to the DTD leadership.[91] Chapter consultants from DTD also visit local chapters each semester to evaluate and report potential rule violations to DTD.[92] In the event of a violation, DTD uses the MRGs for enforcement.[93] MRGs are divided into three categories based on severity, and the violations of MRGs at the highest severity category require expulsion from the fraternity.[94] All violations of the MRGs must be reported to DTD, and DTD decides the sanction(s) to impose on the violating member.[95] Apart from the national MRGs, DTD requires all members to sign the national code of conduct, which includes rules on sexual abuse and alcohol abuse.[96] One responsibility of the chapter president is to "enforce compliance with the code of conduct and DTD's rules and regulations."[97]

B. Procedural History

In 2012, Brown filed suit against Clukey, DTD, and DTDNHC in Maine Superior Court, Penobscot County.[98] Her amended complaint included counts of

84. Brown v. Delta Tau Delta, 2015 ME 75, ¶ 5, 118 A.3d 789.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* ¶ 16.
90. *Id.* ¶ 22.
91. *Id.*
92. *Id.*
93. *Id.* ¶ 23.
94. *Id.*
95. *Id.*
96. *Id.* ¶¶ 19, 21.
97. *Id.* ¶ 21.
98. *Brown*, 2015 ME 75, ¶ 6, 118 A.3d 789. In the original complaint, Brown named Delta Tau Delta Building Corporation (DTDBC) as a defendant. Later in the litigation process, Brown substituted DTDBC for DTDNHC. DTDBC is a defunct corporation that sold the Gamma Nu fraternity house to DTDNHC in 1998. *Id.* ¶ 6 n.3.

assault, false imprisonment, negligence, premises liability, and negligent infliction of emotional distress against Clukey; and counts of vicarious liability, negligence, premises liability, and negligent infliction of emotional distress against DTD and DTDNHC.[99] The Superior Court dismissed Clukey from the case with prejudice in 2013 following an out-of-court settlement.[100] In January 2014, DTD and DTDNHC moved to dismiss. The court granted dismissal on the claim of vicarious liability, but denied the motion on all other claims.[101]

In March 2014, DTD and DTDNHC moved for summary judgment on the remaining claims of negligence, negligent infliction of emotional distress, and premises liability.[102] Following the judgment from *Hughes*, in which the fraternity was found to not have a duty of care, the Superior Court granted the motion on all claims. Like the *Hughes* court, the court in this case reasoned that premises liability was not an issue because neither defendant owed Brown a duty of care.[103] Brown appealed the grant of summary judgment to the Law Court.[104]

C. Arguments on Appeal

On appeal, Brown argued that when granting summary judgment for DTD, the superior court should have held that DTD owed her a duty of care.[105] Brown argued that the trial court's reliance on *Hughes* as a controlling case was incorrect, because the circumstances around the injury in *Hughes* were unforeseeable, unlike the foreseeability of the assault in this case.[106] Further, Brown argued that DTD, unlike the fraternity in *Hughes*, "did in fact create the dangerous situation in this case by failing to enforce its own rules, allowing . . . Clukey to remain a fraternity member and thereby setting the stage for his assault of Ms. Brown."[107] Brown argued that the court should have followed the precedent from *Stanton*, that on-campus sexual assault was foreseeable.[108]

DTD responded by arguing that the court's grant of summary judgment on all claims was valid because neither defendant owed Brown a duty of care.[109] DTD argued that *Stanton* did not apply to this case, because DTD's role was closer to that of a landlord leasing a house to tenants, rather than a university responsible for ensuring the safety of its students, and because Brown was not actually an invitee of the national fraternity.[110] DTD also argued that Clukey's past behavior did not create

99. *Id.* ¶ 6.
100. *Id.* ¶ 7.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* ¶ 1.
106. Brief for Plaintiff-Appellant at 4, Brown v. Delta Tau Delta, 2015 ME 75, 118 A.3d 789 (No. PEN-14-139) (arguing that in *Hughes*, nobody could have foreseen that a student would have leapt head first into a muddy field from a distance high enough to render him a quadriplegic).
107. *Id.*
108. *Id.*
109. *See Brown*, 2015 ME 75, ¶ 7, 118 A.3d 789 (describing how the Superior Court held that neither DTD nor DTDNHC owed Brown a duty of care).
110. Brief for Defendant-Appellee at 35-36, Brown v. Delta Tau Delta, 2015 ME 75, 118 A.3d 789 (No. PEN-14-139).

