The Concept of Foreseeability as it Relates to Personal Injury Litigation in College and University Residence Halls

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THE CONCEPT OF FORESEEABILITY AS IT RELATES TO
PERSONAL INJURY LITIGATION IN COLLEGE AND
UNIVERSITY RESIDENCE HALLS

by

F. Bruce Johnston, Jr.

A Dissertation
Submitted to the
Faculty of The Graduate College
in partial fulfillment of the
requirements for the
Degree of Doctor of Education
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Psychology

Western Michigan University
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The concept of foreseeability as it relates to personal injury litigation in college and university residence halls

Johnston, F. Bruce, Jr., Ed.D.

Western Michigan University, 1989
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On an intellectual level Dr. Beverly Belson has challenged me to complete this study. The depth and breadth of her knowledge have been invaluable. Her keen insight and masterful ability to draw out my best work have been clearly evident. Gentle steering with a firmness which induces confidence have made Dr. Belson’s contributions signal in their significance. Her leadership and direction have been an inspiration. The emotional support and encouragement of my family have made this work possible. Sue’s love and encouragement made this study a reality as she unselfishly accepted the burden of my absence at home. I could not have done this without her. Dr. Shirley Van Hoeven, Dr. Uldis Smidchens, and Mr. Keith Pretty have offered helpful suggestions and been well prepared for our meetings. I owe a vote of thanks to each of them. Hope College provided the practical incentive in the form of a sabbatical leave without which this study might never have been completed. I am deeply grateful for this support.

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CHAPTER I

STATEMENT OF THE PROBLEM AND BACKGROUND

Statement of the Problem

The purpose of this study is to determine what implications exist for higher education as a result of personal injury litigation following assaults in college and university residence halls when foreseeability is a significant element in the case. Analysis of the role of foreseeability, the primary test used by the courts to establish or discredit negligence allegations of this kind, in three important assault cases will reveal those implications which exist for higher education.

Limitations of the Study

Several limitations to this study are important for inclusion. The study is limited to cases in which the concept of foreseeability was a significant factor.

Secondly, the study is limited to the examination of cases involving personal injuries from assaults which occur in college and university residence halls. Numerous other personal injuries may occur in residence halls and elsewhere on college and university campuses, but this study considers only personal injuries which are a result of assaults in residence halls.

The study is limited to three cases. Duarte v. State of California (1978), Mullins v. Pine Manor College (1983), and Miller v. State of New York (1984) are the cases which are reviewed and analyzed in this study. This limits the scope of the study to the years 1978 to 1985 and to these three cases.
Background

Postsecondary institutions in the United States enjoyed a very secure autonomy from judicial scrutiny prior to the changes generated by the campus protests of the 1960s. Institutions of higher learning were operated within a collegial tradition which offered broad latitude to the faculty and administrators in their capacity as decision-makers in the academic and extracurricular lives of the students. This tradition was founded in an earlier time when college officials served as surrogate parents in addition to their roles as educators (Brooks, 1984). Decisions were rarely challenged through litigation unless college or university personnel were accused of being arbitrary or capricious. Institutional authorities were consistently supported by the courts when legal disputes arose prior to the 1970s (Rabban, 1973).

The Twenty-sixth Amendment to the Constitution of the United States was passed in July of 1971. Offering persons eighteen years old the opportunity to vote, this amendment signalled a movement toward a lowering of the age of majority from twenty-one years to eighteen. Shortly thereafter the "relative walls of legislative and judicial non-involvement, if they ever did exist, have come tumbling down" for higher education (Habecker, 1975, p. 370). Gone forever were the days when a student's stay at college was almost at the pleasure of the institution and the individuals who administered the school. The courts had long viewed higher education as a "privilege" (Brooks, 1984; Rabban, 1973). The relationship between the student and the college or university was dramatically "redefined" by court decisions during the 1970s (Peterson, 1981). The courts began to examine institutional responsibilities while tending to confirm the rights for which students had protested so vigorously in the 1960s (Likins, 1979).
The protests of the 1960s moved to the courtroom in the 1970s (Young, 1976a). Hammond and Shaffer (1978) found "only thirty-two landmark cases prior to 1965. There were forty-one (cases) in the five years from 1965–1969. However, in the five years 1972 through 1976 there were 102 with over half of these, 53, in 1975 or 1976 alone" (p. III). This "unprecedented wave of legalism" (Parr & Buchanan, 1979, p. 12) was referred to by Aiken, Adams, and Hall (1976) as an "avalanche" (p. 7) and a "cascade" (p. 13).

Higher education's response to the dramatic change in the legal atmosphere was fraught with difficulties. Traditional institutional decision-making mechanisms were well established and changes in policies and procedures were slow to be made (Barr & Associates, 1988). Identifying the locus of control of institutions and centers of authority within the institutions created additional problems. Levels of enforcement and varying degrees of application created further dilemmas of which traditions would remain and which would change in a slow, evolutionary manner. Gehring (1982), in describing the current status of interaction, says, the threat of legal action is "a conscious preoccupation" of presidents and deans (p. 30). Such an adversarial atmosphere stood in stark contrast to the collegial tradition which postsecondary institutions enjoyed before the litigation "explosion" (Goulder, 1980, p. 328).

