

DEVELOPMENTS IN THE LAW GOVERNING LIABILITY IN 2000

Author:

ROBERT D. BICKEL
Conference Chair, Professor of Law
Stetson University College of Law
St. Petersburg, Florida

Stetson University College of Law:

**WORKSHOP: PREVENTING TORT LIABILITY AND LOSSES-
IDENTIFYING THE ORIGINS OF TORT/ACCIDENT
LIABILITY AND DEFINING APPROACHES THAT LIMIT
PERSONAL INJURY CLAIMS FOR CIVIL DAMAGES**

Clearwater Beach, Florida

February 9, 2000

**DEVELOPMENTS IN
THE LAW GOVERNING LIABILITY
in 2000**
Implications for Colleges and Universities

A brief paper prepared by
Robert D. Bickel¹

to facilitate discussions at a special workshop on tort liability at the
National Conference on Law & Higher Education

February, 2000
Clearwater Beach, Florida

The last decade of the Twentieth Century will be characterized in education law as a period when courts encouraged the re-examination of tort liability concepts that govern the university's liability for personal injuries to students or third parties. This brief outline attempts to identify important developments in the law, and provide illustrative situations that facilitate a discussion of the university's expanding responsibility to manage risks that cause personal injuries. **CAVEAT:** Obviously, courts in different jurisdictions may apply different legal rules, or may see cases differently as to mixed questions of law and fact. We should therefore use the cases simply to identify issues that define the contours of potential exposure. We should not assume the universal application of any decision, but may speculate with some accuracy whether it would be accepted in other jurisdictions.²

**GENERAL RULES GOVERNING THE LIABILITY OF THE COLLEGE OR UNIVERSITY AS
LANDOWNER, AND/OR LANDLORD:**

The tort law governing premises liability has a historical and continuing relationship with property law. In early personal injury cases, the almost absolute dominion of the property owner meant that a third person had little right to be on his land, and therefore had no right to seek civil damages for personal injury through a private tort action. As society evolved, so did the social view of courts – and the importance of tort law began to

¹ B.A., University of South Florida; J.D., with highest honors, Florida State University, 1968. Professor of Law, Stetson University College of Law. NACUA Fellow.

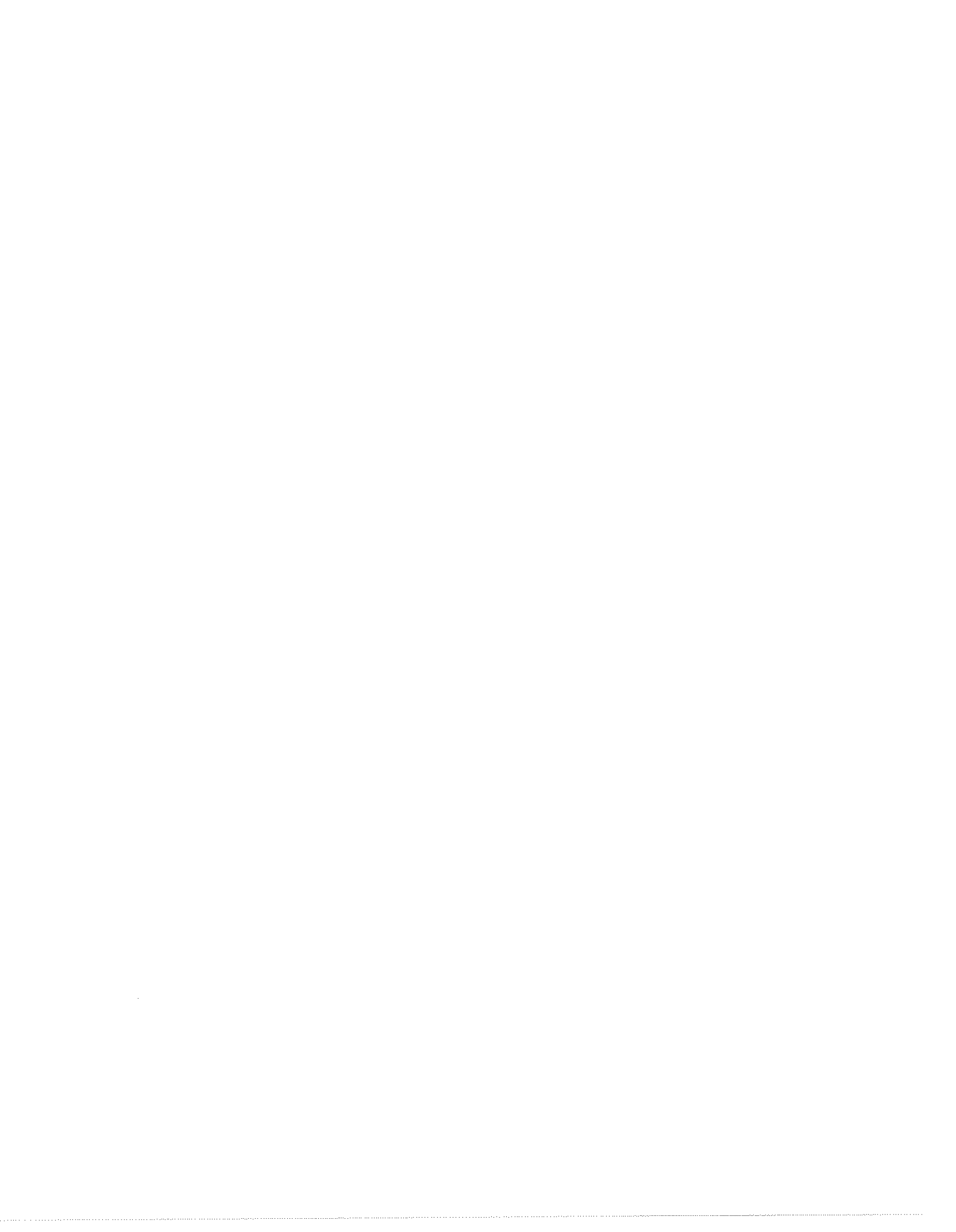
² Intermediate federal or state appellate court decisions, and federal trial court decisions that are digested in this memorandum may be subject to further appellate review and could be modified, reversed, or remanded. Such action could alter the instructive value of the case.



