THE LIABILITY OF EDUCATIONAL INSTITUTIONS FOR THE ACTS OF THIRD PARTIES

Presenter:

GEORGE M. SHUR
General Counsel
Northern Illinois University
DeKalb, Illinois

Stetson University College of Law:

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George M. Shur
General Counsel
Northern Illinois University

and

Mark Doherty
Graduate Assistant
Northern Illinois University College of Law (3rd Year)

I. Introduction

A recent Nebraska Supreme Court decision, Knoll v. Board of Regents of the University of Nebraska, 258 Neb. 1, 601 N.W. 2d 757 (1999) has forced higher education professionals to reexamine the legal relationship between educational institutions, their students, and other third parties. The court held that a university owes a "duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property, and the harm that naturally flows therefrom." Although the court remanded the case on the issue of whether the university breached this duty, it is clear that institutions of higher learning must be aware that there appears to be a movement away from traditional duty analysis -- where courts most often ruled in favor of institutions by finding that, as a matter of law, no duty was owed -- toward expansion of the concepts of duty and liability in the university-student interaction.
context. In what may be a decision with far-reaching implications, the Nebraska court rejected the concept that an institution of higher education had little or (even) no duty vis-à-vis injuries or damages suffered by students (or others) while on campus or involved in campus activities.

This paper will briefly summarize traditional approaches to the duty, and ultimately, the liability, of educational institutions to students for the acts of third parties. One must ask if the Nebraska decision, especially if read in conjunction with, *Nero v. Kansas State University*, 253 Kan. 567, 861 P.2d 768 (1993) and *Furek v. University of Delaware*, 594 A.2d 506 (1991) forewarns of future cases where state courts will no longer protect institutions on the basis of a finding of "no duty." Then, this paper will briefly discuss the duty owed to university insiders as opposed to those outside the university community and, as a corollary, whether there may be a lessened duty or responsibility for the actions of a third party unaffiliated with the institution – i.e. a member of the general public. Finally, we will address a university’s obligation and ability to conduct background checks on prospective students and the implications of such investigation.

II. Traditional Approaches

Various analyses have been utilized in determining the liability of educational institutions for the acts of third persons. However, before fully engaging in that discussion, it is helpful to examine the common factors and policies that are typically balanced when courts deal with a college student injury case. Courts will weigh: the foreseeability of the harm or danger; the seriousness of the harm; the relation of
wrongdoer's conduct to the resulting injury (i.e. proximate cause); the public policy of preventing future harm; the cost or burden on the defendant and the community in imposing a duty; and the availability and cost of any applicable insurance against the activity. See Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

Interestingly, the Tarasoff court imposed liability on a university for failing to protect an off-campus non-student from a dangerous on-campus person.

Historically, universities were viewed as though they acted in loco parentis, thus insulating the university from most civil rights and breach of contract lawsuits as the university was afforded legal immunities much like those given families and government entities. However, as the civil rights (more specifically, student civil rights) movement gained momentum in the 1960s, university insularity began to spring leaks as students eventually expanded their litigation horizons to include tort lawsuits alleging personal injury. (Who among us, as a college student, has not been injured or hurt, or lost property, while participating in a college or college-sanctioned activity – anything from a fraternity party, to intramural athletics, to a field trip, to a wilderness experience sponsored by campus recreation, etc.?)

Until recently, higher education attorneys and administrators could take some comfort in decisions, mentioned later in this paper, where the court essentially refused to second-guess the institutions by imposing a duty (and, hence, liability) for on-campus acts of third parties.1 Therefore, these cases rarely went to a jury, and attorney and risk managers did not have to worry about a panel being so outraged by egregious facts that

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1 For purposes of this paper, the term “insiders” will include members of the university community, including faculty, staff, and students. The case law being discussed will, almost invariably, involve
high damages were awarded regardless of actual responsibility/liability. We thought in *loco parentis* was dead, or at least dying. Professors Robert D. Bickel and Peter F. Lake, of the Stetson University College of Law, have urged a change in this "blank check" and have argued that institutions should not receive such a free pass from the courts. They argue that fairness dictates a more careful analysis of the classic tort principles of duty, and foreseeability. See, Bickel and Lake, *The Rights and Responsibilities of the Modern University*, Carolina Academic Press (1999). (This excellent book includes references to and citations of virtually all the cases and articles which outline the evolution of the issues discussed in this paper.)

Others, recognizing the impossibility of an institution being all-seeing and all-knowing (or being able to control thousands of hormonally-charged students with a seemingly insatiable thirst for alcohol and thrills) and of predicting just what might happen on a college campus, disagreed and argued that the institution is entitled to as much protection as possible. See, Shur, George M., *A Response to Professors Bickel & Lake*, 7 Synthesis 543 (1996).