Brubacher (1973) described the legal atmosphere as an "identity crisis" (p. 267) for postsecondary education with the courts establishing the identity through litigation. "Almost every aspect of college and university administration has been subject to judicial scrutiny" (Gehring, 1983, p. vii) within the last twenty years. Higher education has mirrored, to some degree, the litigious nature developing in society during the same period (Barr, 1988a; Likins, 1979; Miller & Schuh, 1981; Thigpen & Slagle, 1977).
Epstein (1974) observed "that the academy has become litigious is by now a circumstance too pronounced to be disputed" (p. 635). "Constitutional and administrative law, federal legislation, and state statutes and post-secondary statewide governing and coordinating board policies have all helped define certain legal limitations for the exercise of administrative discretion within higher education" (Beeler, 1976, p. 140). The change in the legal age of majority in 1971, which increased student influence in institutional decision-making by offering adult status to most college students, was the impetus in prompting the changes in state statutes and the policy decisions of governing and coordinating boards which defined these limitations.

Student/Institutional Relationship Theories

One of the most dramatic effects of the increase in litigation experienced by colleges and universities is the impact upon the relationship between the institution and the students. This relationship was a very stable one prior to the protests which marked the 1960s. Rapid changes have occurred during the last twenty years as institutions of higher education, with oversight from the courts through judicial decisions, have attempted to develop an acceptable understanding to define the relationship which they share with the students who choose to enroll. The next four sections of this chapter will examine four theories of the student/institutional relationship which have characterized the interaction between institutions and their students. These theories are of particular importance as they are instrumental in defining the context in which the legalistic atmosphere in higher education has developed.
In Loco Parentis

As stated above, the in loco parentis relationship was much akin to a parent/child orientation from the early development of the American collegiate system. Prior to 1900 many college students were fourteen and fifteen years old and needed the supervision provided by the system labelled in loco parentis in the 1913 decision in the case of Gott v. Berea College (Brooks, 1984). The relationship which in loco parentis fostered imposed a duty on the college to exercise control over the behavior of students (“The Student-college,” 1980). There was also a responsibility, or a generally accepted expectation, that the institution and its officials would instill traditional moral values into the lives of students (Garland, 1985; Whiteley & Associates, 1982). This philosophy offered a shield of sorts to the immature behavior some college students espoused. A sense of irresponsibility was accepted by society as a part of growing up during the college years. Packwood (1977) found that the double standard created by in loco parentis allowed some students to become involved in behavioral experimentation with the protection of knowing that as members of the college community less was expected of them, by virtue of their status as college students, than would otherwise be true in environments in society outside the educational domain.

When student’s behavior went beyond what was acceptable for the institution, firm discipline was exercised by the college or university. Even when the student’s behavior had no particular relation to the stated purpose of the institution, the courts were reluctant to intervene on the student’s behalf (Dannells, 1977). The courts assumed that administrators were acting fairly and operating in good faith as professional educators. Judgments made by college or university officials and the procedures which they followed in arriving at those decisions
were left relatively unquestioned by the courts (Bakken, 1968).

The presence of the *in loco parentis* philosophy was a positive element of the educational experiences of some students. They appreciated the structured framework of institutional guidelines which dictated much of their behavior and justified their refusal to become involved in some movements which made them feel uneasy. Protective parents felt relief that the strict rules and watchful administration would offer their son or daughter shelter from the behavior of others (Schneider, 1977).

The basic characteristics of educational institutions in America changed, particularly during the late 1960s and early 1970s, and *in loco parentis* was neither an acceptable nor an appropriate description of the relationship between students and the colleges and universities they chose to attend (Yegge, 1971). The lowered age of majority and emphasis upon student rights were the strongest contributing factors to the decline of the concept of *in loco parentis*.

“Legal authority instead of educational effectiveness” (Dannells, 1977, p. 241) was a difficult concept for institutional officials to accept after years of almost unquestioned autonomy. Rules could not merely exist for the convenience of the institution but must have purposes which were soundly educational in nature (Hammond & Shaffer, 1978). The relationship between the student and the institution was an educational one rather than of familial orientation. The focus changed from behavior control to the development of a sense of community on the campus (Blimling & Miltenberger, 1984).

Despite the generally accepted view that *in loco parentis* is no longer an appropriate model, Gregory and Ballou (1986) make a compelling case for the notion that some of the aspects of this philosophy are still very appropriate and necessary for a strong student-oriented emphasis to thrive. Expanded legal
responsibility and the desirability of providing numerous services for students combine to advocate a modified form of *in loco parentis*. Szablewicz and Gibbs (1987) contend that a "new *de facto in loco parentis* is developing" (p. 457) as students and parents expect that the college or university which the student attends will provide protection for the student. *Mullins v. Pine Manor College* (1983) is cited as an example of this new *in loco parentis* as "the court recognized the student's right to rely on the college's duty, or voluntary undertaking, to provide protection for her safety" (p. 459).

**Constitutional Theory**

*Dixon v. Alabama State Board of Education* (1961) is generally recognized as the decision which brought an end to the legal viability of the *in loco parentis* doctrine and clarified the relationship between the public institution and the student as being a constitutional one in the eyes of the law (Young, 1984). The Dixon case stated simply that students could not be summarily dismissed from a public institution without the basic procedural safeguards which are available to any citizen. Although the legal age of majority was not lowered to eighteen years until a decade later, the Dixon pronouncement began the transition to the view that students were, in fact, citizens (Thigpen, 1979) and "set a distinctly new course" (Bevilacqua, 1976, p. 489) in the relationship between students and higher educational institutions. The focus of Dixon was upon procedural due process rights in college disciplinary hearings, but the impact of the decision made it clear that constitutional rights of college students were protected (Young, 1976a).

*In loco parentis* had placed students almost entirely under the discretionary oversight of institutional officials. The constitutional theory presented students with an active voice in their destiny as students with the same basic rights which
they enjoyed as citizens (Ardaiolo, 1983). Possessing new rights within a legal relationship creates expectations which have been realized as students enter contracts with the same rights and responsibilities of legal adults, practice consumerism, and come to rely upon the institution to provide protection for them (Szablewicz & Gibbs, 1987). The court defined parameters included residence environments managed by the institution, institutionally sponsored or sanctioned events held elsewhere on the campus, and events which the institution sponsored or sanctioned which were held away from the campus.