influence prior notions rooted in the law of property. Courts became concerned about the landowner's responsibility to exercise some care for the safety of those coming onto his property, assuming that the third person was 'legally' there. Until the 1960's the common law of torts engaged in a balancing of rights identified directly with status – that is, whether the third person seeking to hold the landowner accountable for negligence was a trespasser, a business or gratuitous licensee (there with express or implied permission), or was a business or public invitee (there for the economic benefit of the landowner, or a member of the public and on the land for the purpose for which the land is open to the public). Then, in several seminal cases, state supreme courts raised the question whether this status-based rule should give way to the application of the same negligence and reasonableness doctrines in landowner cases that are applied in other typical torts cases. **Rowland v. Christian**, 443 P.2d 561 (Cal. 1968), is illustrative:

SOCIAL POLICY QUESTION: Whether to retain status-based rules that define the landowner's duty to persons injured on his land according to the characterization of the injured person – as trespasser, licensee, or invitee – or to impose a 'single standard' of care: That is, the care that a reasonable owner of such premises would exercise under the circumstances?

The *Rowland* court explained the *traditional* common law rule that a landowner is subject to liability for negligence only as to persons who may be '*classified*' as *invitees* – meaning business or public invitees – and that other persons of 'lesser status' are not entitled to hold the landowner accountable for negligent maintenance of the premises. The court defined the 'status' categories – *trespasser* (a person without privilege to enter or remain on the landowner's property), *licensee* (a person – like a social guest – 'permitted' to come onto the landowner's property by the consent of the landowner, but with no 'business' benefit to the landowner), and *invitee* (a person whose presence is invited – expressly or impliedly because of some benefit to the landowner – that is directly or indirectly connected with 'business' dealings between the landowner and the 'invitee'). This *balancing* of *status* determined *duty*: The landowner owed a duty of reasonable care *only* to the *invitee*. He could assume – as to defective conditions of the premises that caused a risk of personal injury – that the *licensee* or *trespasser* take the



property as they find it, and that the landowner owes them only a duty to refrain from willful or wanton conduct that injures them.