Amongst those cases finding no duty or liability is *Rabel v. Illinois Wesleyan University*, 514 N.E.2d 552 (Ill. App. Ct. 1987). In *Rabel*, a university student was injured when a fellow student stumbled and fell while carrying the plaintiff on his shoulder during part of a fraternity activity. Quoting *Bradhaw v. Rawlings*, 612 F.2d 135, (3d Cir. 1979), the *Rabel* court commented on the relationship between a college and its students:

> Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today’s college administrations has been...
notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. College students today are no longer minors . . . There was a time when college administrators and faculties assumed a role in loco parentis. A special relationship was created between college and student that imposed a duty on the college to exercise control over the student conduct, and reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights . . . A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life . . . Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interest of the student and of the institution of higher learning are much different today than they were in the past. See Rabel v. Illinois Wesleyan University, 514 N.E. 2d at 559.

Thus, the Rabel court held that “we do not believe that the university, by its handbook, regulations, or policies voluntarily assumed or placed itself in a custodial relationship with its students, for purposes of imposing a duty to protect its students from the injury occasioned here.” Id. at 560. See, also, Beach v. University of Utah, 726 P.2d 413 (Utah 1986).

However, even though Rabel and Bradshaw were comforting to college administrators and risk managers, the recent Kansas and Nebraska decisions, are not without precedent. Some older case law established institutional liability for the actions of third parties, although one might argue that at least some of these cases support the old axiom that “bad facts make bad law.” In Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983) the court dealt with the rights of students to safe campus housing. In Mullins, a female student was attacked and raped on campus (located in an urban area just outside Boston) by an unidentified assailant. The court held that a resident student is in a special relationship with the college sufficient enough to create a legal duty under certain
circumstances. The Mullins court based this determination on several factors: the college
ordinarily provided for campus security, especially for resident students; the college
consisted of a high number of young people, especially young women, “creating favorable
opportunities for criminal behavior”; the college was in the best position to protect
students from such behavior; the college, and not the students, determined most security
measures; a portion of mandatory college fees paid for security services— the theory
being that once one provides a service, the service must be performed with reasonable
care; and some students may have never been exposed to residence hall, or metropolitan
life and may not be fully conscious of the dangers that are present. See Mullins at 335.
The application of these factors to the particular facts of the case resulted in liability as the
court found a duty to protect its resident students from foreseeable criminal acts of third
parties occurring on campus. “Colleges must, therefore, act ‘to use reasonable care to
prevent injury’ to their students ‘by third persons whether their acts were accidental,
negligent, or intentional.’” (Citation omitted) Mullins, at 337. However, and fortunately,
the liability established in Mullins did not extend without limitation. If the harm (in the
instant case it was a sexual assault on a student) was unforeseeable or could not have been
prevented even with reasonable care, the university was not liable. Again, one could argue
that, given the student population etc., almost all risks are foreseeable. There are
thousands of them and only a few of us; how can we possibly keep up with the changes in
their lifestyle, preferred methods of partying, and what sometimes appears to be a

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2 Can we accept this stereotype in 2000?
3 This may depend on the institution. For example, some campuses serve a high proportion of first-
generation students, while others may attract students from homes where one or both parents have
attended college. Moreover, we feel that today’s college freshmen are far more sophisticated and
knowledgeable about things social than their 1983 forebears.
pensive for self-destructive behavior? Good question. But we have no answer, especially if the courts take a look after the fact at what should have been obvious or known. One fears that plaintiffs’ attorneys, relying on Mullins, et al, will argue that the institution must “see all” and “know all.” And we thought in loco parentis was dead…..

An extension, or perhaps a reaffirmation, of the principles expounded in Mullins is found in Furek v. The University of Delaware, 549 A.2d 506 (Del. 1991). In Furek, a student was severely and permanently scarred when oven cleaner was poured over him as part of a fraternity hazing ritual gone drastically awry. The court was confronted with the question “of whether the law imposes upon the relationship between university and student a duty, on the part of the university, to make and enforce policies which might protect the student from harm occasioned by the acts of third parties who function under the auspices of the university.” See Furek at 516. Acknowledging “the apparent weight of decisional authority that there is no duty on the part of a college or university to control its students based merely on the university-student relationship,” the court nonetheless held that “where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control.” Id. at 519-20. In the spirit of Mullins, the Furek court recognized several key factors legitimizing the imposition of a limited duty upon the university. First, the court rejected traditional approaches to university liability in stating that the university-student relationship is unique and that it is more than strictly educational. The court also noted that many areas of university life were guided by the university, including housing, food, security, and the provision of extracurricular activities. And even though the court recognized that students are legally adults, “universities continue to make an effort to
regulate student life” leaving more than the student responsible for his/her safety. Id. at 516. Last, the court opined, it appears “equally reasonable to conclude that university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties’ relationship, particularly if such supervision advances the health and safety of at least some students.” Id. at 518.

