# LIABILITIES OF COLLEGES AND UNIVERSITIES FOR ASSAULTS ON STUDENTS: AN UPDATE

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## I. INTRODUCTION

College and university liability for crimes against students, on or off campus, underwent a dramatic shift in the last thirty years. *In loco parentis,* a once well-entrenched doctrine, held the institution liable for failure to protect the student in its role as *parent.* Colleges exercised substantial control over student conduct. In return, students acquired certain rights of protection from the college. The *in loco parentis* doctrine was helpful because it determined, as a matter of law, that a special relationship existed between the college and its students. This special relationship in turn imposed a legal standard of care. The groundswell of demand for recognition of students' rights that occurred in the late sixties clearly demonstrated student disenchantment with the *in loco parentis* arrangement. Students demanded greater freedom in their college life. As a result, colleges are no longer able to regulate student activities with the strictures that once prevailed.[1]

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[1] Bradshaw v. Rawlings, 612 F.2d 135,138-140 (3d Cir. 1979).

> 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. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life.[2]

Colleges and universities today are clearly not *in loco parentis*.[3] Nevertheless, the college does have a duty to protect students from criminal actions. This duty, however, arises only when the criminal action is reasonably foreseeable. Judicial determination of reasonable foreseeability varies widely among the jurisdictions reporting incidents against students. This article discusses current theories of liability emerging from the courts, and their implications for college and university administrators.

## II. THEORIES OF LIABILITY

In order for an assaulted student to successfully maintain a negligence lawsuit against a college or university, four elements must first be proven: (1) that the college or university did, in law, have a duty, (2) that it breached that duty, (3) that the breach caused the injuries, and (4) that the plaintiff suffered physical or property damage. From the plaintiff's point of view, establishing the first element of negligence, that the institution has a legal duty, is perhaps the most challenging legal obstacle. "The university-student relationship does not, by itself, impute a duty upon universities to protect students from the actions of third parties."[4] A negligence claim will thus fail if based on circumstances for which the law imports no duty of care on the college.[5]

If the institution has no notice, actual or constructive, that a danger to its students exists, its duty is generally to provide reasonable

[2] *Id.* at 138-139.

[3] *See* Campbell v. Board of Trustees of Wabash College, 495 N.E.2d 227 (Ind. Ct. App. 1986).

[4] Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993).

[5] *Bradshaw,* 612 F.2d at 138.



security measures. However, once the institution is on notice, then its duty to protect increases accordingly. Thus, often the ultimate factor courts must weigh is whether or not the institution was on notice, and whether or not that information was explicitly given to the university, or should have been gleaned from less conventional or circumstantial sources, such as community standards or prior events.

### A. LACK OF NOTICE LEADS TO NO LIABILITY

The liability of colleges and universities for criminal assaults by a third party upon students depends, in large part, upon the foreseeability of the assault. Foreseeability is therefore essential to determining whether an institution owes a duty of reasonable care. The courts are generally consistent in their holdings that random, unpredictable and unforeseeable events do not impose liability on the college or university. By their very nature, these events do not establish a legal duty. For example, in *Hall v. Southern University,*[6] plaintiff, a student at Southern University was shot by a non-student in the lobby of her dormitory. "Plaintiff's assailant, who was unknown to her, had been sitting quietly in the lobby for some twenty to thirty minutes, when suddenly, without warning or provocation, he pulled a revolver and shot plaintiff as she awaited an elevator."[7] The court held that isolated criminal activities were not sufficient to require Southern to warn all incoming dormitory residents of probable danger from criminal assault.[8] "Even the most sophisticated security forces are powerless to prevent a spontaneous, sudden and unprovoked act of violence. There is no evidence in the record [that] Southern was aware of this assailant's dangerous propensities."[9] Similarly, in *Brown v. North Carolina Wesleyan College,*[10] the deceased was abducted from the defendant's campus along with two other cheerleaders, and was forced by her assailant to drive to a rock quarry where she was raped and murdered. In finding the college not liable, the court concluded that "the evidence does not show a repeated course of criminal activity which would have imposed a duty upon defendant to keep its campus safe."[11] Furthermore, even if

[6] 406 So. 2d 1125 (La. Ct. App. 1981).

[7] *Id.* at 1126.

