THE EVOLUTION OF LIABILITY RULES REGARDING COLLEGE STUDENT ALCOHOL INJURIES: REDUCING STUDENT INJURY AND EXPOSURE

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Stetson University College of Law:

20th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 11-13, 1999
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The story of twentieth century higher education student safety law\(^1\) is the gradual application of typical rules of civil liability to institutions of higher education and the decline of insulating doctrines, which traditionally protected institutions of higher learning from scrutiny in the legal system. A series of alcohol related student injuries have brought public (and legal) attention to questions about the legal rules governing university responsibility for student injury.\(^2\)

In very recent times courts have shown some willingness to reverse long-standing traditions of protecting universities from civil liability for physical injury to students arising from alcohol abuse. It is a time of transformation and transition in higher education and higher education student safety and alcohol law.

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\(^1\)Significant sections of this outline are drawn from and adaptions of Professor Lake's forthcoming article "The Rise of Duty and The Fall of In Loco Parentis and Other Protective Doctrines in Higher Education Law"; Mo. L. Rev (Spring 1999).

\(^2\)Higher education includes colleges, community colleges and universities, undergraduate and graduate programs. Except where particularly relevant, we use "college, university" and "higher education" more or less interchangeably.

\(^2\)See Leo Reisberg, "Some Experts Say Colleges Share the Responsibility for the Recent Riots", THE CHRONICLE OF HIGHER EDUCATION (May 15, 1998). Recent campus riots over beer privileges, a string of alcohol related deaths at prestigious colleges including MIT and LSU have been discussed significantly in the media.
Traditional Protections Afforded Colleges Against Liquor Liability by Rules of Proximate Causation, Special Liquor Liability Rules, and Affirmative Defenses.

Well into the 20th Century, American courts would hold that a deliberate, wilful and/or criminal act was so “unforeseeable” and ‘unexpected and extraordinary’ as to be a superceding, intervening or supervening cause of a harm: the negligence of another actor was thus not the legal or proximate cause of injury.³ While the rule was not without exception, and began to erode into the middle part of the twentieth century,⁴ it was nonetheless a powerful deterrent to many lawsuits. For example, a college student attacked and robbed would have had no recourse even if the college negligently facilitated the crime by, say, failing to keep a parking area well lit. The attacker would have been the sole proximate cause of injury claims against a college arising from sexual assaults. Also, what we know today as date-rape (alcohol induced or not) would have been likewise barred from legal redress.

This rule also had special force in liquor-related injury cases. As the Supreme Court of Oklahoma pointed out:

At common law a tavern owner is not criminally liable for a third person’s injuries that are caused by the acts of an intoxicated patron. Such rule is principally based upon concepts of causation that, as a matter of law, it is not the sale of liquor by the tavern owner, but the voluntary consumption by the intoxicated person, which is the proximate cause of resulting injuries, so that the tavern owner is therefore not liable for negligence in selling the liquor.⁵

³See e.g., Watson v. Kentucky & Indiana Bridge & Railroad, 126 S.W. 146 (1910) (A man deliberately threw a match into a negligently caused gasoline spill and became the proximate cause of harm.) See also H.L.A. HART & A.M. HONORE, CAUSATION IN THE LAW (1962) cited in DAN B. DOBBS, TORTS & COMPENSATION, 237, note 1 (2nd edition, West 1993).


Typically, the person furnishing alcohol was not considered to be a “proximate cause” of injury, the drinker was the “proximate cause”. Such a rule made it impossible to sue a university for failure to prevent alcohol use and/or for failing to enforce alcohol codes, for example. It is not surprising, then, that there were no liquor liability cases by students against institutions of higher education until later in the twentieth century.

The no liability for liquor “proximate cause” rules gave way, mid-century, to new rights of action based upon Dram Shops Acts and/or similar rules announced in case law.\(^6\) Either by Dram Shop Act, rule of court, or both, the traditional rule of proximate causation was abolished.\(^7\) However, legislatures and courts recognized the potential for almost unlimited liquor liability and severely limited liability for serving or furnishing alcohol. For the most part, states placed duties of care upon commercial vendors of liquor regarding on premises consumption of alcohol, and then only if that vendor sold liquor to a visibly and noticeably intoxicated patron or to a minor.\(^8\) These rules were supplemented by statutes prohibiting the furnishing of liquor to minors, and by rules of negligent entrustment that made it unreasonable to provide certain chattels to intoxicated persons.\(^9\) For the most part, all other parties connected to alcohol use and injury (other than the drinker) were not liable.