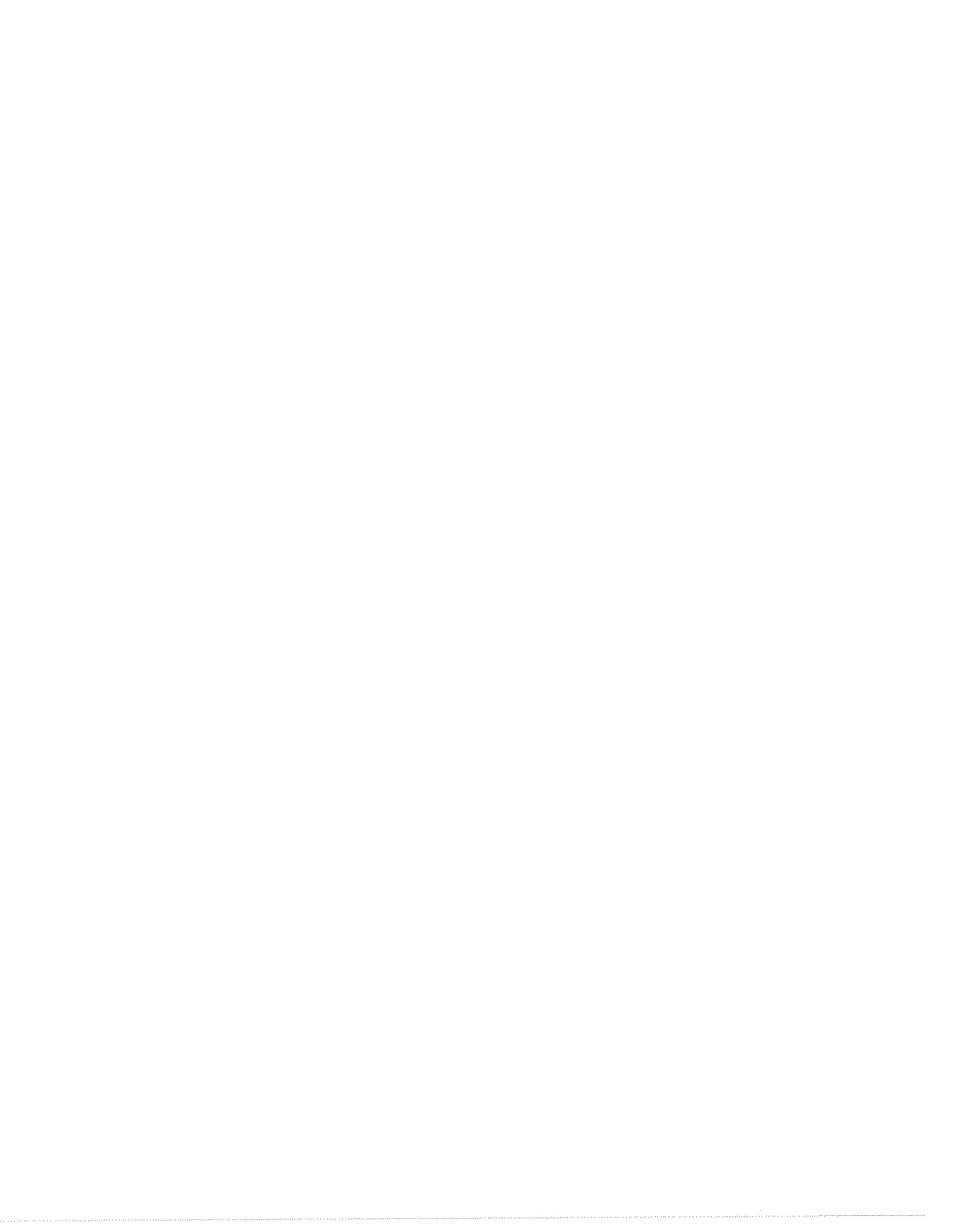
The ‘Rowland’ Rule: The *Rowland* Court announces a ‘modern’ rule – that owners and occupiers of land should have a *single* duty to exercise reasonable care, *under the circumstances*, and that this duty should not be based upon labeling the status of the person injured on the premises, but instead should draw upon social policy concerns that balance the rights of the landowner and the injured party. In sum, the court held, the landowner’s liability for personal injury should be determined by considering, in a given situation:

- | |
|--|
| <ul style="list-style-type: none">- The foreseeability of injury- The closeness of the connection between the injury and the defendant’s conduct- The moral blame attached to the defendant’s conduct- The policy of preventing future harm- The prevalence and availability of insurance |
|--|

The *Rowland* court was concerned that the traditional (old? Property-rooted?) rule actually created an *immunity* – placing the landowner beyond the reach of the injured party – without affording an opportunity to even examine the circumstances that led to the injury, or why imposing responsibility would be appropriate under the circumstances. This concern restates the court’s affirmation of the ‘value of life and limb’ when balancing landowner rights with the right of a third party to expect the landowner to exercise reasonable care. In the court’s famous words:

“A man’s life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission, or with permission, but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party...in order to determine...whether the landowner has a duty of care is contrary to our modern social mores and humanitarian values....”

Thus, even as to a gratuitous social guest, a landowner might have a duty to *warn* of defects *known to the landowner*, and *not obvious* to the *guest*, that create an *unreasonable* risk of personal injury.



Rowland was a cross-current case of tremendous significance to the law governing premises liability. It forced an analysis of the relationship between **duty** and **proximate cause**, and suggested that notions of duty must be subjected to a social policy analysis that considers the appropriateness of loss-shifting in the context of particular cases. But *Rowland* has not produced a universal change in tort law governing premises liability. It has been rejected by many states, and only partly recognized or accepted in others. The arguments against the *Rowland* rule begin by observing that a ‘social policy’ based duty rule, as announced in *Rowland*, would permit a lay jury too much freedom to impose liability on a landowner. Further, the argument goes:

- Premises law properly values the rights of landowners, and should not be abandoned in favor of a tort duty applicable in situations that do not implicate these historical rights; and more important to colleges and universities...
- A ‘single standard’ rule fails to adequately recognize the landowner’s entitlement to immunity, as a matter of law, from a *trespasser’s* private tort action for injuries caused by the landowner’s simple negligence. See *Gerchberg v. Loney*, 576 P.2d 593 (Kan. 1978); *Tantimonico v. Allendale Mutual Insurance Co.*, 637 A.2d 1056 (R.I. 1994).