Contract Theory

Contract theory took the place of in loco parentis as the primary description of the relationship between postsecondary educational institutions and their students (Buckner, 1988). Dodd (1985) refers to the contractual nature of the relationship as a “basic tenet” of educational law (p. 702). Numerous contemporary writers espouse the contract theory as either the primary theory or one of several primary theories governing the student/institutional relationship (Barr, 1988a; Bevilacqua, 1976; Buckner, 1988; Davenport, 1985; Furay, 1970; Hammond, 1979; Laudicina & Tramutola, 1976; Likins, 1979; Millington, 1979; Nordin, 1981-1982; Owens, 1984b; Shaffer, 1984; Weeks, 1982; Zirkle & Reichner, 1986).

The college catalog, other materials distributed by the institution, and agreements documented as elements of the matriculation process compose the components of the contractual relationship (Davenport, 1985; Dodd, 1985; Furay, 1970; Peterson, 1981; Thigpen & Slagle, 1977; Yegge, 1971). Young (1984) delineated the process by which these elements become a contract. The college or university extends an offer of admission to the student, the student accepts that offer, and the institution accepts the student’s money in return for allowing
the student to matriculate. Thus, the contractual arrangement is entered.

The case of Cecil v. Bellevue Hospital Medical College formally characterized the student/institutional relationship as contractual in 1891 (Davenport, 1985; Jennings, 1980-1981). Contract theory was cited again in Booker v. Grand Rapids Medical College in 1909 (Hammond, 1977). These two cases established the student/institutional relationship as being contractual in nature. Anthony v. Syracuse in 1928 further defined the relationship by holding that the contract was embodied by the materials distributed by the institution in an effort to attract students to enroll as well as by additional documents signed during the matriculation and registration processes (Yegge, 1971). Eisel v. Ayers (1978) confirmed both the contractual nature of the relationship and that the contract was established by the materials the institution created and distributed (Peterson, 1981).

The change in the age of majority in 1971 brought an increased tendency among the courts to apply contract theory in matters related to education (Hammond, 1977). Even thereafter court judgments in educational settings were heavily weighted in favor of the institutions rather than the students. This practice is in marked contrast to court findings in contractual disputes outside the academic setting where the courts tend to side with the party who is perceived as the underdog (Dodd, 1985); i.e., the student in most disputes between students and higher educational institutions. Such findings may confirm the evolving nature of law. As changes occur societal mores are incorporated into court decisions. Contract theory, as a broadly accepted principle in higher education, is only a recent development. It would appear that the courts are proceeding cautiously to be certain of the principles by which society would prefer that they operate as well as within the evolutionary nature of the law itself.
The contract, as applied to the higher educational institution’s relationship with students is a very one-sided arrangement. There is no bargaining involved as one would find in a typical business transaction which results in a contract. The original contract and any changes in it are made unilaterally by the institution (Davenport, 1985) simply by changing the catalog for the following year (Dodd, 1985). The only exceptions to this practice include “obvious and explicit” promises to “continue a specific term or condition in the future” (Dodd, 1985, p. 728). The student, on the other hand, agrees, by virtue of accepting the institution’s offer of the opportunity to matriculate, to abide by the rules established in the catalog (Dodd, 1985). Brooks (1984), Davenport (1985), Furay (1970), and Yegge (1971) each contend that the nature of this contract is one of adhesion, an arrangement dictated by a clearly dominant party more in the form of an ultimatum than a bargained or negotiated agreement. The student is clearly a “junior partner” (Furay, 1970, p. 265) in all traditional aspects of viewing this relationship as a contract.

When contractual disputes between institutions and their students result in litigation courts have granted broad discretion and flexibility to institutions and their officials based upon the perceived value (both to the student and the higher education community as a whole) of allowing the educational expertise of institutional authorities to properly exercise educational responsibilities (Davenport, 1985). The result has been that litigation related to the contractual relationship between colleges and universities and their students has not significantly altered the student’s relationship with the institution despite outward appearances to the contrary (Davenport, 1985).

Contract theory has been very appropriate and is successfully utilized by departments of the institution such as residence life and student activities.
housing agreement or a contract with an entertainer are clearly between two
distinct parties, for a short duration, and are much less complex and more readily
definable than the broad context of the entire relationship between an institution
and the students who choose to attend. The relationship is certainly not purely
contractual in nature, leading Ray (1981) to state "the educational contract is a
tangled network of social, constitutional, and economic values" (p. 189).

The contract is not one through which the parties participate in an arms-
length relationship. The institution, and many of its employees, attempt to
educate the whole person through much more active involvement in student's
lives than would be characterized in a traditional two-party business agreement
(Fowler, 1984). "Clearly, faculty, students, and administrators do not view their
relationship as a contractual one" (Rabban, 1973, p. 105). The student enrolled
at a modern college or university possesses a self-view as an active, participating
community member rather than a subordinate with no significant role to play
(Yegge, 1971).

Fisher (1984) contends that there are simply too many complex relation­
ships involved during the years of a student's postsecondary education to rely
on contract theory to identify the overall relationship of the college or university
and the student.

Consumer Theory

Student consumerism is the most recent theory used to describe the stu­
dent/institutional relationship. As envisioned by Stark, Davidson, Leahy, and
Gschwender (1977), student consumerism encompasses "all aspects of the stu­
dent-institution relationship: The type of information given to students about an
institution, its academic programs, and admissions standards; the maintenance

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of educational quality; utility of the degree awarded and student participation in policy decisions; as well as more temporal issues such as food, dormitory conditions, and discipline standards" (p. 16).