The new post — “proximate cause” rules were highly protective of colleges. Colleges were seen to be, at most, “social hosts” or entities that merely engendered, tolerated or facilitated

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\(^7\)Brigance.

\(^8\)Brigance, id.

\(^9\)Brigance, id.
alcohol use. As such, colleges did not face significant risk of liability for alcohol related injury to students. In the 1970's, some questions arose in the courts regarding 'social host' liability – potentially impacting the typical college – but as discussed infra, colleges were largely able to avoid liquor-related injury in this period as well.

Finally, as if the proximate causation/liquor liability rules were not enough before 1960, most states, under most circumstances, would bar a plaintiff’s action entirely if that plaintiff were either contributorily negligent or had assumed the risk of injury. Thus, only blameless or ignorant-of-risk students had any chance to overcome these affirmative defense based bars to recovery. It was thus unlikely that a student victim who was also drinking could have any chance of recovery.

The 'Bystander' Period of the 1970's and Early-Mid 1980's.

In the 1970's and early 1980's, several trends emerged in higher education law. First, in most states, comparative fault had replaced the all or nothing defenses of contributory fault and, to some extent, assumed risk: faulty/students now found greater access to tort remedies. Second, rules of proximate causation generally began to relax and some defendants were now required to guard against the foreseeable misconduct of third parties (including plaintiffs) and in some instances, criminal misconduct.\(^\text{10}\) Most importantly, colleges were being treated increasingly by courts like other businesses. However, these changes were not, however, complemented with significant changes in attitudes towards 'social host' drinking – although the issue was tested. In

\(^{10}\text{See, e.g., Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (establishing that landlord has only to protect tenants from criminal attacks and that the criminal attacker is not the superseding cause of injury).}\)
response to test litigation involving student alcohol use and injury, some courts of this period stated rules forming a new type of legal protection for colleges. In cases involving alcohol use, courts turned to tort rescue doctrines – (hence the “bystander” moniker). The bystander cases became highly celebrated caselaw in the university community.

The cases arose at a time in American law when courts were being asked to reject social host immunities and to broaden the categories of tort responsibility for injury arising from alcohol use and abuse: the courts generally rejected the expansion of responsibility (there were notable exceptions).\textsuperscript{11} American courts protected employers when employees drank on the job or at office parties\textsuperscript{12} and also those employers who facilitated drunken persons to return to their own cars and drive away.\textsuperscript{13} The position of the courts of this era was so strong that it was clear that there was no liability (other than for bars and bartenders) to prevent a drunk person from creating danger to self and others even if there was a “special” relationship between the person and the drinker. The margin of responsibility was determined by the extent, if any, that a defendant facilitated a drunk person’s danger and endangering of others. But courts of this period usually took a pro-defendant view and required either negligent entrustment of a dangerous item (like giving a drunk a car) or ‘control’ (in a strong sense) over the drinker (as in a bar, or in an involuntary detoxification center or jail). In short, American law of this period was generally unprepared to impose civil liquor liability on social or other (non-bar/bartender) hosts for


\textsuperscript{12}See Otis Engineering v. Clark, 668 S.W.2d 307 (Tex. 1983).

furnishing alcohol to ‘adults’, and was unwilling to require people even in legally special relationships with drunks to exercise reasonable care for the safety of drinkers and others, except under unusual circumstances or in the exceptional case. Thus, when students (or others) were injured in alcohol-related incidents, the courts of this era instinctively followed the pattern of other, non-college drinking cases. Importantly, a powerful *de facto* college alcohol injury immunity had come into existence in the 1970's and 1980's. It was powerful enough to trump liability *if alcohol or student drinkers were prominent in causing or contributing to the injury*.