The courts that reject *Rowland* have preserved a ‘no duty’ [immunity] rule, protecting the landowner from liability – *as a matter of law* – for negligent acts that injure a trespasser – but imposing a duty of reasonable care as to licensees, including social guests (*i.e.*, abolishing the distinction between invitees and licensees).³ In a philosophical sense then, the *Rowland* court seems to be saying that, where the case concerns *personal injury*, tort law should govern – unrestricted by rules rooted in property law. Property law does not give proper regard to the balancing of the rights of the parties. Cases like *Gerchberg* seem quite clearly to say the opposite – that property law recognizes rights of a landowner that must be preserved, as a matter of law, including in cases arising from the injury of persons on the landowner’s property, because of the alleged negligence of the landowner:

³ The *Rowland* court actually reached this same result by holding that Defendant’s social guest (normally a licensee) was owed a duty of reasonable care. It went further in announcing the ‘single standard rule,’ but observed that even under a single standard rule, trespassers would ordinarily not recover.



PRACTICE TIP: Notice how a rule of *immunity* works in this context. If the law of negligence says that a landowner has 'no duty' to trespassers, then the landowner's negligence in maintaining his property is irrelevant, because plaintiff's case fails at the beginning, as a matter of law. Plaintiff has no *standing*, and therefore cannot plead an *essential element* of his cause of action. Thus, 'no duty' rules allow a plaintiff's complaint to be dismissed, on defendant's motion to dismiss, *with prejudice*, and with *no jury consideration of the landowner's negligence*. The *single standard rule* is much more likely to allow the injured party to have discovery, and proceed at least to the summary judgement stage of her case, if there are genuine issues of fact regarding the foreseeability of injury, and cause-in-fact. In sum, the *Rowland* rule is much more likely to allow the factfinder to evaluate the university's conduct under the circumstances – its negligence in maintaining its premises.

Case study: A private university allows the public to use one of its gyms and locker rooms for general exercise during the day, without charge. Jane Doe, a nonstudent, came to the gym to exercise. Her three year old daughter attempted to pull open the locked door of a locker. The locker – which was not attached to the floor or any base or platform – fell and seriously injured the child. In a jurisdiction following the 'old' rule, a court could hold that Jane Doe was a gratuitous 'licensee' who 'took the premises as she found them' – relieving the university of liability for negligence (The university would have no duty of reasonable care regarding a gratuitous licensee). In a jurisdiction following the 'single standard rule,' the university would have a duty of reasonable care 'under the circumstances,' and the issue would be whether the university was negligent in not attaching the lockers to the floor or a base, to prevent this type of accident. This is, in most instances, a question of fact for a jury.⁴

As noted above, in some jurisdictions invitees and licensees are treated alike, with some exceptions. *See e.g., Illinois Statutes*, § 740 ILCS 130/2 [Premises Liability Act], abolishing the common law distinctions (labels), in favor of a duty of reasonable care, but providing that the landowner has *no duty*:

- to warn or protect an entrant from '**open or obvious**' dangers, and defining an 'open and obvious' defect as one discovered by the entrant, or one that s/he, in the exercise of reasonable caution, would have discovered⁵;
- to warn of latent defects **unknown** to the landowner;
- to warn of dangers arising from the entrant's misuse of the premises or things affixed to, or located on the premises, or to protect the entrant from his own misuse of the premises, *and* preserving the landowner's immunity from private tort actions by trespassers (*Tantimonico, supra.*, 637 A.2d 1056 (R.I. 1994), except for child trespassers who are not subject to the rule of comparative negligence (the 'attractive nuisance' rule).

⁴ *See Light v. Ohio University*, 502 N.E.2d 611 (Oh. 1986).

⁵ *See Shimer v. Bowling Green State University*, 708 N.E.2d 305 (Ohio Ct. Cl. 1999)(University not liable for injuries suffered by music student when she fell from stage into orchestra pit, where orchestra pit was open and obvious, and student had been on stage many times prior to her fall).



NATURAL AND NON-NATURAL CONDITIONS OF LAND

A landowner might argue that he has no duty to remedy a natural condition of his land even though the threatened harm is potentially severe, and the burden of eliminating the risk is minimal. This argument would be advanced, for example, where a university's property contains a lake or river, natural trails or paths, etc. The argument is a classic one for the summary judgement stage of litigation, and arguably could be made in support of a motion to dismiss. However, in many jurisdictions, including California after *Rowland*, the rule has been modified to provide for liability in some situations. The rule may be summarized as follows:

- Even early common law held the landowner liable for injuries to persons walking on adjoining public roads or highways (as by falling trees on landowner's property);
- At least 13 states treat natural and artificial conditions similarly in assigning responsibility for negligent maintenance, and the Restatement (Second) of Torts also recognizes liability for negligent maintenance of trees, and certain other natural conditions. Nuisance statutes also expand the circumstances under which 'so-called' natural conditions may subject the landowner to liability for unreasonable risk to adjoining landowners, or persons on the land.
- A duty of care should arise out of possession alone, which subsumes the right of the landowner to supervise and control conditions on his property. Thus, liability for nonfeasance is justified (*i.e.*, the imposition of an affirmative duty is justified).