An interesting combination of circumstances has resulted in consumerism being considered as one of the prominent theories to identify the student/institutional relationship. Stark (1977) discusses how federal funds are utilized to create "massive open access to higher education for all Americans" (p. xi). Federal funding and open access coupled with the decline in the number of students graduating from high school has resulted in a "buyers" market (Brooks, 1984) as institutions compete for students. A power shift is at work with the influence students possess rising to a more equal level with postsecondary institutions in terms of influence over decision-making and other priorities within the educational enterprise. Thus, students have become "active participants in a learning process, not passive recipients of a service" (El-Khawas, 1977, p. 169). Issues such as "fairness" (El-Khawas, 1977, p. 173), "responsiveness to student needs" (El-Khawas, 1975, p. 131), and accountability "built on mutual responsibility" (Stark, Davidson, Leahy, & Gschwender, 1977, p. 16) are entirely new concepts when compared with the virtually unchallenged autonomy of the institution's authority within the student/institutional relationship prior to the early 1970s. Laudicina and Tramutola (1976) discuss the impact which this has had in necessitating a change in the manner in which institutional decisions are made. "The educational administrator has become a broker who helps shape and arrange policies and programs by persuasive rather than authoritative technique" (p. ix). Students are campus citizens who must be convinced to commit themselves to a new venture if it is to succeed.

The focus has become the student and, with this advantage, student
demands must be addressed for the communication of accurate information prior to enrollment as well as throughout matriculation (El-Khawas, 1977). The involvement of federal funds offers further risk of controls outside the institution assuming an increasingly larger portion of influence. However, the student-as-consumer concept recognizes the adult status students have been granted and is consistent with contract theory as another means of identifying and accepting adult responsibilities both within the academic community and in the world at large. Hammond (1978) and Morrill and Mount (1986) agree that the consumer model is the most appropriate one following the lowering of the age of majority.

The legalistic nature of the student/institutional relationship is an additional element in promoting the student as consumer model (Shaffer, 1984). Although sometimes slow to respond, colleges and universities, for most practical purposes, have accepted the identification of students as adults. This is in part an outcome of the emphasis upon contract theory. Bevilacqua (1976) envisions the Student Affairs Dean as a “consumer advocate” (pp. 493-494) in articulating the contractual aspects of the student’s relationship with the institution.

Stark and Terenzini (1978) hope “for an effective consumer-assistance program” (p. 6) to serve as a model of cooperation between students and their institutions. When the elements of fairness and responsiveness to student needs (El-Khawas, 1975) are added to the accountability and reciprocal nature of this new student/institutional relationship, Stark and Associates (1977) describe this combination as “a more businesslike relationship” (p. 27). They further assert that the student-as-consumer approach “is an acceptable middle class strategy” for incorporating the ideas which students develop into the process of “educational reform” (p. 27).
Conclusion

"Law, by its very nature, tends to change and to grow very slowly ... one small step after another" (Wright, 1969, p. 1027). The student/institutional relationship is one which has evolved from a strictly regimented in loco parentis theory to one which blends constitutional, contract, and consumer models with some retained or rejuvenated elements of in loco parentis. Clowes (1973) found the elements of this complex series of relationships to be far too complicated for one theory to encompass and cited the courts as a "neutral ground" (p. 135) for resolution of conflicts regarding student's relationships with higher educational institutions. Furay (1970) concurs with the complexity evaluation and finds these relationships "diffuse and unclear" (p. 265). Involved in persistent change and refinement, the nature of the student/institutional relationship will be an evolutionary one which is "constantly being defined by the courts" (Young, 1984, p. 15).

Conclusion

The dramatic increase in litigation involving higher education has been established. Disputes about the relationship between postsecondary institutions and students comprise much of this litigation. Some litigation has served to shape, or more clearly define, those complex relationships.

Personal injury lawsuits are one area of litigation which has experienced "unprecedented growth" (MacLaury, 1988, p. vii) as Americans utilize this tort as a means of compensation for the injury which has occurred (Litan, Swire, & Winston, 1988). The problem of assaults on female students in residence halls is one element of the increased legal activity on campuses in recent years. Since
1975 the preponderance of litigation in relation to college housing has been torts alleging negligence on the part of institutions or their employees (Buckner, 1988). Personal injury torts are a natural outgrowth of the litigation explosion in society and the changed status of young adults attending colleges and universities.

Liability suits alleging negligence have increased dramatically in number in recent years as society strives to compensate victims for losses incurred through the negligence of others. During the last ten years several cases have been heard involving negligence allegations against institutional officials claiming that dangerous conditions were foreseen or should have been foreseen and remedied to prevent harm or injury. Claims that the college or university has a duty to protect students from the acts of third persons have also been raised.

The concept of foreseeability is a prominent factor in many negligence allegations. A definition of foreseeability will be presented in Chapter II. Foreseeability is particularly important when personal injuries are the center of a dispute, as foreseeability is the primary test used by the courts to establish or discredit negligence allegations. Examining this concept within the context of personal injury litigation following assaults on campus will be useful in identifying institutional responsibilities surrounding such matters.

A brief discussion of significant cases in the development of the foreseeability concept will serve to offer a stronger understanding of foreseeability and its implications for the professionals who are most likely to be confronted by situations involving this concept. This study will also be useful for the higher education community at large in becoming more aware of, and sensitive to, implications which arise from the issue of foreseeability in personal injury litigation following assaults or abductions in college and university residence halls.