[8] *Id.*

[9] *Id.*

[10] 309 S.E.2d 701 (N.C. Ct. App. 1983).

[11] *Id.* at 703.

there had been enough evidence to impose a duty, the court concluded that no breach took place because of the presence of a security staff.

In *Klobuchar v. Purdue University,*[12] plaintiff alleged that Purdue University failed to provide adequate security because her estranged husband entered her car with an auto theft device, forced her at gunpoint to drive off campus, shot her five times and then committed suicide. In finding no liability on Purdue's part, the court noted "We agree with the University that the duty owed to plaintiff was the same general duty afforded the public ... Norma admits that neither she, nor anyone else, told the university that her husband might be a threat to her ... She knew nothing that would have alerted the University to anticipate his violent attack on her."[13] Furthermore, there were no facts presented that the University had knowledge of previous attacks on students.[14] Nor was there a special connection between the University and plaintiff's husband that could cause the University to be responsible for his conduct.[15]

Similarly, in *Hartman v. Bethany College,*[16] Heather Hartman was assaulted by two men off the Bethany College Campus. She was off- campus when she met the men, and did not return to the campus before she was assaulted. Neither assailant was a Bethany student nor had an official relationship with Bethany. In finding Bethany without liability, the court noted "it would not be consistent with the case law in this area to impose a duty upon colleges to supervise their students when they leave the college campus for non-curricular activities."[17] The plaintiff was drinking at an off-campus inn which the college did not own and had no duty to regulate or supervise. The court also concluded that Bethany did not have a duty to warn the plaintiff, who was underage, about drinking or about the laws of West Virginia regarding underage drinking. The court noted that "students do not expect the college to lead them through their college years protected from the outside world and would resent such protection if imposed upon them."[18]

The above-mentioned cases illustrate that a college or university will not be held liable when events are unpredictable or unforeseeable. A duty cannot legally arise when an institution is not on notice.

[12] 533 N.E.2d 169 (Ind. Ct. App. 1990).

[13] *Id.* at 171.

[14] *Id.* at 172.

[15] *Id.* at 173.

[16] 778 F. Supp. 286 (N.D.W.Va. 1991).

[17] *Id.* at 291.

[18] *Id.* at 292.



### B. Notice Leads to Liability

Notice is usually described as actual or constructive. With actual notice, the college or university is either notified expressly and directly of an impending danger or threat to a student by a third party, or the institution has actual knowledge of such danger. With constructive notice, information or knowledge concerning a potential danger to a student is imputed by law to the college or university. Imputation occurs because the college could have discovered the danger by proper diligence. Constructive notice requires the college to act as a prudent person in inquiring about the matter. Awareness or foreseeability of the potential danger imposes a specific duty on the college to exercise reasonable care to protect the student. In *Dillon* v. *Legg,*[19] the court noted that reasonable foreseeability does not turn on whether the particular defendant as an individual would have actually foreseen the exact accident and loss. Rather it turns on whether the courts, in analyzing the particular facts of a case, decide what the ordinary man would reasonably have foreseen. Furthermore, a foreseeable harm does not automatically give rise to a duty to prevent such harm. "Rather the question is whether the risk of harm is sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence, a threshold issue of law which requires the court to consider such additional factors as the burdensomeness of the duty on defendant, the closeness of the relationship between defendant's conduct and plaintiff's injury, the moral blame attached to defendant's conduct and plaintiff's injury, and the prevention of future harm."[20]

#### 1. Actual Notice

Cases of actual notice are rare. One tragic example of actual notice took place in *Jesik v. Maricova County Community College.*[21] In this case, the decedent was registering for the fall semester at Phoenix College. Another student, Charles Doss, had words with the decedent and told the decedent that he was going home to get a gun and coming back to the college campus to kill him. The decedent reported this threat to a security guard employed by Phoenix College, and received assurances of help and protection. Approximately one hour later Doss returned to campus carrying a briefcase. The decedent

[19] 68 Cal.2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968).

[20] Bartell v. Palos Verdes Peninsula School District, 83 Cal. App.3d 492, 499, 147 Cal. Rptr. 898, 901(1978).