THE ATTRACTIVE NUISANCE RULE: CHILD TRESPASSERS

Even if the jurisdiction recognizes a 'no duty' rule as to trespassers, where the landowner – by his affirmative act – creates an artificial danger that unreasonably endangers a child, he is subject to liability, if:

- He knows, or should know, that children are likely to come into contact with the condition;
- He knows, or should know, that the condition creates an unreasonable risk of death or bodily injury to children;
- The injured child because of his youth, did not discover the artificial condition, or appreciate the risk to himself;
- The utility of the condition, and the burden to the landowner of removing it – or otherwise eliminating the danger it presents – are slight, compared to the risk to children;
- The landowner fails to exercise reasonable care, to warn of the danger, or eliminate it.⁶

⁶ The rule is restated in § 339 of the Restatement (Second) Torts, and is widely followed.

The rule is applied cautiously – and a landowner is subject to liability to trespassing children *only when the condition causing the injury is hidden, or the child would not appreciate the risk.* The rule recognizes that there are many artificial conditions the dangers from which are, or should be, obvious to any child old enough to be without adult supervision in the situation. However, the presence of a distracting influence or condition may make it likely that the child will fail to appreciate the danger.

Colleges and universities that have expanded academic and sport programs for children on campus must review the impact of the ‘child trespasser’ exception to the ‘no duty’ rule regarding trespassers. Children, more than adult students, may have a tendency to be attracted to inappropriate areas of the university’s premises that expose them to danger. The rule raises issues of premises maintenance and supervision of children participating in on-campus programs and activities.

THE COLLEGE OR UNIVERSITY AS LANDLORD: LIABILITY FOR UNSAFE PREMISES

An exculpatory clause relieving a landlord of the duty to exercise reasonable care regarding the condition of ‘common’ areas over which the landlord has exclusive control violates public policy. McCutcheon v. United Homes Corp., 486 P.2d 1093 (Wash. 1971)(*en banc.*).

A contract for exemption from liability for negligence may be upheld where the conduct forgiven does not fall greatly below the standard of care imposed by law. This concept would be violated if a landlord were able to utilize a general exculpatory clause relieving it of any duty to reasonably maintain the premises for safety purposes. A residential tenant living in the typical multi-family building (or a typical student in a residence hall) is almost wholly dependent upon the landlord for the reasonably safe condition of *common* areas. The generalized use of such clauses would wipe out fundamental common law notions of the landlord’s responsibility, and would have an impact on tenants as a class.

LEGAL RULE AS REFLECTION OF SOCIAL POLICY: Note the balancing of contract and tort, in the same way as the previous decisions balance property rights with interests valued by tort law. And note that the scope of the landlord’s duty to safely maintain premises runs with the extent of the landlord’s control – recognizing that the tenant lacks control over common areas.

CRIMINAL INTRUSION AND THE SAFETY OF INVITEES AND TENANTS

As society has changed, modern tort law has become concerned with the security of premises, but modern rules both expand and limit duty. In most, if not all jurisdictions, modern duty rules were originally announced by courts or legislatures to limit the 'old' common law imposition of strict liability on innkeepers for loss or damage to a guest's personal property. McIntosh v. Schops, 180 P. 593 (Ore. 1919), cited in Kutbi v. Thunderlion Enterprises, Inc., 698 P.2d 1044 (Ore. App. 1985). However, in modifying the 'old' common law rule, modern courts have imposed a larger duty on landowners to exercise reasonable care for the safety of business or public invitees.

The modern rule provides that a landowner who holds land open to the public is subject to liability for physical harm to public invitees caused by the accidental, negligent, or intentionally harmful acts of third persons, if the landowner fails to use reasonable care to (a) discover that such acts are occurring or are likely to occur, or (b) adequately warn visitors to avoid such harm or otherwise protect them from it.⁷ Because the rule is derived from negligence (fault) principles, and not strict liability theory, liability is 'pegged' to foreseeability of harm. And, because the landowner is not generally required to anticipate that third parties will commit criminal acts, the landowner is subject to liability only where criminal intrusion is *reasonably foreseeable*.