Most state have criminal statutes barring hazing of any sort. Virtually all institutions have similar internal policies, enforced through a campus judicial or disciplinary code and by the institution’s right to “de-recognize” the local chapter. National Greek organizations have adopted similar statements.

Apart from the concept of university liability where there is a unique relationship (or special circumstances), liability has been found based on the business invitee or landlord-tenant theory. Johnson v. State of Washington, 894 P.2d 1366 (Wash. Ct. App. 1995), represented the application of business, or landlord, rules to a university. In Johnson, a student was abducted and raped near her dormitory on the university campus. The court declined to apportion liability based on traditional legal theories in the university-student context. In fact, the court explicitly rejected the theory that liability arose from a special relationship between the university and the student based merely on the victim’s status as a student (resident or otherwise) and further rejected an application of in loco parentis doctrine to college students, “since college students are adults and generally not in protective custody of their parents.” Johnson at 1369. However, the Johnson court did find that a duty arose from the fact that the student was an invitee-tenant of the university. The student-plaintiff abducted and raped near her dormitory was entitled to invitee status, and the university thus had a duty to use reasonable care for her
safety because she was “an on-campus student resident who was attempting to gain access to her university dormitory at the time she was attacked. Under these circumstances, the relationship of this student to the university was sufficiently analogous to that of an invitee to justify imposing an equivalent duty of care upon the University.” Id. at 1370. Thus, if the location of the premises or prior criminal events make criminal danger foreseeable, the university (at least in Washington) has a duty to provide reasonable security.

Beyond in loco parentis, a special university-student relationship, a business invitee or landlord-tenant theory, and a holding of no duty owed whatsoever, courts may use a slightly broader brush in painting the liability landscape. In November of 1999, the Nebraska Supreme Court issued its opinion in the aforementioned case of Knoll v. Board of Regents of the University of Nebraska, 601 N.W.2d 757 (Neb. 1999). In Knoll, a student was abducted as part of a fraternity “pledge sneak,” handcuffed to a radiator, and forced to drink 15 shots of brandy and whiskey and from three to six cans of beer over a period of approximately two and one half hours. After being moved to a third floor bathroom and handcuffed to a toilet pipe, the student attempted to escape, while unattended, by sliding down a drainpipe—he fell and suffered permanent head injuries. Although the court’s opinion relied somewhat on the familiar theory of business proprietor liability, the court examined the relationship of the university and a student, as well as the surrounding circumstances, perhaps more broadly than previous adjudicators.

In determining whether a duty existed, the court employed a “risk-utility” test, considering the following: the magnitude of the risk; the relationship of the parties; the nature of the attendant risk; the opportunity and ability to exercise care; the foreseeability of the harm; and the policy interest in the proposed solution. Knoll at 761. The court
stated that the students were clearly invitees and that the university, similar to a business proprietor, is liable for the adverse actions of a third party against an invitee when those actions were reasonably foreseeable to the proprietor.  

The university’s proposition that it owed no duty because the student had superior knowledge of the danger was squarely rejected. The court held that the superior knowledge rule does not apply in a case involving liability for the intentionally harmful acts of a third party. Id. at 762. The Knoll court supported its declaration by explaining that even though “an invitee may very well know that the intentionally harmful acts of a third party are foreseeable on the landowner’s property,” this fact “does not obviate the invitee’s expectation that the landowner will exercise reasonable care in providing protection . . . Awareness of the danger in such cases is irrelevant; it is the landowner that has superior knowledge of, and the ability to provide, protection.” Id. The court stated that the totality of the circumstances, not solely the number or location of prior incidents, were considered in determining foreseeability, for purposes of finding a landowner owed a duty to invitees. Furthermore, the court opined that just one prior criminal act may be enough to impose liability on a landowner for a third party’s conduct on the grounds that further criminal acts were reasonably foreseeable. In addition, in analyzing foreseeability in the context of a landowner’s duty to invitees, the Knoll court held that a prior criminal history need not involve the same suspect to make further criminal acts reasonably foreseeable nor need it involve the same type of crime. The prior acts need not have occurred on campus. Id. at 764. Although no final disposition was had on the question of whether the university breached its duty to act reasonably under the circumstances, the

4 One shudders at the proposition that the use of handcuffs in the pledging process is reasonably
case, at a minimum, suggests that a wide range of factors, circumstances, and relationships will be considered in the duty analysis.