[21] 611 P.2d 547 (Ariz. 1980).

immediately contacted the security guard and pointed out Doss. Again the security guard assured the decedent of help and protection, and the decedent remained in the gymnasium in reliance on those assurances. The security guard approached Doss and questioned him. After the guard turned his back, Doss pulled a gun from his briefcase, shot and killed the decedent. The court held that the actual notice given the college imposed a specific duty to exercise reasonable care to protect the decedent. While ordinarily a third party's intentional tort or criminal act is not part of a recognizable risk, "liability will be imposed if the school realized or should have realized that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."[22] Thus, the decedent's report to the security guard of the possibility of danger raised the institution's duty of care.

### 2. Constructive Notice

Examples of constructive notice, while more common than those of actual notice, still present the complex issue of foreseeability. The relevant question is: how much information is enough to constitute notice? Clearly, whether the risk of harm is reasonably foreseeable is a question to be determined by the facts of the situation. In general, a college is liable for an assault upon a student by a third party when the college has reason to anticipate such an assault and fails to exercise reasonable care to prevent it. The duty to protect students from injury does not arise until the impending danger becomes apparent or the circumstances are such that a prudent man would be put on notice of the potential danger.

In *Eiseman v. State of New York,*[23] a convicted felon enrolled at SUNY-Buffalo in a program for the economically and educationally disadvantaged. He raped and murdered one student, and stabbed another. The court held the state liable for failure to inform the college of the felon's history of mental illness and drug abuse. The perpetrator's criminal history included being arrested twenty-five times and having a heroin addiction of up to twenty-five bags a day. His psychiatric history, just months before his college enrollment, included an acute psychotic episode.[24] Notably in his application to college, the prison doctor failed to show the perpetrator's psychiatric or drug histories. "If the College officials had been appraised of Campbell's

[22] *Id.* at 550 (quoting Chavez v. Tolleson Elementary School District, 122 Ariz. 472, 477-478, 595 P.2d 1017,1022-23 (Ariz. Ct. App. 1979)).

[23] 489 N.Y.S.2d 957 (N.Y. App. Div. 1985).

[24] *Id.* at 961.



long history of violence, explosive antisocial conduct and heroin abuse, they very likely would have rejected his application on the ground that his participation would impose an undue risk of harm to the College Community."[25] The court found the state liable to students Campbell injured, but not liable to non-students. The court also held the college negligent in admitting Campbell without any attempt to find out the nature of the risk he might present.[26] Further, the court held the institution to a higher standard of care specifically because it ran an experimental program for felons: "...once [the] college embarked upon such program,...it concomitantly assumed further duties to establish rational criteria for screening such applicants, to make such inquiry as would enable it to evaluate risks such persons posed for rest of college community and to take measures to minimize those risks, to conduct program in nonnegli- gent manner and to employ that degree of care and foresight commensurate with reasonable probability of harm."[27] Here, Campbell's record alone would place the institution on constructive notice to protect its students.

In some situations, the institution may be placed in a particularly difficult situation when it is on notice of a student's violent propensities. Precisely what action should the institution take if a student is charged, but not convicted, of a violent crime? Removing the student from campus assumes guilt before trial. On the other hand, failure to remove the student places the university in a heightened position of liability. Such was the case in *Nero v. Kansas State University*,[28] Plaintiff was sexually assaulted in a coed residence hall by a fellow residence hall student, Ramon Davenport. Just thirty-five days before the plaintiff's assault, Davenport was accused of raping another student, a charge to which he subsequently pleaded guilty. Because of the charges, the university moved Davenport to another dormitory. However, when the semester ended, and summer school began, he was placed in the only available coed dormitory. There he sexually assaulted the plaintiff, who had no knowledge of the charges pending against him.

Turning to its analysis under the Restatement (Second) of Torts,[29] the court in *Nero* held that "the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties. The *in loco*

*25.Id.* at 962.

*26.Id.* at 963.

[27] *Id.* at 957.

[28] 861 P.2d 768 (Kan. 1993).

[29] Restatement (Second) Of Torts § 344 (1964).