an indication of foreseeability, specifically that a progression from "drinking, outbursts, and fights" to sexual assault was unforeseeable, and that DTD had no notice of Clukey's destructive behavior in the weeks leading to the assault on Brown.[111] DTD asserted that they were entitled to summary judgment on the premises liability claim, as Gamma Nu was the possessor of the fraternity house, not DTD or DTDNHC.[112]

D. Decision of the Law Court

First, the Law Court affirmed the trial court's decision rejecting any vicarious liability claims against DTD and DTDNHC, agreeing with the trial court that there was no direct agency between Clukey and those organizations.[113] Then, the court quickly disposed of all claims against DTDNHC, reasoning that there was no evidence in the record to indicate that DTDNHC could share DTD's duty of care.[114] Finally, the court affirmed the grant of summary judgment for all claims against DTD, with the exception of premises liability.[115]

The court both applied the precedent from *Stanton* to this case and used precedent from other persuasive authority to extend the duty of care from a university to a national fraternity,[116] even though the national fraternity did not technically own the premises where the tort occurred.[117] Additionally, the court extended the duty of care from business invitees to social invitees, holding that a national fraternity owed a duty of care to its local chapter's social invitees.[118] The court also applied the duty framework from *Hughes*: (1) the incident needed to be foreseeable, (2) the fraternity needed to have sufficient control over its members, and (3) the fraternity needed to have sufficiently close relationships with those members, in order for the court to hold that DTD had a duty of care to Brown.[119] If any one of those three elements were insufficient, DTD would have no duty of care. Applying the facts of the case to the law, the court decided the issues of foreseeability, control, and relationship in the affirmative.[120]

E. The Concurrence

Justice Alexander concurred with the majority, but dissented on the court's decision to affirm the grants of summary judgment against DTD for negligence and negligent infliction of emotional distress, as well as the court's decision to affirm the grant of summary judgment for DTDNHC on negligence, negligent infliction of emotional distress, and premises liability.[121] Alexander argued several points: that there was a genuine issue of material fact, such that Brown should be allowed to

111. *Id.* at 41-42.
112. *Id.* at 35-36.
113. *Brown*, 2015 ME 75, ¶ 8, 118 A.3d 789.
114. *Id.* ¶ 1.
115. *Id.*
116. *Id.* ¶¶ 11-13.
117. *Id.* ¶ 5.
118. *Id.* ¶¶ 1, 11, 27.
119. *Id.* ¶ 14.
120. *Id.* ¶¶ 15, 18, 24.
121. *Id.* ¶ 30.

proceed to trial on these claims against both defendants;[122] that the majority's decision to find that DTDNHC, the owner of the fraternity house, had no duty of care contradicted the nature of premises liability;[123] and that there was no substantive difference in the elements of a negligence and premises liability claim, such that both claims should defeat summary judgment.[124]

On the first issue of DTDNHC's duty of care, Alexander focused on the inherent foreseeability of the tortious conduct against Brown. He asserted that the DTD/DTDNHC distinction was a legal strategy designed to limit foreseeable liability, and that the circumstances of life in the fraternity house should have led DTD to consider the possibility of the tortious act.[125] On the second issue, contradicting premises liability, Alexander drew a parallel between the university in *Stanton* and DTDNHC in this case in that both served as premises owners.[126] However, the majority still held DTDNHC to a less stringent standard.[127] On the third issue of the difference between negligence and premises liability, Alexander cited the elements of negligence as stated in *Stanton* in order to illustrate how they could bring a trial court to the same conclusion that there was a triable issue of negligence in this case: DTD owed a duty of care and breached that duty, and that there was a genuine issue of material fact as to whether DTD's breach of that duty of care was the proximate cause of Brown's injuries.[128]