The rule is usually stated to provide that the landowner – *e.g.*, landlord – may be negligent, even though the harm to a visitor/invitee – *e.g.*, tenant – is caused by the criminal act of a third person, if the situation is one in which a reasonable landowner would have foreseen the likelihood of criminal intrusion. The landowner/proprietor is not the insurer of the invitee's – *e.g.*, tenant's – safety⁸, but is required to exercise reasonable care to protect the invitee from unreasonable risks of which the landowner has *superior* knowledge. What constitutes reasonable care in a given situation varies with the circumstances, but evidence of *substantially similar prior criminal acts* may be used to demonstrate that the landowner had actual or constructive knowledge of risk of harm to the invitee. The term 'substantially similar' does not mean identical – as, for example, whether a weapon was used – but whether the prior crimes would put a reasonable landowner on notice that visitors, residents, etc. were subject to increased risk of harm. The question is

⁷ Restatement 2d, Torts, Sec. 344 (1965).



whether the prior activity would have attracted the attention of a reasonably prudent landowner, and caused him to be concerned about the safety of visitors or tenants. Shoney's Inc. v. Hudson, 460 S.E.2d 809 (Ga. App. 1995); Cohen v. Southland Corporation, 203 Cal. Rptr. 572 (1984)[Citing cases from Pennsylvania, New York, North Carolina, Oregon, Texas, Massachusetts, and New Jersey].

What is required to be foreseeable is the general character of the event or harm, not the precise manner of its occurrence.⁹ In Isaacs v. Huntington Memorial Hospital, 38 Cal. 3d 112 (1985), a doctor sued the hospital for damages when he was assaulted in a 'research' parking lot across the street from the hospital's emergency room and physician's entrance.¹⁰ The trial court granted the hospital's motion for nonsuit at the close of the plaintiff's case, finding insufficient evidence to hold the hospital liable for negligence. The supreme court overturned the trial court's decision, holding, *inter alia*, that prior similar incidents are not a rigid requirement in finding that a landowner should have foreseen the risk of criminal behavior endangering invitees on its premises.

Citing Rowland v. Christian, Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, and Mullins v. Pine Manor College, 449 N.E.2d 331, the court held that a rigid 'similar prior acts' rule discourages landowners from taking adequate measures to protect premises which they know are dangerous. Moreover, such a requirement encourages arbitrary results and distinctions (When must the prior acts have occurred? How near must they be in location to the premises in question?). Finally, a prior similar acts rule deprives the jury of its proper role in determining whether a reasonably prudent landowner would have determined that the risk of criminal assault was sufficiently evident to require security measures. In sum, the court held that, while evidence of prior similar acts are helpful to a determination of foreseeability, they are not a 'but for' requirement.¹¹

⁸ See Scott v. Harper Recreation, Inc., 506 N.W.2d 857 (Mich. 1993).

⁹ Cohen v. Southland Corp., 203 Cal. Rptr. 572, 576. *Contra.*, see Boren v. Worthen National Bank of Arkansas, 921 S.W.2d 934 (Ark. 1996)(The fact that apartments, or businesses are in high crime areas does not in itself establish a duty to provide security. The dissent argues that the court should adopt the foreseeable risk rule, and observes that it should be a question of fact whether installation of cameras, or other measures, would have deterred criminal acts that caused plaintiffs' injuries).

¹⁰ As the doctor was opening the trunk of his car, he was grabbed from behind by a gunman who shot him in the chest. He sustained serious injuries, including the loss of a kidney.

¹¹ Citing Kwaitkowski v. Superior Trading Co., 123 Cal. App. 324, the court observed that 'whether a given criminal act is within the class of injuries which is reasonably foreseeable depends upon the totality of the circumstances and not on arbitrary distinctions.' A court may consider such factors as the nature and location of the premises, the access that



Balanced against this consideration is the burden to the landowner if he is required to eliminate or reduce the risk. Where reasonable efforts to reduce risk would not place an onerous burden on the landowner, it is more likely that he will be asked to take affirmative steps to reduce the risk of criminal activity that threatens visitors or tenants.¹² A number of recent decisions have applied this concept to hold supermarkets, restaurants, libraries, schools, summer camps, and other entities liable for crime-related injuries. Even though the criminal act is, in fact, an intervening act, the landowner's negligence subjects him to liability if the criminal act was reasonably foreseeable. See Nebel v. Avichal Enterprises, Inc., 704 F.Supp. 570 (D.N.J. 1989).¹³ For a citation of college cases, see R. Bickel and P. Lake, "The Emergence of New Paradigms in Student-University Relations: From *In Loco Parentis* to Bystander to Facilitator," 23 J. Coll. & U. L. 755, 770-772 (footnotes 102-108).