The **Knoll** case was remanded to the trial court, undoubtedly causing considerable gnashing of teeth by risk managers, attorneys, student affairs administrators, and insurance carriers. Yes, at trial the defendant will undoubtedly argue that young Knoll assumed the risk of harm and was contributorily negligent. A prediction – the case will be settled because of the risk of going to trial, thus encouraging student-plaintiffs everywhere to look to their institutions for recourse for all manners of harm.

**III. Insiders vs. Outsiders**

Anticipating a move toward greater liability for universities for the acts of third parties, university administrators should examine the potential differences that may exist between liability for the actions of university-associated persons versus the conduct of those unaffiliated with the university community.\(^5\) If one agrees that courts will increasingly analyze these claims in the context of foreseeability and the reasonable protection to be provided by the university, this distinction will be important because of the difference in the level and amount of control the university possesses over these two groups. Although student affairs practitioners will undoubtedly argue that it is virtually impossible to control students, they would probably and reluctantly agree with the premise that the university has more responsibility for moderating insider conduct than it does for the conduct of outsiders.

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\(^5\) We do not dispute the notion that the institution is liable for the conduct of its own employees, servants, agents, etc. during the conduct of their institutional responsibilities.
An examination of pertinent case law does not cast much direct light on this issue. Students have been attacked and assailed by a plethora of persons, including fellow students, alumni, non-students, and of course, several individuals never apprehended and therefore unknown. However, intuition as well as selected case law statements suggest that the university is in a better position to protect insiders against acts of third party insiders. The university is likely to be involved in the activities and conduct of its constituent members, or at least it purports to be—i.e. it enacts codes of conduct for students and, often, employees. This, in turn, makes it more likely that the university exercises, or has the right to exercise, some degree of control over the said activities and conduct. In *Furek*, the court dealt with third parties “who function under the auspices of the university.” *Furek* at 516. There the university argued that the students and university operated at arms-length, with the students responsible for exercising judgment for their own protection when dealing with other students or student groups. However, the court was not convinced that the modern college atmosphere, where the students are considered adults, did not necessitate some administrative control and protection of students. “Aside from the opinion in *Bradshaw* (citation omitted), no legal or other authority is cited for the assertion that supervision of potentially dangerous student activities would create an inhospitable environment or would be largely inconsistent with the objectives of college education,” the court stated. It continued, “[i]t seems equally reasonable to conclude that university supervision of potentially dangerous activities is not fundamentally at odds with

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At Northern Illinois University there have been recent claims that vicious physical harassment and hazing was perpetrated by fraternity alumni, during the summer, and at off-campus locations. Moreover, those involved were not even recognized by the national fraternity as members. The national fraternity organization has been cooperative in the investigations of these charges. Was this alumni intervention an aberration? We think so. Does it create the “foreseeability” of recurrence? We don’t know.
the nature of the parties’ relationship, particularly if such supervision advances the health and safety of at least some students.” Id. at 518.

Furek indicates that it is not inconsistent for universities to exercise some control over activities (especially potentially dangerous ones such as hazing) but, rather, that the students may expect it. In addition, the Furek court stated that when there is in fact direct university involvement in, and knowledge of, particular dangerous activities of its students, the university cannot abandon its residual duty of control. Although the “university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property.” (emphasis supplied) This duty was limited to the situations where the university exercised control, including instances arising out of ownership of land and activities involving student invitees present on the premises. Id. at 522.

Again, one must question whether a university should or realistically can exercise such control over a campus of thousands of undergraduates, much less passing motorists, pedestrians, and nefarious characters. Will the institution get the reputation of “smothering” its students and activities? How will this affect the campus climate, admissions, etc.? Have universities been placed in a “Catch-22?” We want to protect our students and staff from dangerous acts of others, but at the same time do not want to subject the academy to greater liability by exercising greater control.

Even Bickel and Lake have noted that “[o]ne unfortunate consequence of Furek is the perception that if you become involved you become liable, so, the logic goes, it is better to be uninvolved or push the students and their dangerous activities off campus.” See, Rights and Responsibilities. College officials may defer in an attempt to avoid any
assumption of duty associated with supervision of student activities. When a college voluntarily undertakes (or accepts by its actions) a duty to protect its students from criminal acts of third parties the college is required to perform that duty with care. *Mullins* at 336. Despite the temptation to stay uninvolved, they suggest that university officials will not and shall not choose this option. It would be "counterintuitive and unlikely given their professional training" for officials to take a hands-off approach. *Rights and Responsibilities* at 133. In other words, such a *laissez-faire* approach is inconsistent with the mind-set of campus law enforcement officers, student affairs employees, and others whose duties and careers are closely interwoven with the lives and conduct of students on campus. Stressing the unattractiveness of such a position, Bickel and Lake stated:

Most importantly, deliberate indifference increases the chances that student injury will occur and thus enhances the likelihood of a finding of negligence. The best way to defeat a lawsuit is to avoid the injury in the first place. Finally, the strategy is now legally doomed to backfire because courts are much less likely to see a college as a true passive bystander and will more often see students and colleges in special relationships . . . It is not the creation of regulations alone which engages a college; it is the creation of a guided, facilitated environment which suffuses student/university relationships with a responsibility of reasonable care to guide student growth and development. Indeed, student affairs professionals see their role as student development, and thus have an inherent problem with legal rules which encourage disconnection or passivity in student/administrator relationships. *Id.* at 133-134.

