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Commentary: Newtown School Lawsuit Offers Painful Casting of Blame

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This lawsuit not only challenges governmental entities but also ascribes blame to individuals who were themselves slain.

Do some of the adult victims of the Dec. 14, 2012, shooting at Sandy Hook Elementary School bear responsibility for the deaths of the children slain during the attack? That is the troubling contention of a lawsuit that was initiated by the estates of two children on the second anniversary of the attack that killed 26 people at the Newtown school.

The lawsuit alleges that the purported negligence of the town, the Newtown Board of Education and Sandy Hook Elementary was responsible in significant part for the killings of the two students and, at least implicitly, the 18 other children. There are some serious questions as to the viability of the plaintiffs' claims, but regardless of the outcome, attempting to allocate blame for the terrible event will undoubtedly prove a painful odyssey.

The suit alleges that the defendants were collectively negligent for a number of reasons, including the existence of a 3-by-4-foot pane of nonsafety glass directly adjacent to the school's locked front door that could not withstand automatic weapon fire; the apparent lack of internal locks on the doors in the classrooms in which students and staff were killed; and the purported failures to provide some teachers with keys to the classrooms, to provide the school with a security guard, and to follow school district guidelines regarding school safety.

There is within these allegations a differentiation between the allegedly negligent actions claimed against the school board and the town and those attributed to the school. It is that distinction that freights this lawsuit with an even more painful dimension than the prior claim filed against the maker of the weapon used in the attack, for it necessarily implicates the actions or inaction of some of the adult victims.

Being a constituent part of the Newtown Public Schools, the school was not a separate and distinct legal entity. Thus, naming the school as a separate defendant would seem gratuitous except that it serves to cloak, at least to a casual observer, the fact that this lawsuit not only challenges governmental entities but also ascribes blame to individuals who were themselves slain. This reality is reflected in the purported conduct attributed to staff members and further underscored by the repeated use of the pronoun "they" in the court

filings, even though the named defendant—the school—obviously is an "it." It is within that context, then, that one must read the two counts that are directed solely at the school, both of which allege a failure "to ensure the safety of its students" by purportedly failing to lock the doors to classrooms, to "take the students to a safer location within the classroom," and "to take steps to protect, secure, or otherwise prevent the killing of the decedent[s]."

School districts and their employees have traditionally enjoyed immunity against suit for acts deemed "governmental"—meaning discretionary—and were undertaken in the course of the employee's governmental function for the direct benefit of the public. In contrast, the employee and the district could be deemed liable if the employee negligently performed a "ministerial" act, which the Connecticut Supreme Court has defined as "a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion."

The Newtown plaintiffs repeatedly employ the term "ministerial" in the complaint, enumerating a number of state statutes that they claim imposed on the school board "a legal and ministerial duty to create, enforce, and abide by a collection of rules and regulations concerning various employee and student conduct ... and to ensure student safety and well-being."

These statutes, however, do not easily lend themselves to the plaintiffs' characterization. For example, Connecticut General Statutes Section 10-220f even uses the discretionary "may" when discussing the possible establishment of a school district safety committee. The complaint also alleges that the school board and the school had prescribed lockdown and evacuation plans, and that these procedures were ministerial; but establishing that they were to be followed "without the exercise of judgment or discretion" could prove challenging.

The plaintiffs then turn their attention to a possible exception to the immunity accorded governmental, or discretionary, acts, which leads to what is easily the most incendiary aspect of the complaint.

Specifically, the plaintiffs use language that tracks an exception to immunity for governmental acts that the Connecticut Supreme Court first applied to school districts in 1994's *Burns v. Board of Education* when there existed "circumstances of perceptible imminent harm to an identifiable person." The line of school-based cases that followed, including the November 2014 decision in *Haynes v. City of Middletown,* has consistently limited the scope of foreseeable victims within this exception to students. Furthermore, *Haynes* held that "the proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm."

The attempt to allege a governmental immunity exception in the Sandy Hook lawsuit is particularly troubling. Most notably, the complaint faults the instructional staff in classrooms 8 and 10, in which the children and staff were, with one miraculous exception, slain, alleging that they failed to effectuate the lockdown procedure and thereby "prevent the killing of the decedent[s] despite having adequate notice that an intruder

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was on premises and inflicting mortal wounds to staff and personnel."

In the most unsettling allegations, the complaint asserts that "the teachers and other staff in [classrooms 8 and 10] were well-aware of this imminent harm as gunshots had been firing down the hallway outside the door to [the] classroom[s] killing both the school principal ... [and] the school psychologist." Thus, the plaintiffs allege, "the teacher[s] ... were on notice that an imminent harm was present to the identifiable victims in their classrooms." The complaint goes on to assert that "it was easily observed and understood that gunfire down the hallway outside the classroom door would expose the children inside same classroom to an immediate and undeniable danger, and the staff's failure or inability to act, to lock the door ... would undeniably place the students ... in immediate danger."

"Well-aware"? "Easily observed and understood"? And so, with such allegations, the shared grief that tightly bound the victims of Sandy Hook is sundered, the survivors of two children faulting teachers and aides who also perished that day for their own unbearable loss.

If the lawsuit is not resolved or dismissed, the adjudication will ultimately come down to a consideration of what was reasonable conduct for teachers and staff when faced with an almost unprecedented reality in terms of sudden, implacable savagery. Although there was an antecedent line of school-based shootings, the Sandy Hook attack was singular. In addition to the number of victims, it was perpetrated not by a teenage student, but by an adult outsider, and the locus of the killings was not at the secondary or postsecondary levels, but among the youngest of students. Perhaps the attack will in the future be deemed to have established a standard of care to which school districts and private schools must now pay heed. Perhaps the class of foreseeable victims will, at least in the context of school attacks, be expanded to include adults, not just students.

For the parties to this lawsuit, however, these are legal questions, and the application of rational analysis to such profound loss seems almost heartless. Most immediately, this case is about sorrow; on the one side the unimaginable loss of a child and on the other the equally incalculable grief of having not only lost a family member but now having that slain loved one blamed for the deaths of 20 children, the ultimate injury compounded by the most terrible of insults. The English Romantic poet William Blake once observed: "Can I see another's woe, and not be in sorrow, too? Can I see another's grief, and not seek for kind relief?" Given the substance of this lawsuit, it is difficult to imagine that whatever the outcome, anyone will find or otherwise realize the "kind relief" of which Blake wrote.

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