PREMISES LIABILITY, COLLEGE/UNIVERSITY LIABILITY FOR CRIMINAL ACTS, URBAN CAMPUS ISSUES, AND SOVEREIGN IMMUNITY

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Sovereign Immunity

In the last few years negligence claims against colleges and universities have increased both in numbers of claims and in dollar amounts awarded. Many of these claims have arisen as a result of injuries suffered on property or in buildings owned by institutions, or as a result of injuries suffered as a result of criminal acts of third parties. Courts often twist traditional negligence concepts. Sometimes this may be done in what appears to be an effort to provide relief for an injured plaintiff because of a particularly egregious fact situation. At other times courts often protect colleges and universities from liability as a matter of public policy.¹ Nevertheless, it is useful to review the basic elements of a negligence claim.

There are four basic elements for any cause of action for negligence. First, there must be a duty recognized by law requiring an individual to conduct his or her activities in accordance with a certain standard of conduct. The concept of duty appears to be a simple concept, but courts, especially in the premises liability area, struggle with this concept. In general, an individual is charged with conducting his or her activities as would a "reasonable person of ordinary

¹ See e.g., Conroy v. Marquette University, 582 N.W. 2d 126 (Wis. App. 1998) where a jury had awarded Conroy, a student employee, $125,000 in damages as a result of another student hitting Conroy with a beer bottle at an off-campus location. Conroy had supervised the other student's move out of a dorm after the student was expelled. Conroy was not told of incidents leading up to the expulsion and, thus, Conroy claimed the University breached its duty of ordinary care. In reversing the case the Wisconsin Appellate Court said that even if Marquette were negligent, public policy considerations would preclude liability. It appears that the Wisconsin court could have reached the same result by finding no breach of duty or, as a matter of law, no evidence that the breach of duty was the proximate cause of the injury.
prudence".  

The second element of a negligence claim is that there must be a breach of duty. The third and fourth elements are related in that the breach of duty must be the proximate cause of any injury. The concept of proximate cause has generated a great deal of discussion among legal scholars. Simply put, for a breach of duty to be the proximate cause of an injury, there must be a close causal connection between the conduct of the defendant and the injury suffered by the plaintiff. Proximate cause is not the fact of causation, but is really a question of law. Some commentators have described proximate cause as, "...a 'fudge-factor' that permits judges and juries to decide that there ought not be liability even when the other prerequisites to liability have already been satisfied." The traditional analysis of proximate cause is if it was foreseeable that if a defendant breached his or her duty of care that it would lead to the injury that was suffered by the plaintiff, then there should be liability.

It is important to remember when talking about tort law that while there may be national trends, there is no national tort law. The duty owed to an individual may be different from state to state and sovereign immunity may be available to a public college or university depending on a particular state's statute.

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3 See Ruchalski v. Schenectady Co. Comm. Coll., 656 N.Y.S. 2d 784, 786 (A.D. 3 Dept. 1997) where a New York Court said: "... although issues of proximate cause and foreseeability usually constitute questions for the trier of fact, Plaintiff's examination before trial . . . established that the assailants' conduct here simply was not foreseeable".

**Premises Liability**

A majority of states still adhere to the common law doctrine which provides that the duty owed to individuals depends on the status of the injured person. A trespasser, or one who enters property without the express or implied consent of the land owner, is owed only a duty not to be willfully and wantonly injured. A person who enters another's property with permission, but solely for his or her own purposes is considered a licensee. Most social guests are classified as licensees. The duty owed by a property owner to a licensee is to warn the licensee of hidden dangers and conditions, but these conditions need not be eliminated. The third category is that of invitee which is an individual who is on the property for business purposes or for the benefit of the owner of the property. An owner of property owes a duty to exercise reasonable care to invitees; thus, a property owner must keep property reasonable safe and warn of hidden perils that could be discovered by reasonable inspection.⁵

One exception to the rules described above is for children who trespass onto property because of some particularly attractive dangerous condition to be treated as an invitee. Many courts have rejected the notion that there must be some sort of "attraction" to the property and have instead simply required that children be treated as invitees so that reasonable care is owed to them by the land owner.⁶ Furthermore, some states have rejected the distinction between invitees, licensees and trespassers and taken an approach which focuses on the reasonable conduct of the defendant under all the circumstances. Other states have abolished the distinction between

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⁵ See *Newton v. Hanover County Board of Education*, 467 S.E. 2d 58, 63-64 (N.C. 1996) and *The Forms and Functions of Tort Law*, Abraham, 227-228.

invitees and licensees but maintain a lower duty of care for trespassers.\textsuperscript{7}