Foreseeability also affects the duty of the university. The university may be more likely to foresee dangerous acts by or against persons affiliated with the university than it would by or to people considered outsiders. It is essential that the university take notice of incidents involving bad acts by its own students and affiliated employees as well as those outside the university community who commit bad acts within its territory. It is not
clear from case analysis that whether the wrongdoer is an insider or outsider would create a significant difference. In Knoll, the court stated, “[i]n analyzing foreseeability in the duty context, we have noted that a prior criminal history need not involve the same suspect to make the further criminal acts reasonably foreseeable,” suggesting that a prior bad act by an insider may make foreseeable to the university a future bad act by an outsider and vice versa. Knoll at 764.

In the category of “no good deed goes unpunished,” in Mullins the director of student affairs testified that she warned students during orientation of the dangers inherent in living at a women’s college near a populous metropolitan area only a short distance from buses and trains leading to and from the city. Mullins at 337.\(^7\) The implication is that it is less significant that the bad actor may be an insider or an outsider (perhaps coming into the campus from the surrounding city) and more important that the act be foreseeable (in Mullins, the evidence indicates that it was actually foreseen). Incidentally, the jury in Mullins was entitled to discount the possibility that the assailant was lawfully on university premises and, therefore, the evidence supported the conclusion that the college breached its duty to provide security to its students. Id. at 339.

Unfortunately the logical (or illogical) conclusion of the arguments presented by Professors Bickel and Lake and the courts in Mullins, Knoll, Nero, and Furek, et al, is to impose what may be an impossible burden on even the most reasonable and careful institution – the burden of being everywhere, knowing everything, and qualifying and quantifying risk. How many acts, criminal or otherwise, need there be to make subsequent

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\(^7\) Pine Manor college is located in Wellesley, Massachusetts, an upper-class and safe environment. Contrast the foreseeability of an incident in such an idyllic setting with the likelihood of problems in institutions located in a high-crime inner city.
acts foreseeable? We know that under age college students drink. That’s a crime, isn’t it? Our colleagues in the student judicial field tell us that alcohol use is involved in a high proportion of campus fights and assaults. Are we thus liable for injuries suffered when a drunk student assaults another?

Recent incidents at institutions as diverse as MIT (death of fraternity pledge from alcohol poisoning), Western Illinois (similar death prompted by a club’s “initiation”), Ball State and the University of Illinois (shootings by spurned party-goers), the University of Michigan (fraternity pledge shot in penis with pellet gun), the University of Louisville (almost $1 million in damages assessed against a national fraternity for beating of pledges), and Texas A&M⁸ make it clear that much liability is predicated on the activities conducted or sanctioned by campus groups, not just individuals. These groups are “recognized” by the institution and most often must have an “official” advisor, usually a faculty member. They are subject to the institution’s rules and, often, disciplinary procedures. How much knowledge of violations of rules or safety will be imputed to the institution because of all its tentacles in and around this, what we hope would be termed, these “outside” groups. Sure, we know that hazing occurs but, dammit, its against our rules and we punish those who are caught. How must diligence does this require? Must we consider monitors for all the activities/events? (Can we find someone, anyone, willing to attend these Greek events, pledge activities, employee golf outings, field trips, etc.) Again, isn’t almost everything foreseeable in the college/university context?

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⁸ A recent letter to the Champaign-Urbana News Gazette claims that the horrific collapse of the Texas A&M University bonfire was not an accident. The author claims that “the loss of life may more accurately be analyzed as the inevitable and calculable social cost of a near-campuswide hazing event” where students were pressured to participate in the bonfire building. See, News Gazette, Letter to the Editor by L. Charles Cooper, December 3, 1999.
Institutions of higher education should not be at ease, standing on the belief that duty will be less likely to extend to acts of outsiders. In *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968 (Ind. 1999), a college student was sexually assaulted by an alumni member of a local chapter of a national fraternity during a party at the chapter. The court held that this act, conducted by an outsider alumni, was foreseeable and thus the chapter as landowner owed a duty of care to the student as an invitee. (Alumni are invited to return for social events – e.g. homecoming. Contrast this with their unexpected, by the institution, involvement with hazing.) It is important to note that two other similar assaults had occurred at similar parties in the recent years leading up to this assault. Nonetheless, it does not stretch reasonable thinking to see this situation play out again where the university is landowner or landlord, or the event is held on University property. Up to now, Universities have been able to argue that certain group activities, most notably fraternity/sorority functions, are separate and distinct from the institution and the academy has no responsibility for injuries or damages suffered during those activities. Given the courts’ recent reliance on foreseeability, is this argument doomed?