F. The Dissent

Justice Clifford dissented from the majority's expansion of premises liability, arguing that DTD had no duty of care to Brown.[129] Clifford maintained that the duty established in *Brown* should be no wider than that of *Stanton*, a case that established a duty of a university to warn students of appropriate safety measures in dormitories, asserting that the narrowness of the holding in *Stanton* did not invite an expansion of a duty of care from business invitees to social invitees.[130]

IV. ANALYSIS

A. The Court was Correct to Reverse the Grant of Summary Judgment for DTD on the Count of Premises Liability.

The court was correct to reverse the grant of summary judgment for DTD on the count of premises liability, for reasons of public policy and established tort theory. On its face, this opinion represents a narrow expansion of premises liability. After *Brown*, a national fraternity organization may be liable for its member's tort, committed against the local chapter's social invitee. Underneath the surface holding,

122. *Id.* ¶ 32.
123. *Id.* ¶ 36.
124. *Id.* ¶ 40.
125. *Id.* ¶ 33.
126. *Id.* ¶ 37.
127. *Id.* ¶¶ 1, 36-37.
128. *Id.* ¶¶ 39-40.
129. *Id.* ¶ 44.
130. *Id.* ¶¶ 62-64.

Brown represents a large step in the court's progressive expansion of premises liability, in an attempt to hold the blameworthy parties accountable in increasingly complex scenarios of property ownership and management. This expansion is necessary because it serves as an effective response to a nationwide problem of sexual assault on campus.[131] To reach the decision to make this expansion, the court followed a logical process. The court chose the precedent rooted in the duty to protect students from assault, then applied the elements of foreseeability, control and relationship to the facts surrounding DTD's potential liability.

When analyzing case precedent, the court was correct to incorporate the *Stanton* duty of care and persuasive authority, instead of following the reasoning presented by *Hughes*. *Stanton* gave universities a duty of care to keep the premises safe for business invitees, but was silent on how that duty would apply to other property owners like national fraternity organizations, or to social invitees as opposed to business invitees. The court could have followed the logic from *Hughes*, which did apply specifically to fraternities, in which the court held that a fraternity has no duty of care to prevent one of its members from injuring himself in an unforeseeable fashion.[132] However, the court appropriately held that while the elements of the duty of care outlined in *Hughes* could be adopted here (foreseeability, relationship, and control), *Hughes* was not controlling in this case, because the injury was foreseeable. The court was also correct to determine that in order to properly analyze the elements of relationship and control, additional case authority would be required. The court analyzed two out-of-state cases and observed that the fraternities in those cases had systems in place to control local chapters, and had multiple avenues to establish and maintain relationships with the members of those chapters.[133] Further, the court reasoned that DTD shared those attributes.[134]

When applying the duty of care to the facts of this case, the Law Court analyzed three elements of that duty: whether the injury was foreseeable,[135] whether DTD had control over its members,[136] and whether DTD had a sufficiently close relationship with those members.[137] High-level indicators of foreseeability included a record of past incidents of violence by Clukey and MRGs that included guidelines against sexual abuse by members.[138] At a more granular level, the circumstances of the night in question include two key facts from which the court could infer foreseeability: the presence of a fraternity member to guard the stairway to member's bedrooms, and

131. *See supra* notes 76, 78-79, 81-83 and accompanying text.

132. Hughes v. Beta Upsilon Bldg. Ass'n, 619 A.2d 525, 525-26 (Me. 1993).

133. *See* Grenier v. Comm'r of Transp., 51 A.3d 388 (Conn. 2012) (reasoning that "whether a national fraternity may be held liable for the actions of one of its local chapters depends both on its ability to exercise control over the local chapter as well as its knowledge either that risk management policies are not being followed or that the local chapter is engaging in inappropriate behavior,"); *see also* Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1110, 1117-20 (La. Ct. App. 1999) ("[Kappa Alpha Psi Fraternity] has a hierarchy of national, regional and local officers answerable to and involved in the national fraternity.").

134. *Brown*, 2015 ME 75, ¶ 27, 118 A.3d 789.

135. *Id.* ¶¶ 15-17.

136. *Id.* ¶¶ 18-23.

137. *Id.* ¶¶ 24-26.

