

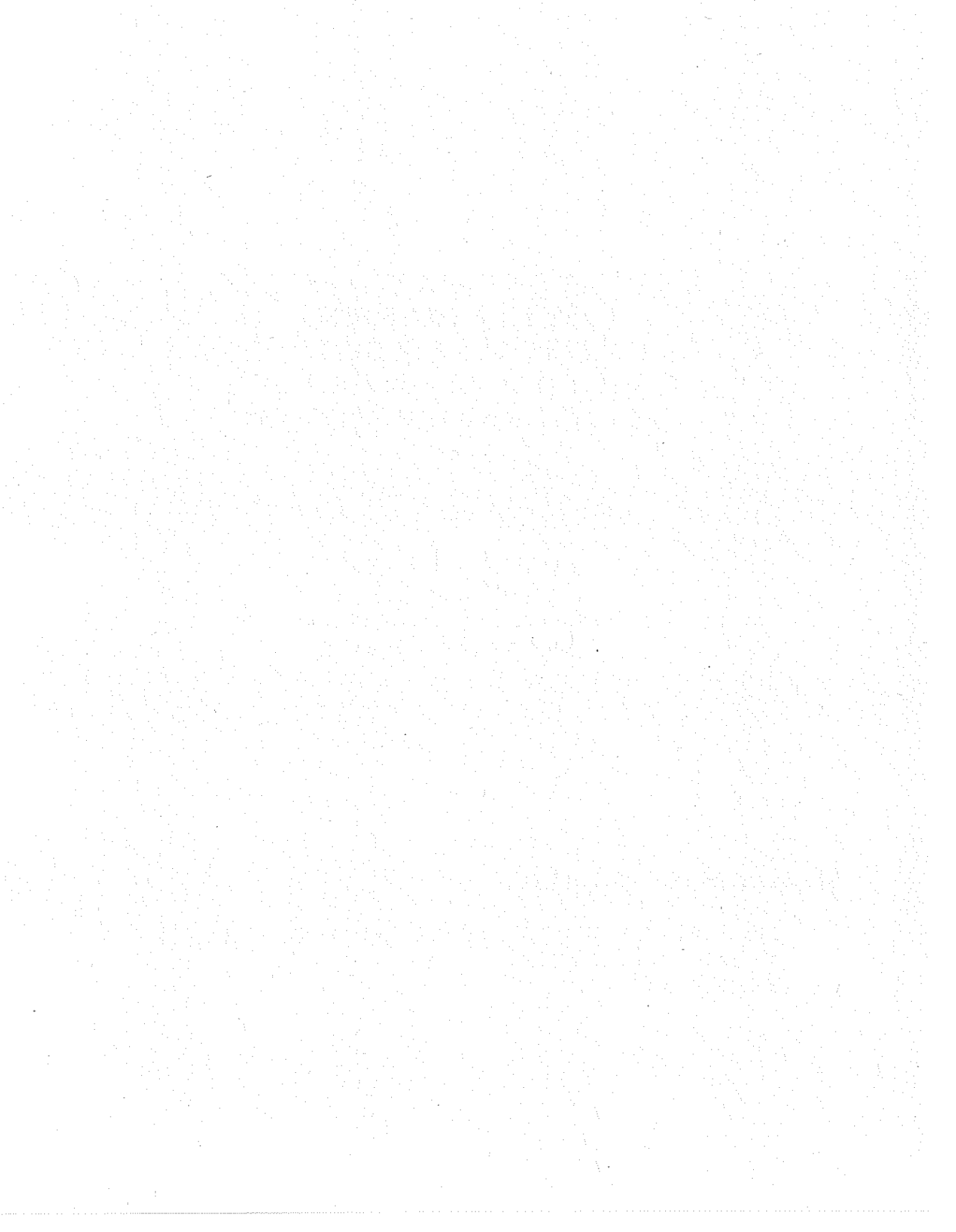
**A SURVEY OF SELECTED RECENT
TORT LAW DECISIONS
ON FREQUENTLY ENCOUNTERED
LIABILITY ISSUES INVOLVING
COLLEGES AND UNIVERSITIES**

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Stetson University College of Law:

18th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 13-15, 1997



A Survey
of
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Introduction

During the past decade, colleges and universities have been held increasingly accountable for civil reparation for harm done on university campuses, or as a result of university sponsored or supervised activities. Universities have become popular defendants, not simply because they have the economic ability to pay tort judgements. More significantly, courts have, in the past few years, more fully embraced both established and evolutionary theories of duty which hold the university to a standard of reasonable prudence.