Foreseeability is an important factor in three cases which are the most
significant decisions involving negligence as it relates to personal injuries from assaults or abductions in residence halls. Duarte v. California (1979), Mullins v. Pine Manor College (1983), and Miller v. State of New York (1984) are important to the study of litigation in higher education. Foreseeability was a significant factor in each case. An analysis of these cases will provide a more complete understanding of their facts, the importance of foreseeability as a significant component in the outcome of each case, and will reveal implications for higher education which result from personal injury litigation following assaults in college and university residence halls when foreseeability is a significant element in the case.
CHAPTER II
A REVIEW OF THE LITERATURE

Introduction

A definition of the concept of foreseeability as it relates to negligence torts is important for this study. A more comprehensive understanding of foreseeability will be achieved through an examination of elements closely related to foreseeability. These elements include: the various duties which an institution may owe students; the breach of duty; negligence; liability; the reasonable person; and special relationships.

Foreseeability

Foreseeability is an objective human behavior standard defined by the facts present in a given court case and a standard of conduct known as the reasonable person theory. Black (1979) defines foreseeability as “the ability to see or know in advance; hence the reasonable anticipation that harm or injury is a likely result of acts or omissions” (p. 584). McDowell (1985) states that foreseeability is used to describe “actual, subjective awareness of possible future occurrences. It carries a sense of prevision, a consciousness of the possibilities of future happenings, and also implies the ability to plan for those future possibilities ... an integral part of prudent human behavior” (p. 290). McDowell continues by asserting that foreseeability identifies and designates responsibility for arranging compensation following a harm or injury. Moore and Murray (1983) emphasized a “recognizable danger,” “presumed or actual knowledge,” and “a reasonable belief that
harm may follow” (p. 70) in defining foreseeability. Walker (1980) adds that “a defendant is liable for the reasonable foreseeable consequences of his conduct” (p. 480). Green (1961) asserted that foreseeability is “an objective standard for determining of the quality of a defendant’s conduct: i.e., whether negligent or not!” (p. 1420).

Foreseeability involves the reasonable anticipation of harm or injury to another person to whom the defendant owes a duty (Hopfengardner, Odell, & Soden, 1985). The foreseeability is the test of the scope of the duty which is owed (Shipley, 1965). “If, given a certain situation, injury or loss could reasonably have been foreseen, there exists a duty to avoid the injury or loss” (Baley & Matthews, 1984, p. 277). The harm or injury is likely as a result of an act or failure to act on the part of the person owing the duty. Removing the danger, or taking all reasonable steps to attempt to remove the danger, is the responsibility of the person who owes the duty. “The purpose of the foreseeability concept is to define on the continuum between responsibility and remoteness the point beyond which the defendant has no liability” (McDowell, 1985, p. 296). “If harm is not foreseeable, the institution has no duty to protect against it, and thus, cannot have breached any duty to act” (Raddatz, 1988, p. 6).

The precise nature of the danger, harm, injury, or consequence of the person’s behavior need not be foreseen by the person owing the duty. The presence of a general threat of harm is all that is required (Goodhart, 1930; Morris, 1952; Parmele, 1945; Raddatz, 1988; Shaver, 1987), and the nature or level of the harm or injury is irrelevant when the negligent act causes the harm or injury and is foreseeable (Richmond, 1987).

Foreseeability is the generally accepted standard for establishing negligence in cases alleging negligent behavior (Baley & Matthews, 1984; Green, 1961;
Keeton, 1984; Kelsen, 1978; Shipley, 1965). A test of foreseeability determines the presence or absence of negligence. This is its only purpose as foreseeability is not used to determine the extent of the consequences of the act or omission (Keeton, 1984).

Foreseeability, or the objective standard for evaluating a person's conduct in a given situation, is measured by the reasonable person test. The reasonable person is a hypothetical individual who acts prudently and with good judgement in all situations. Thus, the true test of foreseeability is not what the person involved in the question foresaw (or failed to foresee), but rather "what a man of reasonable prudence would have foreseen" (Holmes, 1881, p. 54).

Despite the presence of the reasonable person test as an objective measure, the legitimate question remains as to what is foreseeable and what is not. Green (1961) lamented that "attempting to draw a line between the foreseeable and the unforeseeable in every day affairs is equivalent to determining where space ends and outerspace begins" (p. 1413). James (1953) finds an intertwining of what should be foreseen with what is "fair and just" (p. 318) in placing limits on the legal responsibilities persons must assume.

Keeton (1984) notes that the question of foreseeability must be left to the individual court to determine based on the merits of the individual case being heard. Foreseeability is not a precise concept due to differing circumstances in individual cases. McDowell (1985) describes foreseeability as "open-textured and vague" thus allowing courts to apply the concept to "wide ranging factual situations" (p. 296). A "range of foreseeable risk" is a statement which allows the greater flexibility which this concept necessitates. "In one sense, almost nothing is entirely unforeseeable, since there is a very slight mathematical chance, recognizable in advance, that even the most freakish accident which is possible

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will occur, particularly if it has ever happened in history before” (Keeton, 1984, p. 297). “In another, no event whatsoever is entirely foreseeable, since the exact details of a sequence never can be predicted with complete omniscience and accuracy” (Keeton, 1984, p. 297).

Several authors from the legal profession referred to foreseeability as “limiting” liability (James, 1953; McDowell, 1985; Morris, 1961; Prosser, 1953; Shipley, 1965). Although numerous education authors discussed foreseeability (Buckner, 1988; Gehring, 1983; Henderson, 1987; Marczynski, Rice, & Souder, 1986; Moore & Murray, 1983), none chose to state, or even imply, that foreseeability limited liability in any manner. This may be a coincidence based on the limited sample of articles or different perspectives from which the authors from different professional orientations present their cases, but it is interesting to note this difference.