138. *See Brown*, 2015 ME 75 ¶¶ 4, 16, 118 A.3d 789.

the interaction with Adams on that stairway.[139] While the court did not incorporate past similar cases against DTD, a pattern of prior litigation also suggests that the sexual assault on Brown was foreseeable.[140] Besides the foreseeability element, the court was also correct to hold that DTD had the requisite level of control over its members, and a sufficiently close relationship with those members, reasoning that the following combined facts serve to fulfill those elements: the extensive MRGs, DTD's constitution and rules, the DTD alumni advisors and chapter consultants, and the established reporting process from local chapters to DTD.

As a result of this decision, the court extended the previously established duty of care in *Stanton*, creating intermediary levels of complexity. Instead of a university's duty of care, the court made a fraternity accountable, as a fraternity is an organization that manages the activities of students who live on university grounds.[141] Instead of a duty to business invitees of UMO, the court extended the duty to social invitees of a University-affiliated local chapter of a fraternity.[142]

While the dissent considered this extension an unsupported leap,[143] the court's decision is actually in step with the complexity of DTD's methods to shield itself from liability for the actions of its members. This is not a straightforward relationship between a university and its invitees. The fraternity creates several intermediary levels, such as the alumni advisors, chapter consultants, and local chapters, in the form of unincorporated student associations.[144] Put simply, expanding the scope of premises liability was the only way for the court to ensure that DTD could not defeat summary judgment, and therefore have a potential breach of duty evaluated by a fact-finder at trial.

The court's decision is also an effective use of deterrence, an accepted goal of tort law.[145] By reversing summary judgment for DTD, the court ensured that DTD would have to bear the costs of further litigation, potentially extending into a costly trial. Going forward, DTD may find that it is less costly to more efficiently enforce its existing policies than to litigate sexual assault claims. DTD's stepped-up enforcement will hopefully deter future incidents of sexual assault on the property of its local chapters, committed against business or social invitees. However, while the court correctly extended premises liability based on public policy and tort theory to hold DTD accountable, the court side-stepped both policy and theory by refusing

139. *Id.* ¶ 3.

140. *See* Garza v. Delta Tau Delta Fraternity Nat., 948 So. 2d 84 (La. 2006); Ostrander v. Duggan, 341 F.3d 745 (8th Cir. 2003); Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968 (Ind. 1999); Motz v. Johnson, 651 N.E.2d 1163 (Ind. Ct. App. 1995). These are all cases involving sexual assault in which DTD was a party.

141. *See Brown*, 2015 ME ¶ 27, 118 A.3d 789 ("Imposing upon a national fraternity . . . a duty to take reasonable steps to protect the safety of social invitees at its fraternity house is no more onerous or unexpected than the duty society imposes upon a university to exercise care in the administration of its dormitories.").

142. *Id.*

143. *See id.* ¶ 44 (reasoning that DTD did not have a duty of care because DTD had no control over the fraternity house or the members of the local chapter).

144. *Id.* ¶¶ 5, 22, 25.

145. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 514 (2003). While tort scholars of the twentieth century who are proponents of deterrence are actually divided into two camps, Compensation-Deterrence Theory and Economic Deterrence Theory, the two theories are nonetheless bound by the same underlying goal of using tort law as an instrument to deter future harm.

to reverse summary judgment on DTDNHC, the actual premises owner.

B. The Court Erred in its Decision to Affirm the Grant of Summary Judgment for DTDNHC on the Claim of Premises Liability.

When the court affirmed the grant of the summary judgment for DTDNHC on the claim of premises liability, the court made a decision that contravened the history of premises liability in Maine, and weakened the deterrence effect of its holding for DTD. Justices Alexander and Clifford may have critiqued this issue from opposite sides, but both justices are correct in that this case serves as a unique example of a Maine decision where a non-premises owner would be held liable on premises liability grounds, while the premises owner would escape such liability. While the court was correct to reverse summary judgment for DTD, the court erred by not going further and reversing the grant of summary judgment for DTDNHC on the claim of premises liability. The court had at least three pathways for justifying a reversal of summary judgment for DTDNHC.