In a series of famous bystander era cases, courts held that there was no duty to protect a student-drinker from injury related to inebriation while on a required curricular trip in a remote location,\(^{14}\) that there was no duty to protect a female student in her dormitory from an individual drinking and performing a dangerous fraternity-encouraged ‘ritual’,\(^{15}\) that there was no duty to protect students who drank in a dormitory and then went off campus to engage in drag racing,\(^{16}\) and that there was no duty to protect even underage students from injury incurred after leaving a school sponsored off-campus drinking party.\(^{17}\)

These cases have become known as the ‘bystander’ cases because in each of them the university was cast in the role of a legal ‘bystander’ to ‘uncontrollable’ student actions and drinking. These courts refused to view the student/university relationship as sufficiently ‘special’ to impose any duty of care upon the college to prevent alcohol injury.

\(^{14}\)Beach v. University of Utah, 726 P.2d 413 (Utah 1986).


\(^{17}\)Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).
These college alcohol cases were simply following liquor no-duty/injury rules of that era and applied them to campus liability issues. These cases provided a limited and new form of insularity from legal liability for colleges. While doctrinally narrow, the alcohol cases were far reaching in impact. Liquor related injuries and problems were on the rise on college campuses. Because many injuries involved alcohol use, colleges could look to the courts for protection in a large number of situations. Where as a typical business only occasionally would deal with alcohol liability issues, major safety problems on campus were increasingly alcohol related.

*Recent Trends Regarding Alcohol Liability*

No duty alcohol rules have remained powerfully entrenched in higher education law well into the early 1990’s. Recently, however, there are signs that courts will no longer categorically insulate universities from liability when alcohol use contributes to injury. There is now very clear precedent contradicting the ‘bystander’ cases and there are potential trends afoot which could further undercut university alcohol injury legal insularity.

Consider first that in very recent times, some courts in non-college cases have begun to pick away at the no-duty rules that have protected ‘social hosts’ and other non-bar/bartenders. Two types of authority are worth watching. In one line of cases, some courts have imposed liability on businesses that furnish alcohol to employees at work, at office parties, etc. The cases raise questions of ‘furnishing’ alcohol and facilitating driving after a person is intoxicated.

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In another related development, some courts have taken an expanded view of the notion of what it means to "furnish" alcohol, particularly to minors.\textsuperscript{19}

Second, social attitudes towards college aged drinking (particularly abusive, under-aged drinking) have shifted, particularly in the last two or three years. As a result of the alcohol related death of freshmen at MIT, MIT endured a \textit{criminal} investigation for its role in the incident. Similar alcohol related deaths have made headlines around the country. There is a sentiment that a dangerous college aged drinking culture has gotten out of hand and needs to be dealt with. In particular, there is concern that some college freshman -- first timers away from home especially -- are particularly vulnerable to abusive college liquor cultures. Strong social sentiment, coupled with trends in liquor liability law, suggest that more courts will craft rules for colleges that establish legal duties in alcohol related injury cases.

There is recent evidence that this shift is already occurring with some courts.

In \textit{Booker v. Lehigh University},\textsuperscript{20} a student who fell on rocky trail after consuming a large amount of alcohol sued Lehigh University and lost. For the college, the case was a mixed victory: the court noted that had the university purchased and supplied liquor, served liquor or otherwise planned a liquor event, the result would have been different.\textsuperscript{21} The most notable case, however, is clearly \textit{Furek v. The University of Delaware}.\textsuperscript{22} In that case, a student was badly

\textsuperscript{19}See Rust v. Reyer (NY 1998). In \textit{Rust} a person who did not purchase or sell liquor facilitated a party where minors were furnished liquor. The court determined that one can furnish liquor to minors without selling liquor to them or placing liquor in their hands directly. The court made oblique reference to colleges alcohol use and the case will no doubt influence campus liquor policies in New York State.


\textsuperscript{21}Id.

\textsuperscript{22}594 A.2d 506. (Dec. 1991).
burned when he had oven cleaner poured over his head in a pointless — and prohibited — fraternity hazing incident.\textsuperscript{23} As is usual in hazing incidents, alcohol use facilitated the dangerous behavior. Unlike courts in the bystander era, the Delaware Supreme Court did not view the University as a helpless bystander to uncontrollable student drinking and hazing activities. In particular, \textit{Furek} faulted the university for not adopting particular rules and protocols that would have reasonably diminished the risks of alcohol and hazing injuries.