It is also critical to understand that not all acts of violence or dangerous activity have subjected universities to liability despite university control over related activities or the foreseeability of wrongdoing. Even though it appears that institutions may be losing the protection of a finding as a matter of law that there is “no duty,” it is inconceivable that a strict liability standard will be applied. Universities simply must exercise *reasonable care*. In *Gragg v. Wichita State University*, 934 P.2d 121 (Kan. 1997), a woman was shot and killed while celebrating the 4th of July on campus. There was no history of recent assaults nor any shooting on the campus. The criminal perpetrator was an outsider. In
response to the knowledge that about 20,000 people would be attending the fireworks
display, the University developed a security plan and assigned 80 officers to the event.
See Rights and Responsibilities at 147. Although judgment for the defendant university
was not entered as a matter of law (i.e. a determination that no duty, special or otherwise,
existed), after analyzing the facts the Gragg court found that the university had done what
was reasonable in protecting its students. There was no breach of duty.

A final thought regarding foreseeability. In recent years, campuses have been
subject to the “Campus Crime Reporting Act,” n/k/a “The Clery Act.” We are directed
not only to keep track of crime statistics on or about campus but, also, to provide
appropriate warnings or cautions to the campus community when dangerous events have
occurred. Therefore, we are directed to be knowledgeable about security issues on
campus. How, then, when faced by our campus versions of a Knoll or Nero, can we argue
that we were unaware of risk or that the risk was unforeseeable. Bickel and Lake are
suggesting this sort of accountability, which would create an impossible burden and
limitless liability on the institution. Thus, perhaps a balancing of the realities and public
policy should lead courts to follow the rationale of Rabel, Bradshaw, and Beach, etc. We
shall see.

Obligation to Conduct Background Checks

Whether the institution should conduct background checks to prevent potentially
dangerous people from becoming part of the campus community raises certain legal and
logistical problems. For example, at least in the employment context, state human rights
laws may make it a violation to discriminate on the basis of an arrest record. For example, the Illinois statute relating to the use of arrest records in employment decisions states:

Unless otherwise authorized by law, it is a civil rights violation for any employer, employment agency or labor organization to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded under Section 5 of the Criminal Identification Act as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment. 775 ILCS 5/2-103.

Note that the Illinois statute, typical of many, relates solely to arrests and there appears to be no problem with inquiring about convictions. In the employment context, employers must be careful as to how they handle potential employees once past unlawful acts are discovered.

Without regard to the realities of either state law or the impossibility of making inquiries about (literally) tens of thousands of applicants for admission, and because of the lack of case law in the higher education area, some have suggested that university administrators follow or be bound by the standards of care or duty expressed in decisions involving the private, business sector. “The message in the business cases is much clearer. First, do *reasonable, customary* research of individuals. In the university context, where admissions is often selective, it is often reasonable to believe that the vast majority of students are not serious known threats and that, if you ask, much of their criminal history will emerge.” *Rights and Responsibilities* at 141. Therefore, it seems reasonable that courts will not require the university to do more than it already does. *Id.* Once potential danger is discovered, the university must presumably exercise reasonable care to share this information among its various areas of operation. “Courts will assume generally that
information is shared and used and not forgotten or unused.” Id. Might the reasonableness of the institution’s inquiry be determined by what other area institutions are doing? Bickel and Lake forget that what may be perfectly reasonable and customary at one institution may be rather extraordinary at another and ignore the possibility that the practice at institution A may be argued as the standard which should have been followed at institution B.

Before analyzing the business model, there is one case involving higher education which bears mention -- *Eiseman v. State of New York*, 511 N.E.2d 1128 (N.Y. 1987). In *Eiseman*, a convicted felon, Campbell, was released from prison after serving the mandatory statutory prison sentence. He had been clinically diagnosed as paranoid schizophrenic, rehabilitation was thought unattainable, and his parole officer considered him a high risk. Campbell applied and was accepted to SEEK, a program where state universities accepted economically and socially disadvantaged persons who had the capacity to complete post-secondary education. Shortly thereafter, Campbell raped and murdered Eiseman, murdered her roommate, and inflicted serious injuries to a third roommate. A lawsuit was brought claiming the university breached its duty to ensure its students safety by failing to reject Campbell’s application because of the unreasonable risk of harm and foreseeable danger he presented. The New York Court of Appeals held that the university was not liable, finding that the university did not have a heightened duty in admissions or a duty to restrict the prisoner’s activity on campus for the protection of other students. *Eiseman* at 615. “The Court of Appeals indicated the state’s interest in reintegrating a former convict into society—allowing him to enroll and reside in the university community—could outweigh the state’s general interest in student safety. As a
matter of civil rights law, that ruling remains highly questionable.” *Rights and Responsibilities* at 145.