Traditional notions of duty and negligence suggest that universities must give serious consideration to increasing resources devoted to

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premises maintenance. Situations imposing liability address defects as to premises,² inadequate maintenance³ and maintenance schedules⁴, and inadequate policy or communication of policy regarding the safety of premises⁵. Beyond premises liability, colleges and universities must address risks associated with activities on their premises, including the expansion of formal and informal recreation and sport⁶, new horizons in student field experiences (including the popularity of experiences abroad), programs on campus that enroll or otherwise involve children and

² See, e.g., Malley v. Youngstown State University, 658 N.E.2d 333, 105 Ed. Law Rep. 277 (Ct. Cl. Ohio 1995)[Hole in floor of university parking garage].

³ Williams v. Junior College District of Central Southwest Missouri, 906 S.W.2d 400, 103 Ed. Law Rep. 871 (Mo. App. 1995) [Jury could find that university had constructive notice of presence of foreign substance on shop class floor, and that university was negligent in applying wax to shop floor, or in failure to have skid-resistant surface].

⁴ Delaney v. University of Houston, 835 S.W.2d 56 (Tex. 1992).

⁵ Pitre v. Louisiana Tech University, 655 So.2d 659, 100 Ed. Law Rep. 1214 (La. App. 1995) [University was negligent in, among other things, not communicating consistent policy regarding students' makeshift sledding on hill rendered dangerous by highly unusual snowstorm].

⁶ Pitre v. Louisiana Tech University, *supra.*, note 5; Sicard v. University of Dayton, 660 N.E.2d 1241, 106 Ed. Law Rep. 1305 (1995) [Jury question whether university employee was reckless in not acting as "spotter" for student athlete who was required to lift weights, where student was injured by falling weight].

adolescents⁷, and the operation of campus housing⁸.

On a higher level, courts in a growing minority of jurisdictions are suggesting that the university bears some responsibility to minimize the risk of peer sexual harassment⁹, as well as other intentional or reckless student behavior that causes physical or mental injury to other students.¹⁰ While insurance studies show that liability in these situations is still quite minimal, as contrasted with the likelihood of damage awards in premises, sport and recreation injury cases, assault and harassment cases represent an area of potential exposure that merits attention.

What follows is an example of recent cases illustrating these trends, and a comparison of some of the university cases to traditional tort cases in other settings. Caveat: This presentation does not attempt a discussion of race or sex harassment, property torts (such as civil theft), professional (e.g., medical) malpractice, statutes of limitations, governmental immunity,

⁷ Williams v. Junior College District of Central Southwest Missouri, *supra.*, note 3.

⁸ Miller v. State, 478 N.Y.S.2d 829 (1984) [University has the same duty as a private landlord as to maintenance of building security].

⁹ See my paper accompanying the opening plenary session earlier in these materials.

¹⁰ Furek v. University of Delaware, 594 A.2d 506 (Del. 1991) [University may be liable for injury to pledge caused by fraternity hazing if it knows or should know of dangerous hazing activities and fails to act].

liability of public officers or officials, breach of contract, nuisance and strict liability, employee injury and workers' compensation, insurance, defamation, fraud, misrepresentation, or civil rights. Many of these topics are the subject of separate sessions at this conference.

Premises Liability

Pitre v. Louisiana Tech University, 655 So.2d 659, 100 Ed. Law Rep. 1214 (La. App. 1995) contains a comprehensive discussion of the elements of negligence, as applied in premises defect cases. Pitre restates the classic description of the plaintiff's burden in a negligence case, to prove: 1. That the defendant (university as owner and operator of premises) has a duty to observe a standard of care; 2. that the defendant failed to conform its conduct to that standard (negligence); 3. that the defendant's substandard conduct (negligent act or omission) was a cause-in-fact of the plaintiff's injuries; 4. that the defendant's substandard conduct was a legal cause of the plaintiff's injuries (that plaintiff's injuries are within the scope of defendant's liability); and 5. that plaintiff suffered actual damages.¹¹

The Pitre case arises in an unusual setting. In January, 1988, an ice and snow storm moved through the university's campus. The university placed on the bed of each dormitory resident a bulletin, reading in part:

¹¹ 655 So.2d at 665.

“We encourage snowmen, sledding, etc., in proper areas and using good judgement...” and “discouraging” sledding into the path of cars, or being “dragged behind” moving vehicles. Classes were cancelled, but students remained on campus. Many from the local area, including Pitre, were unfamiliar with snow, but took the opportunity to engage in makeshift sledding, using cardboard boxes, serving trays, toilet seats, and plastic trash can lids. Pitre, a twenty year old student at the university, was paralyzed when he and two other students rode down an 85 foot hill while lying head first on a trash can lid, and struck the base of a concrete light pole in a university parking lot.