First, the same duty of care as articulated in *Stanton* could still be successfully applied to DTDNHC, despite a lack of detail in the record.[146] In *Stanton*, the court held that UMO, which owned the dormitory where the assault took place, had a duty of care to protect its business invitees from foreseeable harm.[147] Similarly, DTDNHC owned the fraternity house where Brown was assaulted.[148] While DTDNHC may or may not be as blameworthy as DTD for the assault, given a lesser-documented degree of relationship and control between DTDNHC and the fraternity members, it would be up to a fact-finder in the trial court to determine exactly how much DTDNHC should be liable. At this stage, when evaluating whether summary judgment should be affirmed, it would be sufficient to simply find that DTDNHC could potentially have a duty under the theory of premises liability.

Second, the court could have reversed the grant of summary judgment for DTDNHC by recognizing that under the theory of alter ego liability, the two corporations should be considered one entity. Alter ego liability is a theory that allows a Plaintiff to pierce the corporate veil under the rationale that due to common control, Corporation B is the alter ego of Corporation A.[149] In Maine, the courts can pierce the corporate veil when a corporation is the alter ego of another corporation.[150] Applying alter ego liability would be an attempt by the court to push back against what Justice Alexander referred to as DTD's "sophisticated legal mechanism . . . to immunize its local real estate from court process."[151] Entity structures like the one employed by DTD are common across the fraternity industry.[152] If the court had

146. *Brown*, 2015 ME 75 ¶ 1, 118 A.3d 789.

147. Stanton v. Univ. of Me. Sys., 2001 ME 96, ¶ 10, 773 A.2d 1045.

148. *Brown*, 2015 ME ¶ 5, 118 A.3d 789.

149. Brendan M. Wilson, *Using Subsidiaries to Hold and Manage Real Property*, REAL ESTATE TAXATION, Fourth Quarter 2010, at 41.

150. Theberge v. Darbro, Inc., 684 A.2d 1298, 1301 (Me. 1996).

151. *Brown*, 2015 ME ¶ 33, 118 A.3d 789.

152. *See* Douglas E. Fierberg, *The Greek Industry: Strategies for Litigating Claims Involving Serious Injury, Death, Hazing, and Alcohol Misuse* ATLA-CLE 2617 (2005):

> The typical fraternity house ("KTA" for this example) and the property on which it is located are likely owned by the KTA national fraternity or an affiliated company, the KTA

used alter ego liability as a rationale for reversing the trial court's grant of summary judgment for DTDNHC, this decision could have prevented DTD and other national fraternity organizations from employing this "mechanism" in the future. Further, while the entity structure serves as a "legal shield to litigation," that shield may not be indestructible.[153] Maine courts will "disregard the legal entity of a corporation . . . when necessary in the interest of justice."[154] "The theory of the alter ego has been adopted by the courts to prevent injustice, in those cases where the fiction of a corporate entity has been used as a subterfuge to defeat public convenience or to perpetuate a wrong."[155]

The interest of justice prevails in this case. The existence of separate corporate entities for DTD and DTDNHC, in addition to the unincorporated student association of Gamma Nu, have been used at least in part to defeat public convenience, by insulating the national organization from tort claims of the fraternity members and their social invitees.[156] It is much more difficult to find the national organization liable for a tort claim when the organization is separated by a housing corporation, local chapters in the form of unincorporated student associations, and the individual members, who are likely judgment-proof. The required element of common control is evidenced in part by information on DTD's public website.[157] DTD's Director of Business Affairs also serves as the CFO of DTDNHC, and DTD's Director of

---

> Housing Corporation. KTA Housing Corporation has been established to own, manage, and/or lease the fraternity house to fraternity members operating the State University KTA Fraternity Chapter Corporation (another entity established under the authority of the KTA national fraternity). The KTA Chapter Corporation is a nonprofit corporation holding few assets. The KTA national fraternity corporation sits atop this type of structure and establishes the risk-management policies governing activities. The KTA national does not technically hold title to any chapter or housing corporation assets, and its articles of incorporation and, despite creating the risk-management policies and structure, its bylaws likely state that it has no right or ability to control or supervise the activities of the chapter or housing corporations. . . .
>
> This corporate structure . . . has been used by national fraternities to argue that they have no legal responsibility for the wrongdoing of their local chapters. . . . While the national fraternity seeks to employ this structure to avoid liability, all of these entities it established are under its control . . . Principles of agency may enable one to pierce the structure even though the national fraternity has assiduously engineered a legal shield to litigation.