*parentis* doctrine is outmoded and inconsistent with the reality of contemporary collegiate life."[30] Instead, the court likened the relationship to that of a landlord and tenant. "The university has a duty to use reasonable care to protect its tenants. Generally, whether a landlord had breached the reasonable care to a tenant is a question of fact, . . . and the trial court erred in granting summary judgment."[31] Thus, the university's liability for placing the accused in a dormitory with other students is a question of reasonableness. This conclusion does not answer the troubling question, however, of the institution's liability for refusing to house a student with allegedly dangerous propensities. On the one hand, every defendant is entitled to the presumption of innocence until charges are adjudicated. On the other hand, exposing students to a potentially violent individual involves risk. Either decision carries with it some degree of liability. "University administrators are now confronted with a Hobson's choice when dealing with students criminally charged who enter pleas of not guilty."[32]

## III. INSTITUTIONAL POLICIES

A university-imposed policy may also lead to liability, if that policy is the proximate cause of injuries to students. In *Miller v. State of New York,*[33] a student encountered a trespasser in the laundry room of her dormitory. The assailant blindfolded the woman and took her through "an unlocked outer door from the basement, back in another unlocked entrance to the dormitory, up some stairs to the third floor and into a dormitory room, where she was raped twice at knife point and threatened with mutilation or death if she made any noise."[34] The New York State Court of Appeals equated the liability of the State University with that of a landlord. The appellate court found negligence because of the state's policy of having all dormitory entrances always unlocked. This policy existed despite an open campus and reported criminal incidents. The court noted that as a landlord, the state had a duty to maintain minimal security measures in the face of foreseeable criminal intrusion upon tenants. "Thus, defendant here had a duty to take the rather minimal security measure of keeping the dormitory doors locked when it had notice of the

[30] *Nero,* 861 P.2d at 778.
[31] *Id.* at 779.
[32] *Id.* at 785.
[33] 62 N.Y.2d 506,478 N.Y.S.2d 829,467 N.E.2d 493 (1984).
[34] *Id.* at 830.



likelihood of criminal intrusions."[35] The court rejected the state's claim of governmental liability. "When the liability of a governmental entity is at issue, it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency is engaged generally in proprietary activity or is in control of the location in which the injury occurred."[36]

In contrast, the court in *Savannah College of Art and Design v. Roe*[37] held that a college is not obligated to provide protection under a landlord-tenant theory. Here, students sued the College for failure to provide adequate security after a sexual assault in their dormitory. Holding that the college did not breach its contractual relationship, the court stated, "inasmuch as the housing policy agreement does not express plainly and explicitly the college's willingness to undertake to protect the student dormitory residents from the criminal acts of third parties, and we are not willing to imply such an undertaking from the language of the housing policy agreement, the college was not contractually obligated to provide such protection."[38] Under a negligence theory, the college did not breach its duty of care because the college did not have knowledge of any criminal sexual assaults previously occurring at the college.[39] Note, however, that the college was aware of an urban environment, two instances of peeping toms, the removal of a vagrant and an intoxicated person, a student surprising a burglar, and several petty thefts.

Even when the institution does have a duty to protect its students or employees from third parties, providing adequate security on campus may preclude liability for negligence. In *Vangeli v. Schneider and Cornell University*,[40] the plaintiff worked for Cornell University in maintenance. In that capacity, he was provided a dorm room in which he was subsequently attacked. To gain access to the dormitory, the defendant first scaled a steel grating covering the fire escape and climbed over a grating into an exterior stairwell. Then finding an unlocked fire door, the defendant broke down the plaintiffs door and assaulted him.[41] The plaintiff established Cornell's duty to provide minimal security measures by showing a five year history of reported

35. Id.. at 833.
[36] *Id.* at 833 (quoting Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 182, 448 N.Y.S.2d 141,433 N.E.2d 124 (1982)).
[37] 409 S.E.2d. 848 (Ga. 1991).
[38] *Id.* at 849.
[39] *Id.* at 850.
40. 598 N.Y.S.2d. 837 (N.Y. App. Div. 1993).
[41] *Id.* at 838.

crimes. Nevertheless, no breach was found. "Cornell was only required to provide reasonable security measures and we are of the view that by placing two locked doors between plaintiff and Schneider ... Cornell met and discharged its duty."[42]

## IV. Sovereign Immunity as a Defense

State-owned institutions may argue the defense of sovereign immunity when sued for assaults on students. Under the doctrine of sovereign immunity, governments are free from liability for torts committed except in cases in which the governmental entity has consented by statute to be sued. For example, in *Leadbetter v. Rose and the University of North Dakota*a student alleged that the chair of the physiology department sexually assaulted her while they were attending a meeting. Holding that the University of North Dakota was an arm of the state, the court invoked the doctrine of sovereign immunity and barred the action.