The court of appeal held that, as landowner, the university owed its invitees (including Pitre) a duty to discover any unreasonable conditions or use of its premises, and to correct the defective condition, or warn the invitee of its existence.¹² Perhaps more important to the fact situation, however, a majority of the five judges held that the university was sufficiently involved in student housing and security, and the operation of extracurricular activities that its relationship with its students should encompass a duty to prevent unreasonably unsafe student activities, or effectively warn students of unreasonable dangers known to the

¹² 655 So.2d at 666.

university and not appreciated by students.¹³

The Pitre court was disturbed by the university's encouragement of the very activity as to which it claimed no responsibility¹⁴. The court observed that university police had actually been told to prohibit sledding on the hill in question, and that it would not have been burdensome for the university to discourage sledding on the hill, or warn the students of the danger of the activity because of the presence of trees, light poles and concrete posts.¹⁵

The court recognized that even inexperienced college students might realize the danger of the makeshift sledding activity, and found that Pitre and other students knew or should have known of the risks of lying headfirst on the lids.¹⁶ Thus, the conduct of both the university, and Pitre contributed to his injuries. The court apportioned liability by finding Pitre

¹³ Id.

¹⁴ 655 So.2d at 667, 669. The court noted that the university made no effort to inform the students of a safe area for sledding.

¹⁵ The most remarkable testimony was by campus police officers who observed that many of the students had never lived away from home, and did not see danger "like a grown-up does." One officer observed "We call ourselves high priced babysitters sometimes." 655 So.2d at 667.

¹⁶ The students had seen the poles and had actually struck a stadium fence at the bottom of the hill. However, the court found the university's "encouragement" of the activity created an "illusion" of safety, and the students would have been likely to follow a more prudent warning.

75% at fault for his own injuries, and awarding damages that were insufficient to pay even the entirety of Pitre's lifetime medical expenses.¹⁷

Open and Obvious Dangers: In a case like Pitre, the university is likely to argue that it should not have a duty to correct, or warn students of dangers that are *open and obvious*. Jurisdictions do not treat this issue consistently. Some hold that the "open and obvious" danger rule is a "per se" rule, and that a landowner should have no duty to warn even an invitee about an open and obvious danger. However, the jurisdictions following this rule usually limit its application to those situations in which the entrant knows of and appreciates the danger, as where s/he has experience equal to or superior to that of the landowner.¹⁸ It appears in any event that the modern majority rule is that a landowner is liable to an invitee on his premises if (1) the landowner knows, or should know of a condition that presents an unreasonable risk to the invitee, and (2) *should expect that the invitee will not discover, or appreciate the dangerous condition, or will fail to protect himself against it*.¹⁹ Thus, the landowner may be liable where he should anticipate that an invitee might be injured

¹⁷ The court found \$3.8 million in damages, but awarded Pitre approximately \$900,000.00.

¹⁸ See e.g., Stinnett v. Buchele, 598 S.W.2d 469 (Ky. 1980).

¹⁹ Restatement 2d, TORTS, § 343A.

by a condition, despite its obviousness. Such situations include those in which the invitee's attention is distracted by the context of the landowner's activity, or where the condition is unexpected, or forgotten by the invitee.²⁰

The Pitre case stretches the Illinois rule to its outer limits, but can be defended in light of the university's encouragement of sledding, thus contributing to the illusion that the activity was not unreasonably dangerous. The disturbing observation of the court is that a duty to warn or prevent the activity existed, even though the students admitted that they knew of the concrete poles, and fences at the bottom of the hill, and the tendency of the lids to go fast and spin out of control. The court recognizes this knowledge, and treats Pitre's conduct as unreasonable under the circumstances. However, the issue of his conduct is one of comparative negligence, dramatically reducing, but not barring his recovery.

The *Wisconsin* rule allows recovery in situations like Pitre, unless the injured party's negligence is greater than that of the defendant landowner. The Wisconsin rule recognizes the duty of the landowner to exercise reasonable care as to invitees, and treats the issue as one of

²⁰ See Ward v. K Mart Corporation, 554 N.E.2d 223 (Ill. 1990).

apportionment of liability, under a comparative negligence principle. In other words, there the injured party is more negligent than the defendant landowner, he is deemed the legal cause of his injury. Application of the *Wisconsin* rule may have denied recovery altogether to Pitre (the murky issue being the effect of the university's encouragement of the activity, thus obscuring its danger). An illustrative case is Griebler v. Doughboy Recreational, Inc., 466 N.W.2d 897 (Wis. 1991), denying recovery to a party guest who dove headfirst into a pool of unknown depth.