However, the decision in *Eiseman* is fact particular. The university had no knowledge whatsoever of the applicant’s potential dangerousness, while the student-victims were aware that Campbell was a convicted felon. A standard application form asking his physician whether the applicant experienced any stresses was answered “No.” *Eiseman* at 613. In addition, questions regarding the applicant’s need for, or past, treatment were left unanswered.⁹ Thus, Bickel and Lake suggest that “no college should read *Eiseman* as *carte blanche* regarding dangerous felons. We agree. The court’s holding does not mean that colleges cannot or should not work to rehabilitate society’s offenders: just that they should generally know who they are dealing with and use reasonable precautions for student safety.” *Rights and Responsibilities* at 145. But, having agreed with this premise, are admissions offices now required to comb through all applications to determine whether there is the possibility of a criminal or dangerous background? We do know that many (most?) large public institutions admit most students on the basis of a formula analysis of high school GPA, class rank, test scores, etc. Often, only the applications of borderline applicants are given careful consideration. We await an answer to the obvious question: Is it reasonable to assume that all applicants with high scores are pacific and not a threat to the campus community?

Moreover, it remains unclear exactly what universities should do to screen applicants for potential dangerous behavior. In a larger scheme, the question may be to

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⁹ The *Eiseman* case arose before the enactment of the Americans with Disabilities Act, but after the effective date of the Rehabilitation Act of 1973. It is important to note that questions of this nature are, at best, suspect and probably a violation of present law and practice.
whom is a greater duty owed—the applicant seeking admission, and possibly redemption and rehabilitation, or the university community into which this former, and potentially future, dangerous person is being accepted? Assuming a duty of care applies to the university’s admissions process (and we do not propose that it should), many difficult questions arise, including what legal framework should be used in analyzing the application process. See Jerome W. D. Stokes and Allen W. Groves, Rescinding Offers of Admissions When Prior Criminality is Revealed, West’s Education Law Reporter (Feb. 1996), for an examination of these and other questions surrounding the duty of a university regarding potentially dangerous applicants.

Some authority suggests an analogy to claims of negligent hiring, where “the issue of liability primarily focuses on the adequacy of the employer’s pre-employment investigation into the employee’s background.” Garcia v. Duffy, 492 So.2d 435 at 438. Would it make any difference that few, if any, large public universities have the inclination or resources to delve into the character of applicants? How can a duty exist if the classic legal comparable, the reasonable person (or, here, the reasonable institution), does not bother to make these inquiries. This is one of the intellectual problems with arguing that higher education should be bound by the business model.

In business, the employer may be found liable for the injuries caused to a third person for negligent hiring where: (1) the employer knew or, in the exercise of ordinary care, should have known of its employee’s propensity for violence or other unfitness at the time of hiring; (2) the employer nevertheless hired the employee; and (3) the negligently hired employee proximately caused the resulting injuries to the plaintiff. Id. at 438. One
commentator has suggested that negligent hiring standards should be applied in
determining university liability in the admissions process when he stated:

[These theories . . . appear to be at least as applicable to university students as they are to employees. When a university admits a student, it puts that student into intimate contact with other students. Some students see each other all day, every day, and share eating and living quarters as well. Further, university students live in a competitive, high-pressure environment that produces considerable stress, and it is not unreasonable to conclude that this stress might lead some individuals to commit acts of violence. If a student is prone to this kind of violent behavior, the university is therefore putting other students at risk. Thus, one can make the following argument: If a student commits a violent act against another student, and the university could have avoided the incident, the theory of ‘negligent admitting’ could apply to the university, making it responsible for any injury that results. The university could avoid liability by asking appropriate questions of student applicants and acting reasonably upon the answers—in some cases, excluding students who are prone to violent behavior. See Chicago Daily Law Bulletin, June 6, 1995, at 6, citing Butler v. Gamma Nu Chapter of Sigma Chi, 445 S.E.2d at 471.

We disagree, for the reasons stated above.