Despite \textit{Furek}, a number of courts in the late 1980's and early to mid 1990's followed the more traditional path of no-liability for alcohol injuries to students. The cases have, \textit{inter alia}, held that a minor was not entitled to sue regarding injuries sustained as a result of off-campus drinking;\textsuperscript{24} a university was not liable for injuries sustained when an intoxicated student used a trampoline at a fraternity party;\textsuperscript{25} and, a university was not liable when a student who had been drinking at a frat party was killed in a motorcycle accident on a public street.\textsuperscript{26} Several cases have held that where students are drinking and a student is suddenly and unforeseeably attacked (including sexual attacks) by other students, the university is not liable.\textsuperscript{27} In perhaps the most unusual case displaying antipathy to a student-drinker, a college freshman became intoxicated off campus, was badly beaten in some unknown way, and made his way to a commuter railway

\textsuperscript{23}\textit{Id.}


\textsuperscript{25}Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987).


\textsuperscript{27}See, \textit{e.g.}, Motz v. Johnson, 65 N.E.2d 1163 (Ind. App. 1995).
platform where he collapsed and needed assistance; the Illinois Supreme Court determined that
the railroad personnel were under no duty to provide immediate assistance to this trespasser. \(^{28}\)

The near term future of liability and duty regarding college aged drinking remains to be
seen. It seems most likely that in the immediate future some courts will disassociate from the
trend of the ‘bystander’ courts and will be influenced by cases like Furek. It also seems likely
that other courts will continue to follow no liability rules. In short, universities may face a
genuine split of authority on alcohol liability in the near future. Moreover, colleges face
increasing exposure in non-alcohol cases — e.g., premises maintenance and safety claims — and
courts may find liability, in incidents where alcohol is abused, under non-alcohol liability rules.

**Strategies for Reducing Alcohol Injury and Liability**

The Higher Education Center for Alcohol and other Drug Prevention offers a variety of
resources and services to help reduce alcohol injury and liability. The Center was established by
the U.S. Department of Education in 1993 to assist colleges and universities in developing and
carrying out alcohol and other drug prevention policies and programs that will promote campus
and community safety and nurture students’ academic and social development.

The Center seeks to increase the capacity of post secondary schools to develop,
implement, and evaluate policies and programs based on environmental management strategies.
Environmental management means moving beyond traditional general awareness and other
educational programs to identify and change those factors in the physical, social, legal, and
economic environment that promote or abet alcohol and other drug problems. Through training

and on-going technical assistance the Center also supports statewide initiatives aimed at reducing alcohol and other drug use through the work of local campus and community coalitions.

To accomplish its mission, the Center conducts regional training, co-sponsored in conjunction with national and regional organizations; organizes professional development workshops for experienced prevention specialists and program evaluators; gives presentations at national and regional meetings; and trains a cadre of regionally based trainers (*Center Associates*). The Center also provides specialized training and technical assistance on compliance with the Drug Free Schools and Campuses Act of 1989 (DFSCA).

People associated with colleges and universities or other organizations can access the Center's technical assistance services by telephone (1-800-676-1730), fax (1-617-928-1537), via e-mail, ([HigherEdCtr@edc.org](mailto:HigherEdCtr@edc.org)), or via an on-line form. An initial consultation may result in distribution of materials, referral to other resources, review of publications and other prevention materials, review of implementation and evaluation plans, additional telephone consultations with senior Center staff or consultants, and on-site consultation.

The Center's publications constitute its “textbooks,” and thus play a vital role in its provision of training and technical assistance services. Currently there is still a lack of quality prevention material and research on prevention in higher education. The Center identifies the needs for material and publications in order to fill existing voids.

In 1998 the Center formed a *Presidents Leadership Group* to create a blueprint for alcohol and other drug prevention on college campuses. A report of the Presidents recommendations, *Be Vocal, Be Visible, Be Visionary* and a copy of 21-minute video that shows
the recommendations of the Presidents Leadership Group in action and highlights the Center’s environmental approach is available from the Center.

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