The issue of the invitee's awareness and appreciation of a premises defect is further illustrated in Malley v. Youngstown State University, 658 N.E.2d 333, 105 Ed. Law Rep. 277 (Ohio Ct. Cl. 1995). In Malley, a nurse, who was a part-time student at YSU slipped and fell in a hole in the concrete floor of a university parking garage. The court observed that university employees who regularly patrolled and inspected the garage should have discovered the hole. Therefore, the court held, the university had constructive knowledge of its presence as a danger to invitees on the premises. The court noted that the hole was in a loading area, and not in the clearly marked pedestrian walkway. However, the court defined the issue of plaintiff's crossing of the loading area as one of comparative negligence reducing, but not barring recovery.

Even the most conservative of jurisdictions will not find for the university as a matter of law, unless the danger in question is truly open and obvious. In all jurisdictions, where the defect that causes injury is not open and obvious, the injured party's alleged inattention or carelessness is one of comparative negligence, not duty. See, e.g., Williams v. Junior College District of Central Southwest Missouri, 906 S.W.2d 400, 103 Ed. Law Rep. 871 (Mo. App. 1995).

In Williams, a high school student who was enrolled in the college's auto mechanics course slipped and fell on the floor of the shop facility where the class was held. Evidence was sufficient to show that a foreign substance, probably with a petroleum base, was left on the floor between classes. Although the instructor testified that he inspected the floor, the jury found his inspection to be careless and awarded damages to compensate the student for his injuries. The appellate court affirmed, holding that, if a reasonable inspection would have disclosed the foreign substance on the floor, the college had constructive notice of the dangerous condition of the premises.²¹ The court held that neither the absence of a

²¹ The court also found that students had previously fallen, and that a skid resistant paint could have been applied to the floor. Compare Kimes v. Unified School District No. 480, 934 F.Supp. 1275, 112 Ed. Law Rep. 252 (D. Kansas 1996) [School did not have actual or constructive knowledge of dangerous condition of wet floors in school welding area. Presence of foreign substance on floor does not raise presumption of negligence].

skid resistant surface, or the presence of a foreign substance is necessarily apparent to a student using the shop facility. The issue is one of fact, and the student's alleged inattentiveness to either or both conditions is a matter of comparative negligence.²²

Status Rules: Most jurisdictions no longer distinguish between invitees and licensees (those on the landowner's property legally, but without benefit to the landowner), and hold that the landowner's duty is one of due care under the circumstances, except as to trespassers. See, e.g.,

²² The court affirmed a jury verdict awarding plaintiff 80% of his damages. Where plaintiff is actually aware of the precise condition that causes his injury and voluntarily assumes the risk, jurisdictions following the Missouri rule will permit a denial of damages under the open and obvious rule. See also Banks v. Trustees of University of Pennsylvania, 666 A.2d 329, 104 Ed. Law Rep. 789 (Pa. Sup. 1995) [Summary judgement for university affirmed where student fell while attempting to climb and jump over a four foot high wall, while attempting to avoid fraternity protest that blocked main pedestrian thoroughfare].

Some jurisdictions limit an implied assumption of risk argument to cases involving inherent, or primary risk. In Weller v. Colleges of the Senecas, 635 N.Y.S.2d 990, 106 Ed. Law Rep. 282 (1995), a student was paralyzed when his bicycle struck a tree root, causing him to fall violently. The student had veered off a paved path onto a grassy path between two trees on the campus. Defendant Marriott Corporation (the College's maintenance contractor) admitted that students had created at least one desired pathway off the end of the paved path and that students rode bikes in the area where plaintiff's bike struck the tree root. The court held that a jury could find that, under these circumstances, a tree root is not necessarily an inherent feature of a path near trees, and that the plaintiff in this case was not aware of the tree root until just before the accident.

The Weller case notes that many jurisdictions limit the primary assumption of risk doctrine to sports and entertainment cases, citing Turcotte v. Fell, 510 N.Y.S.2d 49, 502 N.E.2d 964 [Professional horse racing]. The court did dismiss the university under the New York recreational use statute, § 9-103[1][a], relieving a landowner from any duty of care as to premises maintenance when the landowner allows its land to be used, without charge by the public for...bicycle riding. The suit was reinstated as to Marriott Corporation.

Poulin v. Colby College, 402 A.2d 846 (Me. 1979).²³ Since the trespasser's presence is contrary to the landowner's interest in his/its property, most courts still refuse to impose a duty on the landowner to exercise reasonable care for the trespasser's safety. Where such a "no duty" rule is evident, the university should prevail by summary judgment in a personal injury case. An illustrative case is Pride v. Cleveland State University, 657 N.E.2d 878, 104 Ed. Law Rep. 1330 (Ohio Ct. Cl. 1995), holding that the university owed no affirmative duty of care to a homeless man who was injured when he climbed over a brick wall and fell into a classroom building ventilation shaft.²⁴ The Ohio court noted that, at most, the university owed an undiscovered trespasser a warning of dangerous conditions actually known to the university. Although in this case the university was aware of prior thefts of small fixtures, it had no knowledge of the taking of the 250 pound grates covering the ventilation shaft.²⁵

²³ Compare Rowland v. Christian, 443 P.2d 561 (Cal. 1968) [Arguing for the abatement of status rules as determining the landowner's duty of care].