PRACTICE TIP ON THE ISSUE OF CAUSATION: The university's negligence in failing to keep premises in good repair – as where the lock on a common entry door to a female dormitory goes unrepaired despite complaints from residents – may subject the university to liability for criminal assault, because the university's negligence creates the opportunity for criminal entry. In such a situation, a court is likely to reject the university's assertion that the criminal act was an independent intervening cause. The jury is asked simply whether its negligence was significant enough that it should be held accountable. See Delaney v. University of Houston, 835 S.W.2d 56 (Tex. 1992); cf. Weitz v. State, 696 N.Y.S.2d 656 (N.Y. Ct. Cl. 1999).

INJURIES BEYOND PREMISES

Recent decisions re-examining the university's duty to supervise students, or provide for their safety during their participation in off-campus programs have considered the question whether the university has a duty to warn a student, or reasonably protect her from injuries that are foreseeable in the context of the program or activity.

strangers might have to the premises, existing security, lighting, etc., as well as prior criminal activity. Thus, in Cohen, the court properly found that 'the very operation of [all-night convenience stores] may be said to [create] an especial temptation and opportunity for criminal misconduct,' thus increasing the foreseeability of injury to customers. Similarly, the operation of a parking garage in an office building in a high crime neighborhood raises a question of fact regarding the foreseeability of criminal assault, notwithstanding plaintiff's inability to prove specific instances of prior assault on the premises. Gomez v. Tigor, 145 Cal. App. 3d 622.

¹² Cohen, at 578; Isaacs, at 125.

¹³ Int. app. denied, 125 F.R.D. 415 (1989). Because the allegation of negligent security in such situations is based upon the invitee's status and relationship with the landowner, the landowner's liability does not extend beyond his premises, and even on premises extends only to those areas within the landowner's control. Thus, for example, a landlord's duty to provide reasonable security to his tenants extends to those areas of the landlord's premises over which the landlord retains control during the lease (common entrances, stairwells, laundry rooms, lobbies, lounges, recreation facilities, etc.).

Such affirmative duties have been generally been recognized in the context of university sponsored field trips,¹⁴ and now seem to be an issue in cases where the university places students in off-campus programs as interns or externs. *See, e.g., Gross v. Nova Southeastern University*, 716 So.2d 337 (Fla. App. 1998), review granted, 737 So.2d 551, S.C. Case no. 94,079 (1999).

DUTY TO CONTROL OTHERS

In the past twenty years, the law has recognized an affirmative duty to control the conduct of another person or persons, where certain relationships exist. In the 1990's this emerging rule has been applied, in several jurisdictions, to redefine the university's responsibility to exercise reasonable care to minimize the risk of student (peer) assault, or to intervene in situations of known or knowable misconduct by students that threatens the safety of other students.

The cornerstone of this emerging rule is the recognition by courts that students and student-tenants in university housing have a *landowner-invitee* relationship with the university. *Knoll v. Board of Regents*, 601 N.W.2d 757 (Neb. 1999) is illustrative. In *Knoll*, the Nebraska Supreme Court held that, because a student is an invitee of the university, it has an affirmative duty to exercise reasonable care to protect him from being abducted and assaulted by members of a fraternity, when the risk of assault is known or foreseeable. The *Knoll* court reaffirms the *Rowland* court's observations about the social policy basis of duty rules, holding that in determining duty, courts apply a 'risk-utility' test, considering:

- **The probability and seriousness of the risk that caused the student's injury**
- **The relationship of the parties (the nature of the student-university relationship)**
- **The opportunity and ability of the university to exercise reasonable care**
- **The foreseeability of the harm**
- **The policy interest involved.**

The court held – citing *Nero v. Kansas State University*, 861 P.2d 768 (Kan. 1993), and *Johnson v. State*, 894 P.2d 1366 (Wash. 1995) – that all but one court to address the issue has concluded that students are invitees. This being so, the court

¹⁴ *See e.g., Mintz v. New York*, 362 N.Y.S.2d 619 (App. Div. 1975); *Regents of the University of California v. Roettgen*, 48 Cal. Rptr. 2d 922 (Ct. App. 1996).

observed that the university – as landowner – has a duty to protect an invitee against harm from the accidental, negligent or intentional conduct of third parties, where the university has superior knowledge of the risk of harm and the ability to provide reasonable protection.¹⁵ Examining the record in the case before it, the court held that the university had actual knowledge of:

- prior ‘hazing’ by fraternities that included physical abduction of pledges, and forced drinking
- a prior criminal sexual assault of a female high school student at the house of the fraternity whose members abducted and assaulted Knoll
- a prior physical altercation between members of the fraternity and another fraternity, and
- a prior incident when campus police found a member of the fraternity intoxicated and unconscious in a restroom of the fraternity’s house.