An Ohio court in a case involving Youngstown State University determined that a student of a state university was an invitee, and, as a result, the University owed a duty to exercise ordinary and reasonable care to protect that student from an unreasonable risk of physical harm. In this case a student fell in a parking garage when she stepped in a hole in the pavement. The Ohio court found that the University was charged with constructive notice of the risk presented by the defect in the pavement and as a result this was a breach of duty of care owed to the Plaintiff as an invitee.\textsuperscript{8} Contrast this with two cases from the State of Louisiana, both involving defective sidewalks. In both of these cases students at state universities in Louisiana won significant verdicts at the trial court level as a result of defects or damages to sidewalks on campuses at Northwestern State University and Louisiana State University. These jury verdicts were reversed on appeal. The reversals were both based on conclusions by the Appellate Courts that the defects did not create unreasonable risks of harm. In one case, the Plaintiff had fallen in a high traffic area and was the only person ever reported to have fallen there. In that case the Supreme Court of Louisiana determined that the defect was not an unreasonable danger and emphasized the social utility of sidewalks and the cost of repair of these sidewalks.\textsuperscript{9} The State Court of Appeals determined in the other case that the defective condition was obvious, thereby reducing the risk of harm to an individual. That court also stressed the public benefit of sidewalks and the cost of a finding of liability for every time a pedestrian stumbled or tripped off the edge of

\textsuperscript{7} \textit{Forms and Functions of Tort Law}, Abraham, 220-229.

\textsuperscript{8} \textit{Malley v. Youngstown State University}, 658 N.E. 2d 333 (Ohio Ct. Cl. 1995)

\textsuperscript{9} \textit{Boyle v. Board of Supervisors, Louisiana State University}, 685 So.2d 1080 (La. 1997)
a sidewalk on a campus.\textsuperscript{10} It is hard to make a rational distinction between the Louisiana cases and the Ohio case. It appears that the Louisiana courts appear to be granting some type of de facto immunity from certain premises liability claims for its state universities.\textsuperscript{11}

In the Maxwell case discussed above, the Louisiana court referred to the open and obvious defect as an additional basis for barring recovery. The standard rule is that an invitee may be barred from recovering for injuries if the hazard which caused the injury is as readily apparent to the invitee as it is to the owner. The State of Tennessee raised this defense in a case where a former student was running across the campus of East Tennessee State University delivering food coupon booklets for a telemarketing company. The student cut across a courtyard which was bordered by metal pipe segments. As he tried to hop over the piping, the Plaintiff stepped on a pipe segment and caught his foot in the piping and broke his hip. The Tennessee Appellate Court determined that the hazard was not open and obvious and commented about the viability of the rule in light of the fact that comparative negligence is available in the State of Tennessee to apportion the relative fault of the invitee and the property owner.\textsuperscript{12}

There are two other recent cases which also focus on the lack of duty of a property owner to warn against dangerous conditions which are readily observable. In \textit{Kurshals v. Connetquot

\textsuperscript{10} \textit{Maxwell v. Board of Trustees}, 692 So. 2d 641 (La. App. 3 Cir. 1997)

\textsuperscript{11} This notion of immunizing universities in a different context has been commented upon by Professors Bickel and Lake. See \textit{Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of ‘In Loco Parentis’ in the Restatement (Second) of Torts}, Robert D. Bickel, Peter F. Lake, 20 \textit{Journal of College and University Law} 261 at 288 (1994)

\textsuperscript{12} \textit{Estate of James Archer Muse v. State of Tennessee}, 1997 Tenn. App. LEXIS 933 (Court of Appeals of Tennessee, Western Section (December 29, 1997))
Central School District 13 a fifteen year-old student was playing handball and went on the roof of the junior high school to retrieve a ball. He stepped on a skylight on the roof and fell through to the gym floor and was injured. The New York court, while recognizing that a landowner has a duty to exercise reasonable care in maintaining property in a safe condition under all of the circumstances, including a duty to warn, determined that in this circumstance there was no duty to warn when it was obvious that the skylight was there and was not to be walked upon. Similarly, in Pitre v. Louisiana Tech University14 an unusual snow storm occurred in Louisiana and a student at Louisiana Tech joined other students who were sledding down a hill on campus near the football stadium. Mr. Pitre and three other individuals were riding a large garbage can lid down the hill when the lid went into the stadium parking lot and collided with the concrete base of a light pole. Mr. Pitre suffered permanent paralysis from the chest down as a result of the accident. Pitre sued Louisiana Tech alleging negligence on the part of the university based on a failure to erect cushions around solid objects to prevent sledding injuries and failing to warn students of hazards that might be encountered in sledding. Pitre won a multi-million dollar judgment at trial and the university appealed. The Louisiana Supreme Court stated that a landowner does owe an individual a duty to discover dangerous conditions and to either correct or warn of the existence of such conditions. The court further determined that because of the obviousness of the dangerous condition (crashing into a light pole) there was no duty on the part of the university to warn of the apparent danger or to protect against the injury. The court rejected the notion that there was any special relationship duty created merely because Mr. Pitre was a student at the university.