²⁴ The court noted that the plaintiff had twice been warned not to sleep on the grates of the shaft. On the second occasion, plaintiff had been issued a trespass warning.

²⁵ The court held that, since the plaintiff was a trespasser, the university's was liable only for wanton conduct.

A traditional exception to the rule, applied to university cases, is that a duty of care might be owed to a trespasser who reasonably believes himself to be on a public or dedicated walkway. The Ohio court recognized the exception, but held that the ventilation shaft in question was not a part of a dedicated walkway at CSU, nor on a path worn by pedestrian traffic.

Duty to Control Others

Negligent Security: Criminal Intrusion: Assaults at public secondary and postsecondary campuses raise the issue of the scope of the duty to take affirmative action to protect students. Traditional tort law refuses to impose upon municipalities and other political subdivisions a general duty to protect the public.²⁶ In other words, while a governmental unit might have a political obligation to protect public safety, the common law does not recognize a private cause of action for damages simply because a person is a crime victim. A private cause of action is recognized at common law only where there is a special relationship between the governmental entity and a crime victim. Such a relationship arises when an express assurance is made by a governmental agent, and the victim

²⁶ When the state waives its immunity from private suit for damages in tort, it does not generally create any new cause of action. Rather tort claims acts simply remove the absolute immunity historically afforded the government, and hold the governmental unit responsible for its negligence to the extent it would be responsible were it a private party. See, e.g., Fla. Stat. § 768.28.

relies on that assurance. See Riss v. City of New York, 240 N.E.2d 860 N.Y. (1968); DeLong v. County of Erie, 457 N.E.2d 717 (N.Y. 1983).²⁷

The public duty doctrine is not necessarily dispositive of a public university's liability for student assault. Johnson v. State of Washington, 894 P.2d 1366 (Wash. App. 1995) is illustrative. The Johnson case arises out of the abduction and rape of a freshman student near her dormitory on the campus of Washington State University. Johnson's claims that the university was negligent as landowner were dismissed on the university's motion for summary judgement.²⁸ The court of appeals agreed that the public duty doctrine prohibits private suits for damages based upon a notion that a governmental agency has a general duty to the public at large. Moreover, the court rejected the argument that the university is *in loco parentis*, and thus responsible for the protection of Johnson merely because she is a student.²⁹ However, the court reversed the dismissal of

²⁷ As when a victim receives assurances from a 911 agency that rescue personnel are in route to the crime scene. Cf. Chambers-Castanes v. King Cty., 669 P.2d 451 (1983); Roy v. City of Everett, 823 P.2d 1084 (Wash. 1992); City of Little Rock v. Weber, 767 S.W.2d 529 (Ark. 1989).

²⁸ The trial court relied on the public duty doctrine, and also held that, in any event, the act of the rapist was an intervening criminal act, and thus the legal cause of Johnson's injuries.

²⁹ See Bickel, R. and Lake, P., "Reconceptualizing the University's Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of *In Loco Parentis* and the Restatement (Second) of Torts, 20 J. of Coll. & Univ. Law 261 (1994).

Johnson's claims as a matter of law, holding that Johnson was a business invitee of the university, and that the university owed her a duty of reasonable care as to the safety of its premises.³⁰

Issues of the university's negligence, and whether the university's acts or omissions were the legal cause of Johnson's injuries are, the court held, jury questions where evidence shows that the university could reasonably have foreseen criminal assault. The court's ruling in this regard applies the traditional tort rule that a criminal assault of a tenant is not an intervening act if it is foreseeable by the landlord. That foreseeability depends upon the number and type of prior criminal acts occurring on the landlord's premises, and normally should not be determined on summary judgement.³¹ Caveat: The private college does not enjoy the benefit of the public duty doctrine. It is therefore clearly

³⁰ Citing Peterson v. San Francisco Community College Dist., 685 P.2d 1193 (Cal. 1984); Jesik v. Maricopa Cty. Comm. College Dist., 611 P.2d 547 (Az. 1980); Isaacson v. Husson College, 297 A.2d 98 (Me. 1972); see also Cutler v. Board of Regents, 459 So.2d 413 (Fla. App. 1984)[University as landlord has a duty to provide reasonable security as to students residing in campus residence halls]; Cf. Savannah College of Art & Design v. Roe, 409 S.E.2d 848 (Ga. 1991)[Duty of security is based in contract, unless university landlord has reason to foresee criminal assault of dormitory resident]; Leonardi v. Bradley University, 625 N.E.2d 431 (Ill. App. 1993); Hartman v. Bethany College, 778 F.Supp. 286 (N.D.W.Va. 1991)[Student is not an invitee of university when student visits fraternity house in early morning hours, or patronizes off campus pub owned and operated by university alumnus].