The actual outcome of a case is based upon the elements or circumstances which the judge and/or the jury select for emphases (Morris, 1961). Foreseeability is almost always a factual issue to be determined by the jury if the judge determines that the evidence directs that the case is given to the jury for review of the factual issues (McDowell, 1985). James (1953) referred to foreseeability as “elastic” (p. 786) as he emphasized that societal pressures and the facts of individual cases establish the judicial mores which contribute to judgments in cases involving the concept of foreseeability.

A foreseeability formula is difficult to define because of the imprecise nature of the concept. However, any such formula would certainly incorporate “reasonable care under the circumstances” (Green, 1961, p. 1414) and a “range of foreseeable risk” (Keeton, 1984, p. 297).
Negligence

Negligence is conduct which falls below the standard established by law for the protection of others from unreasonable risk (Keeton, 1984). Black (1979) defines negligence as “failure to use such care as a reasonably prudent and careful person would use under similar circumstances” (p. 930) and that it is the “duty of every person to exercise due care in his conduct toward others from which injury may result” (p. 931). Radin (1970), noted the imprecise nature of negligence and stated that “in determining the amount of care which it is negligence to omit, custom and usage, both particular and general, may be considered” (p. 218) and that “negligence, like care, has degrees which are the inverse of the degrees of care involved” (p. 218).

Negligence is “the dominant cause of action for accidental injuries in this nation today” (Keeton, 1984, p. 161). Relations between persons are involved in negligence (Prosser, 1953). Four basic elements are included. First, a duty must exist between the person of whom negligence is alleged and the person to whom the behavior caused harm or injury. The behavior which is allegedly negligent could be either a specific act or a failure to act, an omission, on the part of the person accused of negligence. Secondly, there must be a failure to offer the necessary standard of care when viewed in comparison to the risk of harm or injury which is involved. Third, there must be a specific act or failure to act on the part of the person or institution accused of negligence. Lastly, there must be a specific injury which actually occurs and produces harm to the person alleging negligence (Alexander & Solomon, 1972). The definition of negligence is one which gradually evolved over more than a century of litigation in American and English courts (Green, 1961). Near 1840 negligence replaced strict liability
(Lieberman, 1981). Oliver Wendall Holmes is credited with moving "negligence from a specific, predetermined duty to a general standard of care" (White, 1978, p. 180). White goes on to refer to negligence as a "touchstone" (p. 182) of a theory of civil obligation not to injure others. Coughlin (1975) described a negligent act as "careless" or "reckless," but "an unintentional harm" (p. 68).

The standard of care required by law is a very flexible one depending upon the circumstances of the specific case or incident to determine what is reasonable (Henderson, 1987). A. R. White (1985) referred to negligence as "a failure to give active measure-taking attention to the risks inherent in the successful prosecution of some activity" (p. 102). Lieberman (1981) stressed that the standards of negligence were subject to interpretation by the courts enhancing the "infinite flexibility" (p. 37) of the negligence concept. Farnsworth (1963) associated the standard of care with that "expected of the reasonable man under similar circumstances" (p. 125).

Aside from the basic general steps cited above, there is no broadly accepted formula for establishing negligence, and standards vary from state to state as they are applied by the court systems (Drowatzky, 1977; Roe, 1979). Foreseeability is only one factor in establishing negligence, although it is generally accepted as the essential factor. Keeton (1984) refers to the "gravity of harm and the utility of the challenged conduct weighted against the gravity and the foreseeability" (p. 298). The plaintiff has a tremendous burden of proof in negligence cases (Hauserman & Lansing, 1981–1982).

The concept of negligence is based on relations between persons. Thus, no act, in and of itself, is negligent. The act is only negligent when viewed in relation to persons "foreseeably within the risk of injury" (Goodhart, 1930, p. 450).

Foreseeability relates to negligence as the primary test of negligence and
serves, with the action taken or not taken, as a result of what is, or should be, foreseen as the connecting links between duty and negligence. Brechner (1977) stressed that negligence must be found before liability can be imposed.

Payne (1962) cited an interesting example in stressing that negligence is "a state of affairs" (p. 24) although it is more frequently referred to in terms of an act or omission. The example is that it is negligent to leave a "car without lights in a dark road," (p. 24) but the negligence is gone after sunrise. Thus, negligence is determined by the circumstances surrounding a situation rather than by a hard and fast definition of the concept.

The issues of proximity, remoteness, and unforeseen consequences have caused considerable concern in litigation because of the range of findings by different courts. There are not firmly established standards to be used in predicting the outcomes of litigation involving these issues. Litan, Swire, & Winston (1988) assert that from the mid-nineteenth century until very recently plaintiffs had to prove that injuries were "proximately caused" (p. 5) by the negligent behavior of the defendant in order to win a tort suit. Smith v. London and South Western Railroad (1870) is the "landmark case" (Goodhart, 1930, p. 449) in this regard. Hedge clippings piled beside a rail line caught fire from the sparks of a passing train. The fire spread across a field of two hundred yards, crossed a road, and Smith's cottage burned. The railroad was found to be negligent in this case. Palsgraf v. Long Island Railroad (1928) resulted in a very different outcome. This case involved a woman who was injured by a scale which fell on her while she waited for a train on the station platform. A man at the other end of the platform was hurriedly attempting to board another train which was departing. As he was helped onto the train by two railroad employees, a package fell onto the tracks beneath the train. The package contained fireworks which
discharged causing the scale to fall onto Mrs. Palsgraf. No recovery was allowed as she was a third party and not directly involved in the relation between the particular individuals. The trial court felt that such a relationship was necessary for negligence to be found (Goodhart, 1930). Other cases which will be reviewed later in this study reveal that the standards surrounding negligence and the issues of unforeseen consequences and remoteness have been greatly expanded as courts strive to respond to "the felt necessities of the times" (Holmes, 1881, p. 1).