See also Colangelo v. Tau Kappa Epsilon Fraternity, 517 N.W.2d 289 (Mich. Ct. App. 1994) (featuring a similar structure between the Tau Kappa Epsilon Fraternity and the Theta Psi Chapter Housing Corporation of Tau Kappa Epsilon).

153. *See Colangelo*, 517 N.W.2d 289. *See also* Estate of Hernandez v. Flavio, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995) (in dicta, reasoning that "[a] national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored.").

154. *Theberge*, 684 A.2d at 1301.

155. Bonnar-Vawter, Inc. v. Johnson, 157 Me. 380, 387, 173 A.2d 141, 145 (1961).

156. *See* Whebbe v. Beta Eta Chapter of Delta Tau Delta Fraternity, No. A12-1675 2013 WL 1188029 at *1 (Minn. Ct. App. Mar. 25, 2013), (holding that "a landowner does not have a duty to protect an invitee from the criminal actions of a third party . . . ."); Ostrander v. Duggan, 341 F.3d 745 (8th Cir. 2003) (holding that DTD could not be found liable under the theory of premises liability because the fraternity did not own or control the premises where an assault took place).

157. *Alan Selking*, DELTA TAU DELTA, (Nov. 29, 2015) http://www.delts.org/our-people/staff/alan-selking/; *Andy Longo*, DELTA TAU DELTA, (Nov. 29, 2015) http://www.delts.org/our-people/staff/andy-longo/.

Fraternity Programs also manages the operations of DTDNHC properties.[158]

Third, the court could have reversed summary judgment for DTDNHC to act as a more effective deterrent against future harm. The court's reversal of summary judgment for DTD is a partial deterrent, but the court's holding for DTDNHC prevents that goal from reaching its full potential. DTD may be unable to win on summary judgment in the future, and may be forced to bear the costs of settlement or litigating a trial, but they can also protect their valuable real estate through a housing corporation. DTD may not be sufficiently motivated to enforce its policies, because only DTD's assets are on the line, and DTDNHC's real property is safe from liability.

The court's decision to hold that DTD had a duty of care was rational, because the harm to Brown was foreseeable, and because DTD had control over the actions of its members and sufficiently close relationships with those members to prevent the harm from occurring. However, refusing to assign that duty to the actual property owner is a perplexing choice that may degrade the significance of this opinion to future Maine courts. Further, by refusing to give DTDNHC a duty of care under the theory of premises liability or the theory of alter ego liability, the court allows DTD and similarly situated national fraternity organizations to keep their "legal shields" intact.[159] Finally, the court's decision represents a weakened deterrent for DTD. While this decision could incentivize DTD and other national fraternities to better enforce their rules instead of litigating them, these fraternities can remain assured that any assets belonging to their housing corporations will remain unaffected.

V. CONCLUSION

Sexual assault on campus is a widely occurring problem, and the courts must be able to impose a duty of care on national fraternity organizations, to ensure that a fact-finder could hold them liable for how they address such a prevalent problem. To that end, the court was correct to expand premises liability in Maine to assign a duty of care to a national fraternity organization to protect the safety of the members and their invitees. Although there is a complex corporate structure at work in this case, increasingly nuanced facts should be matched by a more nuanced body of law. However, in adapting that law, the court should not forget the guiding principle of premises liability: that the premises owner has a duty of care to protect its invitees from harm. This should still hold true despite limited discovery on the premises owner, because as long as the premises owner has at the minimum been established, the duty of care should apply. The court should also not forget that deterrence is an established goal of tort law, and reversing summary judgment for only one of two closely-related corporations may not be an effective application of deterrence. Thus, the court was correct to reverse the grant of summary judgment for DTD, but erred by not doing the same for DTDNHC.

158. *Id.*

159. Fierberg, *supra* note 152.