³¹ See Delaney v. University of Houston, 835 S.W.2d 56 (Tex. 1992), rejecting university's claims that security of dormitory premises is a police power issue, subject to doctrine of discretionary governmental immunity. Negligent failure to repair lock on landing door of university dormitory may be basis for suit by student assaulted by criminal intruder, where broken lock facilitates entry of assailant.

subject to a traditional tort analysis under the landowner-invitee rule.

Peer Assault or Reckless Conduct: The issue of the university's duty to control others is more difficult when the situation involves peer assault, or reckless behavior by a student that injures another student. Early cases, such as Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979),³² reasoned that any duty of reasonable care to provide for student safety from wrongful conduct by other students must rely on the assertion that the university stands *in loco parentis*, or that its relationship with students is otherwise custodial. Recently, Delaware, Kansas, and other jurisdictions have recognized, as did Washington in the Johnson case, that the rejection of surrogate parent status does not immunize the university from accountability for peer assault, where the university knows, or should know of student acts that place other students at risk of bodily or mental injury. The most notable decisions are Furek v. University of Delaware, 594 A.2d 506 (Del. 1991), and Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993).

The Delaware Supreme Court held in Furek that the university's involvement with its students raised issues of duty beyond the mere duty to educate. Indeed, the court held that there is no legal authority to

³² *Cert. denied*, 446 U.S. 909 (1980); see also Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552 (Ill. App. 1987).

support the notion that the university's supervision of potentially dangerous student activities would create an inhospitable or educationally inappropriate environment.³³ In Nero, the Kansas court held that university acts that place students at risk are subject to a negligence analysis.³⁴

Vicarious Liability of the University for Negligent Injury of Students

By An Employee: In auto accident cases, premises liability cases, and other

³³ 594 A.2d at 518. More specifically, the court questioned the notion that the adult status of students makes university intrusion into situations of dangerous student behavior (such as fraternity hazing, or dangerous use of alcohol) inappropriate.

³⁴ Thus, the university may not disclaim any duty of care toward a female student, when it places an adult male student facing criminal charges for sexual battery in a coed dormitory after assigning him to an all male dormitory. *But see* Eiseman v. State of New York, 511 N.E.2d 1128.

In Motz v. Johnson, 651 N.E.2d 1163 (Ind. App. 1995), the court refused to hold a national or local fraternity liable for injuries sustained by a guest when she was sexually assaulted by an alumnus of the fraternity at a homecoming party on the campus of Indiana University. The court noted its prior decision in Bearman v. University of Notre Dame, 453 N.E.2d 1196 (Ind. App. 1983), holding that a university has a duty to take reasonable precautions to protect patrons of football games from injuries caused by the negligence of third parties. However, the court refused to extend Bearman to impose liability on the fraternity for a *criminal* act of one of its guests, when the act was not reasonably foreseeable. The court rejected plaintiff's argument that liability should be imposed under the state's dram shop law, noting that the alumnus supplied his own beer at the party, and that there was no proof that the fraternity served him knowing that he was visibly intoxicated. The court cited Welch v. Railroad Crossing, Inc., 488 N.E.2d 383 (Ind. App. 1986), refusing to hold a tavern owner liable for an unforeseeable, unexpected, and spontaneous criminal attack of a patron behind the tavern. *Cf.* Ember v. B.F.D., 490 N.E.2d 764 (Ind. App. 1986), suggesting that a tavern owner might be liable for a criminal assault of its patron if the tavern gratuitously promised patrons and neighbors that it would have a police officer on duty to patrol its parking lots. *See also* Foster v. Purdue University Chapter, Beta Mu of Beta Theta Pi, 567 N.E.2d 865 (Ind. App. 1991), holding that national fraternity's "advisory" communications to local chapter expressing disapproval of alcohol abuse, date rape, and hazing do not create a duty to control alcohol consumption by local chapter members.

cases of student injury caused by employee negligence, liability of the university for personal injury is usually imposed because of the permissive use of a university vehicle, or the negligence of an employee who is acting within the scope of his employment at the time of the negligent act. However, the issue of the university's vicarious liability, under tort law (rather than under 42 U.S.C. §1983, or Title IX) for student injury caused by a prohibited act, requires a more difficult analysis. Among the recent cases, Emoakemeh v. Southern University, 654 So.2d 474, 100 Ed. Law Rep. 457 (La. App. 1995) is instructive.