Smith and Palsgraf are cited in numerous other cases leading Keeton (1984), in discussing unforeseeable consequences, to state that there is "no other one issue in the law of torts over which so much controversy has raged, and concerning which there has been so great a deluge of legal writing" (p. 280). This pronouncement reinforces the statements regarding the flexibility of the standards by which acceptable behavior was measured as an appropriate standard of care. It further supports the assertion that the law is interpretive and fluctuates with the particular mores of society at a given time and with the particular circumstances of a case being considered.

"Lawsuits against academic institutions for assault or other criminal activity are usually based on the theory of negligence. In other words, the college or university was careless or failed to protect the victim properly and adequately against foreseeable campus crime" (Raddatz, 1988, p. 2).

Liability

Radin (1970) offers two definitions of liability. The first refers to liability as "an obligation or duty to do something or refrain from doing something, created by contract or status or by the conditions of social living" (p. 189). The second definition labels liability as "an obligation to pay money in compensation for
breach of a contract or for a tort” (p. 189). Black (1979) called liability “a 
broad legal term” (p. 823). Barr and Associates (1988) present a more expansive 
definition for liability in stating that “responsibility for possible or actual loss, 
penalty, evil, expense, or burden. Liability is often used to mean liability for 
damages, an amount determined by trial on the facts of the case” (p. 361).

Kelsen (1978) stipulates that conduct which is intentional or which is fore­seen involves liability which is based on the determination of fault. Unintentional 
or unforeseen behavior is based on absolute liability (Kelsen, 1978) or liability 
without fault (Black, 1979). Using the same theoretical framework to connect 
liability with negligence requires that a negligent act or omission inflict absolute 
liability upon the person responsible for the act or omission (Kelsen, 1978).

Strict liability requires the assumption of payment for all losses suffered by 
the victim (Calfee & Winston, 1988). It has also been referred to as absolute 
liability, a concept which “ignored questions of fault” (Hall, 1987, p. xi). In in­stances where strict liability is imposed only the breach of the duty is required 
to result in a finding of liability against the defendant (Mawdsley & Permuth, 
1983). A relationship between the plaintiff and the defendant placed a limit upon 
liability late in the eighteenth century. Although used today almost exclusively 
in relation to product liability (Black, 1979), strict liability was used before the 
middle of the nineteenth century in situations involving property damage. Smith 
v. London South Western Railroad (1870) provided the landmark decision re­gard­ing liability for unforeseen consequences of a negligent act (Goodhart, 1930). 
MacPherson v. Buick Motor Co. (1916) established that a negligent person’s ac­tion could incur liability which was extended beyond those who were in immediate 
danger to an entire class of persons who were more removed from the situation 
(Richmond, 1987). The Polemis case in 1921 found a “defendant is liable for all
direct consequences of his acts even though unforeseeable" (Payne, 1962 p. 1). Judge Cardozo, in the Palsgraf case in 1928, was unwilling to allow recovery based on remoteness and is criticized by Prosser (1953) who stated that Cardozo greatly "oversimplified the matter" (p. 10). The Wagon Mound (1961) case repudiated Polemis and directed this aspect of law toward the modern legal era by offering the foresight of the reasonable person as the measurement of consequences for which a defendant may be held liable in negligence (Payne, 1962).

Liability is designed to satisfy the two aspects of deterrence and compensation (Calfee & Winston, 1988). Deterrence is designed to decrease the possibility of additional violations by the specific person penalized or others who are, or become, aware of the penalties involved in conviction. Compensation offers the victim a recovery for the harm or injury which has been suffered as a result of the act or omission of the convicted party. Dworkin (1986) stressed the "moral right to compensation for foreseeable injury" in circumstances other than ones which would disproportionately penalize the person responsible for the injury who was "careless out of proportion to his moral fault" (p. 241).

The defendant's ability to pay, through personal or corporate wealth or a strong program of insurance coverage, is frequently a criteria for liability judgments in the place of direct responsibility for the injury or harm which occurred ("Liability law," 1986). "Practicality dictates that those sued will be those with the 'deepest pockets'"a (Roe, 1979, p. 7). In an effort to resolve this dilemma government pressure is presently attempting to connect liability to fault through legislative action. Although common law precedent already ties liability to fault, the problem persists (Greene, 1986). Requiring the wealthy, or the entire social system, through insurance or strict liability, to compensate victims for damages is, on the one hand, reasonable from the perspective of the victim who deserves
some relief. However, if viewed from the alternate perspective, the person with little or no fault should not be required to compensate a victim for an accidental occurrence even if the plaintiff possesses the means to fulfill the compensatory obligation which is imposed. Such a system of justice represents a strict liability theory rather than a requirement on the basis of legal duty (McDowell, 1985). Ballou (1981), in discussing suits following rapes, notes that “suits against third parties provide a means of realigning the social responsibility for rape prevention and providing compensation for the victims” (p. 160). Litan and Winston (1988) express concern that the deterrence element has been diminished by caps placed on judgments for non-economic damages by some state legislatures.

The imposition of liability must be preceded by a finding of negligence (Brechner, 1977). The foreseeability of harm, which essentially establishes the negligence, is also a necessary condition for liability judgments. Without a duty, a defendant could be negligent without being liable (Keeton, 1984; Prosser, 1953). The breach of a duty “does not make the actor liable. It merely subjects him to liability” (Restatement, 1965, Section 4a).