In many jurisdictions, the doctrine of sovereign immunity has declined over the years with most states now having abolished or restricted it. Some courts, likewise, are moving away from the doctrine of governmental immunity. In *Ziss v. Cuyahoga Community College,*[44] the court held that "an institution of higher education should no longer be able to avail itself of this defense." The plaintiff could thus sue for injuries sustained when robbed and beaten by an armed assailant on the grounds of Cuyahoga Community College.

In *Delaney v. the University of Houston,*[45] an intruder raped the plaintiff in her dorm room at the University of Houston. The evidence showed that the university had recruited plaintiff and personally assured her of a safe place of residence. Subsequently, the university became aware that dormitory doors were left propped open, thus receiving notice that the potential for intruders was present. The university argued that its actions, "like the State's, are always governmental and never proprietary, and that it is immune from liability for all breaches of contract, breaches of warranties and DTPA (Texas Deceptive Trade Practices) violations."[46] In rejecting that argument and finding the University liable, the Supreme Court of Texas found that a governmental entity is not immune from claims

[42] *Id.* at 839.
[43] 467 N.W.2d 431 (N.D. 1991).
[44] 468 N.E.2d 752 (Ohio Ct. App. 1983).
[45] 835 S.W.2d 56 (Tex. 1992).
[46] *Id.* at 58.



for intentional torts that arise out of negligence. Thus, sovereign immunity may no longer be a viable defense in some jurisdictions.

## V. Implications for College and University Administrators

The authoritarian role of colleges and universities over their students has changed dramatically in the last thirty years. "Students have demanded rights which have given them a new status and abrogated the role of in loco parentis of college administrators."[47] The modern American college is no longer an "insurer of the safety of its students."[48] Nonetheless, from an ethical and legal point of view, institutions still have a duty to provide a reasonably safe environment for students. The following list summarizes the key legal concepts raised in this article that are pertinent for administrators.

« No Liability for Random Acts of Violence

> As a general rule, unforeseeable assaults on students result in a finding that the college or university has no duty under the theory of negligence, and therefore no liability.

*t* Actual Notice Raises Specific Duty

> When a college or university become expressly aware of a potential danger to a student, a specific duty is imposed upon the institution to exercise reasonable care to protect the student.

« Constructive Notice Raises Liability

> A college or university is considered to have constructive notice of a potential danger to a student if the institution could have reasonably foreseen such danger. Constructive notice is determined by the courts on a case-by-case basis resting on the facts of the situation. Foreseeable harm does not automatically give rise to a duty to prevent such harm. The gravity of the potential harm must be balanced against the amount of activity needed to protect against such harm.

[47] Baldwin v. Zoradi, 123 Cal. App.3d 275, 287, 176 Cal. Rptr. 809, 816 (1981).
[48] *Bradshaw,* 612 F.2d at 138.

« Duty of Reasonable Care

Liability occurs when the college or university is on notice that students may be harmed. Under these circumstances, the likelihood of injury is foreseeable and the institution has a duty of reasonable care. Among other things, reasonable care can include protecting the general student population by hiring security guards, heeding explicit warnings from students, locking doors on residence halls, and increasing security when prior incidents occur. At a minimum, the college or university should view itself as a landlord, with a duty to maintain minimum security on its campuses.

« Erosion of Doctrine of Sovereign Immunity

State owned and operated institutions may no longer have the option of relying on the defense of sovereign immunity as protection from liability. The doctrine of sovereign immunity has eroded in many states and must be viewed on a state-by- state basis to determine its viability.

Unfortunately, violent crime is becoming pervasive throughout society. Colleges and universities, historically perceived as safe- havens, are not immune to these broader societal trends as assaults on students become an ever increasing reality on campuses across the United States. Indeed, it was larger social forces that led to the decline of the traditional theory of institutional liability, the doctrine of *in loco parentis*. In place of *in loco parentis,* the courts have fashioned a duty to protect students based on a reasonably foreseeable approach.