In Emoakemeh, the court held the university vicariously liable for injuries suffered by a student who was shot by a resident assistant employed by the university. The shooting occurred during an altercation between the resident assistant and another resident over violation of dorm rules. The court applied the traditional tort rule rather than any special rule confined to education environments. An employer is responsible for the negligent acts of its employees, the court held, when the conduct is so closely connected in time, place and causation to the employment duties of the employee that it constitutes a risk of harm attributable to the employer's enterprise. The employer is thus not responsible when the employee's conduct is motivated by purely personal considerations

entirely extraneous to the employer's interests.

Southern argued that the resident assistant's duties included only reporting of infractions, and not confrontation with students violating rules. Moreover, it argued that the possession or use of a gun by an employee was prohibited. The court responded that the focus of vicarious liability is not upon the act itself, but the context of the act. Thus, where the altercation occurs within the context of the employee's general duties, the fact that the act is contrary to university policy is not sufficient to relieve the university of responsibility.³⁵

The ruling is in accord with mainstream notions of imputed fault. Vicarious liability is based upon the relationship between employer and employee, not the primary negligence of the employer. Thus, even where the employee's conduct is in violation of employer rules, the employer may be liable because the activities of the employee at the time of the negligent act or omission are within the scope of his employment.³⁶

³⁵ The ruling goes only to the issue of vicarious liability, where negligence of the employee and causation are proven. Compare Hall v. Board of Supervisors of Southern University, 405 So.2d 1125 (La. App. 1981), holding that the university was not liable for the intentional shooting of a student in a dormitory lobby, where the shooting was sudden and not reasonably foreseeable.

³⁶ The employer may therefore be liable for employee negligence in situations involving the employee's performance of activities that are partly business related and partly personal, such as smoking in his hotel room while filling out expense reports on a business trip.

Field Experiences: As field trips and field experiences become routine throughout the curriculum, colleges and universities must be cautious not to place undifferentiated reliance upon the few early cases that suggest a no-duty rule as to the safety of student participants. Cases such as Beach v. University of Utah, 726 P.2d 413 (Utah 1986), suggest, for example, that the student-college relationship is not, *per se*, sufficient to impose a duty on a professor to control the conduct of a student who consumes alcohol while riding in a van on a field trip with the professor and other students.³⁷ However, while accepting Bradshaw's rejection of duty based on notions of *in loco parentis*, or custody, the Beach court seems to imply that it *would* impose a duty if the professor had

In Carol "WW" v. Stala, 627 N.Y.S.2d 136, 100 Ed. Law Rep. 692 (Sup. Ct. 1995), the intermediate appellate court refused to impose liability upon a university organization that operated a "Big Buddy" program matching college students with agencies and individuals needing volunteer assistance, when a student in the program sexually assaulted plaintiff's son. The court relied exclusively upon Palsgraf v. Long Island R.R. Co., 162 N.E.2d 99, a case that enjoys contemporary distinction because of its historical significance, rather than the validity of its reasoning. Palsgraf suggests that the remoteness the relationship between a victim's injury and the negligence of the defendant is relevant to the determination of duty. Palsgraf was decided when the rule of causation was a direct cause rule. Modern notions of foreseeability, as applied to causation, suggest that the majority's rationale in Palsgraf is flawed in refusing to recognize the duty of the railroad to the plaintiff, who was clearly a business invitee. Nonetheless, Palsgraf has often been cited for the proposition that "unforeseeable plaintiff's" do not generally recover in negligence cases. In Carol "WW", the dispositive fact seems to be that plaintiff's son was not a participant in the Big Buddy program, but rather a neighbor of a participating child.

³⁷ The professor apparently knew his biology students were drinking in the van, and that the plaintiff had consumed too much alcohol on a prior trip.

knowledge that the student/plaintiff was a danger to herself or others because of her intoxication.³⁸ Other cases suggest a limited duty on the part of the university to exercise reasonable care in the planning of a field trip or experience, including selection, inspection and maintenance of equipment, and instruction of students regarding safety measures. Mintz v. State, 362 N.Y.S.2d 619 (1975), is illustrative. In Mintz, the court held that a university was not liable for the deaths of students on a canoe trip, as the deaths were caused by a sudden, unforeseeable and severe storm, and not by any negligent act of the university. The court noted the university's establishment of standards regarding student participation, including a protocol for pairing of students in canoes based on experience, use of weather forecasting devices, and the like.