Assuming that a court would hold the institution to the business standard, it does
not appear that a full-blown investigation would always be necessary; rather, in most
cases, ‘a simple review of the application materials and follow-up interview, if available,
would be sufficient. As in the negligent hiring context, a balancing test would be
employed to determine if a given applicant appeared to require the extra burden of a more
thorough background check,” which would include the nature of crime, any risk posed to
other students via admission, and any steps that could be taken to reduce any such risk.

Rescinding Offers at 865-66. Additional inquiry may be required in at least two instances.
The first situation is where an application reveals “red flags” (including an unusual absence
of information, inconsistencies, etc.) that would alert a reasonable person that some risk of
harm may come from admitting a specific applicant. Id. at 866. The second situation is
where an applicant discloses prior criminal acts or violent activity, again causing a reasonable person to conclude that a risk of harm may exist. Id. In both situations, “an additional inquiry would be required, with the specific parameters of that inquiry established by the facts of the case and the information revealed thereunder.” Id. Case law states that even with special circumstances there is no legal requirement that the admissions officer make an inquiry with law enforcement agencies concerning an applicant’s potential criminal record. Garcia at 440. What questions may suffice to obtain the information desired by the university follows.

The University of North Carolina-Chapel Hill specifically asks applicants whether they have “ever been convicted of a crime other than a minor traffic altercation” and whether they have “any charges pending at this time.” Rescinding Offers at 865. If an applicant answers in the affirmative to either of these questions, the application is forwarded to a special committee for a further, personal hearing with the applicant and an examination of the specific offense indicated. Id. “Assuming that the institution is located in a state that permits inquiry into prior criminal convictions, the UNC approach offers the best opportunity for gathering relevant information through identification of essential background facts and further inquiry, as well as affording some measure of due process to the applicant.” Id. at 865-66. However, as stated above, assuming that applicants for admission are to receive the same state law or ADA protection as job applicants, the university must be careful as to not violate the applicant’s human or civil rights. The cautious administrator will check applicable state law before adding such language to the admissions application.
Some argue that perhaps no inquiry into prior acts should be made by the university admissions committee, believing the “only proper decision-makers as to redemption and the risk of recidivism are the judge and jury who hear the facts, determine guilt, and assess the penalty deemed appropriate, along with the parole committee or probation officer who determine when the individual is safe to return to society.” Id. at 868. Thus, the university should not second-guess that decision and, after the appropriate judicial and corrective measures have been taken, the prior crime becomes a non-issue in the admissions process. “As a result, the university is effectively immunized from any legal claims should recidivism occur after enrollment, since a clear public policy has been imposed upon the admissions process requiring an initial assumption of redemption.” Id. Some may disagree with this approach and view the “no-consideration, no-liability” standard as ducking responsibility and exposing others in the university community to unreasonable risk while, at the same time, leaving them without any compensation for their injuries from an insolvent perpetrator. Id. at 870.10 “If one is thus unwilling to shift to the courts or legislature the sole responsibility for weighing redemption versus recidivism in the college admissions process, then retaining such discretion by the university should bring with it a certain legal duty and its concomitant risk of liability.” Id. Whatever standard is applied in framing this duty should weigh the particular crime (including its nature, level of violence, and mitigating circumstances), punishment, redemption, and risk of recidivism given the particulars of a given case. Also, any evidence of rehabilitation or

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10 In making this argument, Stokes and Groves appear to be arguing that for every unfortunate event someone must PAY, an interesting theory of liability and social responsibility. Already, we are beset by claimants seeking access to the “deep pockets” of the institution. Maybe we should post a notice at the campus gate: “All who would do harm or cause injury must provide proof of insurance or financial accountability”. (!)
genuine remorse should be considered as a factor playing into the admissions committee's decision in accepting or rejecting an applicant.

Conclusion

The area of institutional responsibility for bad acts committed by third parties (i.e. other students, strangers, or faculty and staff not acting within their scopes of authority) is in flux. Administrators and attorneys in states which adopt a Bradshaw/Rabel/Beach approach may breathe a bit easy, but only until the next claim. Judges read the newspapers. They know of the problems occurring on our campuses and the frustration in dealing with them. It is possible that courts, perhaps relying on Knoll and Nero, etc., will rush to destroy the ivory tower protection of "no duty." One would hope, however, that the institutional realities will enable the courts to find that it is impossible to protect people from each and every contingency. Prior to recent case decisions, that was done by findings, as a matter of law, of "no duty." If the courts continue to abrogate that theory, universities (and their insurance carriers) must argue that given the customs and realities of higher education, a reasonable response to campus crime, hazing, alcohol abuse, etc., may be far different than that required from the business sector. We are dealing with a distinct and unique population, student demands of freedom, and the inappropriateness of returning to in loco parentis. In other words, if the duty is imposed, recognize the realities of the campus in determining whether the duty was breached.