Citing Gans v. Parkview Plaza Partnership, 571 N.W.2d 261 (Neb. 1997), and Erichsen v. No-Frills Supermarkets, 518 N.W.2d 116 (Neb. 1994)(Holding that prior criminal history need not be identical to make further criminal acts foreseeable), the court concluded that, in the face of the incidents known to the university, it had a duty to exercise reasonable care to protect students – including Knoll – against the risk of abduction and hazing by the offending fraternity.¹⁶

The rule is of law applied in *Knoll* is generally accepted, but liability is denied in cases where the injured student fails to prove that the university had actual or constructive knowledge of prior criminal or other acts which would cause a reasonable landowner to foresee unreasonable risks to tenants. See e.g., Weitz v. State of New York, 696 N.Y.S.2d 656 (N.Y. Ct. Cl. 1999), holding that a university is not liable for the assault of a student tenant (in its high rise housing unit) by a fellow student and others in the absence of proof that the university had knowledge of any prior criminal activity on the premises of the high rise housing unit in which the plaintiff was assaulted, and that the university negligently failed to keep the outer doors (common entrances) to the

¹⁵ The rule applies, the court held, even if the invitee (here the student) also has knowledge of the risk. The court observed that, if the rule did not apply in spite of the invitee’s own awareness of the risk, landlords in high crime areas would have no duty to provide any protection for tenants, since the tenants would always be aware of the danger of crime. Such an outcome would be absurd.

¹⁶ The court observed that the rule applies where prior criminal activity occurs on or in the vicinity of the university’s premises, rejecting the university’s contention that it had no duty because the fraternity house in question was not owned or operated by the university. The court noted that the rule applies to student housing units on property owned by the university, and fraternity houses that are considered housing units under university control, even though not owned or operated by the university.



housing unit secure. The court observed that the duty of a university landlord to maintain its housing units in a reasonably safe condition does not include the duty to protect student tenants from “spontaneous” and unforeseen attacks by one student upon another. The university landlord does have a duty to provide reasonable security for its tenants. However, to subject the university to liability for peer assault, the student tenant must prove that the assault was foreseeable (by showing for example that the university was on notice of recent criminal acts in the building), that the university failed to keep the premises in a secure condition (*e.g.*, by failing to fix broken locks, or keep outer doors locked), and that this failure was a proximate cause of the injury.¹⁷ See also **Lloyd v. Alpha Phi Alpha Fraternity and Cornell University**, 1999 U.S. Dist. LEXIS 906 (N.D.N.Y. 1999), holding that a student injured as a result his participation in fraternity hazing cannot subject the university to liability for his injuries in the absence of proof that the university, through its employees, knew or should have known of the need to control the conduct of members of the fraternity that caused the injuries. The federal court held that New York state law does recognize that a university might be held liable – even where a student engages in a voluntary activity – if the university had actual or constructive knowledge that injurious conduct was likely to occur or recur, and failed to control that conduct despite the opportunity to do so. However, the court held, in the case before it the university had no reliable knowledge of recurring hazing by the offending fraternity and the student himself ‘made a concerted effort to hide’ the incidents that caused his injuries, until he filed suit against the university and the fraternity.¹⁸

¹⁷ On the issue of proximate cause, the court observed that a student plaintiff may be denied recovery where the persons who assaulted him lived in the building and gained proper access by using their own keys, or where they were let into the building by a resident. The court qualified its observation by noting that the university was not liable for an assault facilitated by criminal entry through a door ‘propped open’ by residents, where there is no evidence that the university knew that any door had been propped open on the day of the assault.

¹⁸ The court cited **Furek v. University of Delaware**, 594 A.2d 506 (Del. 1991), approving a jury verdict in favor of a student pledge injured by hazing activity, where the university knew of repeated past hazing incidents on campus that caused harm to students, and where campus police witnessed activities (*e.g.*, student pledges ‘marching’ with paddles) that suggested the likelihood that hazing was about to occur. It distinguished **Furek** on its facts, holding that **Lloyd** showed only that Cornell knew of the general history of hazing by black fraternities and had received two anonymous (and apparently unreliable) reports of hazing by the fraternity in question. The court’s fact findings on this issue include the finding that the fraternity’s advisor was not an agent of the university, despite his status as an employee of the university’s department

CONCLUSION

As we enter the year 2000, the emerging legal trend seems to be one that can be described as 'back to the future.' Courts are defining the university's duty under tort-accident law according to traditional tort (fault) concepts, and seeing the college or university as they would see any other landowner or landlord under rules of premises liability, including liability for unsafe conditions that facilitate foreseeable criminal intrusion and assault. The 'lesson learned' is that college and university attorneys and administrators (risk managers, student life administrators, campus law enforcement officials, and maintenance personnel) must pay more attention to traditional tort law. While traditional tort law concepts could arguably 'take a back seat' for most of the modern era, in favor of education law's attention to the student discipline process, faculty rights, employment discrimination, and other subjects, the relevance of tort law in the 1980's and 1990's as an important facet of education law will force us to recast our reading of negligence cases and increase the attention given to risk management.

of athletics, and that his ignorance of the fraternity's pledging activities supported the university's position that it knew little or nothing of any risk to Lloyd.