Educational Malpractice: Tort vs. Contract Rights of Students

State courts continue to summarily reject a tort cause of action for educational malpractice, viewing such a theory as dependent upon *in loco parentis* concepts and violative of the principle that courts should not substitute their judgement for that of university officers in matters of

³⁸ The plaintiff wandered away from the other students and the professor and fell into a rock crevice, suffering paralysis. The court found that when observed by the professor, she showed no visible signs of intoxication. The opinion suggests that, had he known that she was less than competent to exercise reasonable care for her own safety, a relationship imposing duty might be created.

academic policy. In Sirohi v. Lee, 634 N.Y.S.2d 119, 105 Ed. Law Rep. 255 (Sup. Ct., 1995), the intermediate appellate court reaffirms this statement and, without explanation suggests that this discretion in matters of academic policy supports the collateral notion that the college has no legal duty to shield a student from the dangerous activity of another student. The case, involving Columbia University, appears to attach undue significance to the result in Eiseman v. State of New York, 511 N.E.2d 1128.³⁹

Conclusion: Duty vs. Negligence

This presentation outlines selected situations in which tort doctrine is commonly applied to college and university activities that invite inquiry about the responsibility of the university to minimize the risk of student injury. In most of these situations, there is nothing unique about the tort analysis, as compared with traditional tort cases arising outside the college or university environment. The notable recent trend in the college and university cases is toward the reconceptualization of the duty element in

³⁹ Eiseman held that a state university was not negligent in enrolling a former prisoner and assigning him to housing also occupied by a female student whom he killed, when the university did not know of the former prisoner's history of assault and attempted suicide. The court noted that the university did inform the female student that the former prisoner was a convicted felon, thus suggesting that the university fulfilled any duty to warn. Moreover, the court's ruling is less than explicit regarding the university's potential liability had it known of the prisoner's history of assault and suicide attempts. See Nero v. Kansas State University, *supra* .

cases arising from bodily injury to students on campus, or in the context of university activities off campus. This revisiting of duty, along with the increase in the number of injuries to students generally by all causes, makes it imperative that university attorneys and administrators give more significant attention to the management of personal injury exposure.

It is simply not productive, given recent trends, to seek the protections of the qualified immunities afforded by the notable “no-duty” cases of the 1970’s and 1980’s. The erosion of “no-duty” rules is a reality in a growing number of jurisdictions. Moreover, it must be recognized that the desire to cling to “no-duty” concepts is born of the fear that the imposition of a duty of reasonable care as to student safety makes the college the insurer of the safety of its students. Such an assumption is simply not suggested by negligence rules. It is axiomatic to negligence law that duty suggests only the responsibility to act reasonably under the circumstances. To prevail in a personal injury case based on a theory of negligence, a plaintiff must prove that the university’s conduct fell below a standard of reasonableness, and that its substandard care was the cause in fact and legal cause of the student’s injuries. Such conclusions are dependent upon issues of foreseeability of aberrant risk and the significance of the university’s acts or omissions as contributing factors in

the student's injury.

Realistically, university attorneys seek the protection of “no-duty” rules because it is their desire to obtain the dismissal of plaintiff's case by pre-trial motion, or summary judgement. Attorneys for tort defendants generally prefer to avoid trial, especially by jury. Since *duty* is the singular question of law in a traditional negligence case, a “no duty” rule allows the court to end the case without evaluation of the university's conduct. Issues of negligence and causation are, on the other hand, fact issues appropriate for referral to the fact finder, usually a jury. Universities remain ambivalent about submitting their conduct to evaluation by a jury, preferring to argue that students somehow generally assume the risk of college life.

In sum, recent decisions suggest the likelihood that courts might now be willing to question “no duty” rules, or notions of assumption of risk as a bar to recovery in student injury cases, and instead subject university conduct to a standard of reasonable care, at least in traditional premises liability cases; accidents caused by negligence in the conduct of university activities; affirmative university conduct that places students at risk; and perhaps in cases of student injury caused by other students or third parties. If the trend continues, university attorneys and administrators

would be well-advised to examine university activities for evidence of reasonable precaution. Education and technical assistance should be provided in methods of risk management. Student affairs personnel, campus police, maintenance personnel, and others should develop effective lines of communication, and procedures to enhance injury prevention and insure immediate and correct investigation of accidents when they occur. Governing boards and presidents should insure that adequate resources are devoted to maintenance functions, and that maintenance and safety personnel, including campus security, have the judgement, training and expertise required of them in carrying out their responsibilities, in a college setting.

The modern college or university cannot afford to support a “culture” of professional administrators who play a role in all aspects of student life on campus, without giving equal attention to the safety of the environment within which its students study, and live. As efficiency in management of academic and academic support programs becomes more important, efficiency and effectiveness of risk management becomes vital to the success of the college’s operations.