13 643 N.Y.S.2d 622 (A.D. 2 Dept. 1996)
14 673 So.2d 585 (La.1996)
There are several recent premises liability cases involving athletic or recreational facilities which have turned on the plaintiff's appreciation of the dangerous situation or condition. In Boycher v. Livingston Parish School Board, 15 Mr. Boycher, who had eighteen years of construction experience, volunteered to assist the baseball coach in constructing a press box for the high school baseball field. To complete the job, scaffolding was needed and while the scaffolding had been supplied, no scaffold boards were provided. Mr. Boycher had brought this fact to the attention of the coach, but the boards were still not available. Mr. Boycher decided to use some aluminum planks that were left over from the bleachers instead of scaffolding boards, and he stepped on one of the planks and fell to the ground, severely injuring his heel. The Louisiana Appellate Court determined that Mr. Boycher was an invitee to whom the school board owed a duty to keep the premises in a reasonably safe condition and to discover any dangerous conditions. However, in reversing a verdict for Mr. Boycher, the court considered his age, experience, and familiarity with construction work and concluded that because of these factors there was no duty owed to Mr. Boycher to prevent him from using improper equipment.

In Daniel v. City of Morganton16 the plaintiff Kristin Daniel was participating in a softball practice with her high school varsity softball team. The team was practicing on land owned by the defendant school board but leased and maintained by the defendant city. The field was being constructed by the city and the surface was rough and the city was unaware that the high school team was using the field. During practice Ms. Daniel was struck in the face by a batted ball that took a bad hop off of the rough field. The North Carolina Court of Appeals determined that the plaintiff was a licensee as to the defendant city and that any danger posed by the irregular playing

15 716 So.2d 187 (La.App. 1 cir. 1998)
16 479 S.E.2d 263 (N.C.App. 1997)
field was open and obvious. Thus, there was no duty to warn regarding the rough surface.

An interesting contrast is the case of McIntosh v. The Omaha Public Schools\(^\text{17}\) where a high school football player attended a spring football clinic at his high school. The field used for this clinic was a hard packed field with little grass and a rutted and uneven surface. During the clinic the plaintiff, McIntosh, caught his foot in a hard rutted area and fell and fractured his leg. The Nebraska Supreme Court determined that the school system had invited McIntosh to attend the spring clinic thus making him a business invitee under Nebraska law. As such, the school board would be subject to liability for injuries if a jury found the field to involve an unreasonable risk of harm to a business invitee and the plaintiff would not discover the danger or would fail to protect himself against the danger. Here, McIntosh did recognize the danger but the jury would be charged with determining whether the defendant used reasonable care in maintaining the field. Thus, while an institution might be able to escape liability for defective athletic premises if the defect is obvious to the plaintiff, it is clear from the McIntosh case that it is still incumbent upon colleges and universities to provide safe playing fields, inspect for hidden dangers, and to warn of obvious dangers.

Courts have struggled with how to classify, for duty purposes, a police officer who is answering a call and is injured as a result of a defect on the premises. In Newton v. Hanover County Board of Education\(^\text{18}\) a police officer was answering a burglar alarm at a county high school and climbed an exterior metal stairway that led to the second floor of a field house. In climbing down the stairway, the police officer fell and severely injured his hand. The police officer sought damages from the school board for his injury claiming that the stairs to the second

\(^{17}\) 544 N.W.2d 502 (Neb. 1996)

\(^{18}\) 467 S.E.2d 58 (N.C. 1996)
floor were inherently dangerous. The North Carolina Supreme Court noted that some jurisdictions apply a "no duty rule" to police officers and firemen which bars these individuals from any recovery if they are injured in the line of duty. The court went on to distinguish the "no duty" or "firefighters rule" by pointing out that in this case the plaintiff was not injured because of an emergency situation, but because of the inherently dangerous condition of the premises. The court concluded that the police officer should be treated as an invitee and, thus, owed a duty to use ordinary care to keep the property reasonably safe, and to warn of unsafe conditions. The court stated that the failure to warn or repair the condition of the stairway would justify a jury determination that the school board was negligent.19

Commentators have questioned the use by some courts of the rejection of the concept of in loco parentis as a way to allow the university to avoid liability to a student.20 One example of such a case is Rothbard v. Colgate University et al.21 The plaintiff in this case sustained serious injuries when he fell from the second floor of his fraternity house at Colgate University. The plaintiff's room had a window which opened over the curved portico above the entrance to the

19 In a similar but somewhat bizarre case, Darnell v. Louisiana Tech University, 709 So.2d 890 (La.App. 2 Cir., 1998), a college student had complained about continuous problems with her leaking air conditioner so that water often accumulated on the floor of her dorm room. The student's mother brought her back to campus after a visit home and slipped and fell on the wet floor injuring her right knee. The mother sued Louisiana Tech and her daughter. The university filed a third party claim against the daughter urging that she was responsible for all of the damages for failure to warn her mother of the dangerous conditions. In its holding, the court of appeals stated that the daughter's awareness of the dangerous condition gave rise to a duty to warn her mother of the danger and apportioned 25% of the degree of fault to the daughter, thereby reducing the verdict against the university to 75% of the amount of damages awarded at trial.

20 Bickel and Lake

21 652 N.Y.S.2d 146 (Sup. Ct., Appellate Division, N.Y. 1997)