The courts have placed a number of limitations upon liability. Without these limitations, Keeton (1984) was concerned that “law becomes unpredictable” (p. 293). Insisting upon a “reasonably close connection” (Keeton, 1984, p. 300), commonly referred to as proximate cause (Green, 1929), between the consequences and the harm which is threatened is one method of limiting liability. The conduct of the plaintiff is another limitation (James, 1953). Contributory negligence, depending upon its extent, can drastically reduce liability. In limiting liability the scope of the foreseeable risk is offered by Prosser (1953) as “the only available alternative to unlimited liability” (p. 24). James (1953) agrees, stating that “since the basis of liability for negligence is the foreseeability of unreasonable
harm, the liability should be limited by the scope of the reasonable foresight” (p. 785). James ends his discussion of the limitations on liability prophetically asserting that “the concept of duty is a limitation on the scope of liability” and that “the concept of foreseeability is elastic, and as knowledge increases and the pressure toward social insurance grows, the limitation will probably be pushed further and further back” (p. 786).

In conclusion, liability, as with negligence, is a flexible concept which the law allows the court to determine based upon the merits of the individual case. The examples given above offer evidence that the scope of liability has altered with societal needs, again much like negligence. In relation to higher education, litigation actions demanding relief for liability have followed the pattern of increased litigation which has been witnessed in other aspects of higher education. Pittillo (1970) states that “many activities now considered an essential part of college life bear concomitant hazards which evoke implications of tort liability” (p. 200). Hammond (1978) and Staff (1981) stress the active presence of liability risks in administrative work within postsecondary institutions.

Duty

A legal duty, as defined by Black (1979), is an

Obligation, to which law will give recognition and effect, to conform to particular standard of conduct toward another. The actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause. (p. 453)

Radin (1970) refers to a duty as “an obligation the violation of which may become the basis of an action at law” (p. 228). The Restatement (Second) of Torts (1965)
measures duty in behavioral terms as the "actor shall conduct himself or not conduct himself in a particular manner" (Section 4a).

The obligation which a duty necessitates is usually defined by broad terms such as the use or exercise of reasonable care (Green, 1928). Societal fluctuations and changes in conditions within the social order demonstrate the nature of duty as non-static but reflective of "the philosophies and practicalities of society" (Hauserman & Lansing, 1981-1982, p. 202). Keeton (1984) noted these social changes as bringing about "the recognition of new duties" (p. 54). Reasonable persons, and their reactions to given sets of circumstances, assist in defining the parameters of what duties should encompass. Keeton (1984) is credited with the statement that "the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists" (p. 359).

The concept of duty is also clearly relational as at least two persons are involved in the relationship from which the duty arises. The duty, once defined, places one person in a role of offering the care upon which the obligation is based, and the other person who is the beneficiary of the care as a result of the protection offered by the person upon whom the duty rests. The general standard of care as defined by the reasonable person can sometimes be increased or decreased in certain jurisdictions by common law practices or the mores of the local region (Keeton, 1984). The specific standards are established by the courts on the local, state, and national levels and the legislatures in an overlapping function for the states (Mawdsley & Permuth, 1983).

Duty is also involved with the risk associated with the circumstances of a situation. In matters where it appears that a duty is owed, the person owing the duty must exert reasonable efforts to insure that the person or persons to whom the duty is owed is/are not exposed to unreasonable risks of harm. These
risks are measured by the courts in evaluating the merits of a request for recovery for harm or injury by those to whom the duty is owed. Acts or omissions may each be actionable as Twerski (1983) states "where there is valid reasoning for imposing a duty, nonfeasance as well as misfeasance can support liability" (p. 1026).

In addition to the social requirements cited above, Anderson (1986) found matters of public policy important in the establishment of duty. Issues of "foreseeability, the likelihood of injury, the magnitude of guarding against the injury, and the consequences of placing that burden on the defendant" (p. 691) are also crucial in determining the duty issue.

Foreseeability is noted by numerous authors as a major element in defining or measuring the duty in a specific case (Anderson, 1986; Baley & Matthews, 1984; Batson, 1986; Duarte, 1978; Green, 1961; Henderson, 1987; James, 1953; Keeton, 1984; Loeb, & Schack, 1987; McDowell, 1985; Prosser, 1953). As Baley and Matthews (1984) noted, "modern principles define duty in terms of foreseeability. If, given a certain situation, injury or loss could reasonably have been foreseen, there exists a duty to avoid the injury or loss" (p. 277).

The decision in the case of Haven v. Pender (1883) moved to replace absolute liability with a concept of duty beyond a very limited "class of persons to whom one owes the duty to refrain from negligent acts" (Richmond, 1987, p. 917). The case involved an injury to an apprentice workman who subsequently sued the owner of the ship where he was working, although the owner was not his actual employer. A portion of Justice Brett's opinion in this case served as the first effort at establishing a formula for duty (James, 1953). It states:

Whenever one person is placed by circumstances in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill

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in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. (p. 779)

Judge Cardozo's opinion in *Palsgraf v. Long Island Railroad* (1928) spoke to the duty issue in several instances. "The risk reasonably perceived defines the duty to be obeyed" (Richmond, 1987, p. 950). Although the duty owed was significantly expanded later to include other persons, Cardozo's opinion made it clear that persons who were within immediate risk created by the negligent behavior of the defendant were owed a duty and could seek recovery if the defendant failed to act as a reasonably prudent person would (Richmond, 1987).

The legal nature of duty in a court case is decided by the judge as it is an element of law rather than of fact (Hansen, 1985-1986) and "the duty a defendant is under, or the protection a plaintiff was entitled to have, is unknowable until the case has been adjudged" (Green, 1928, p. 1025). If the judge chooses to pass a case to the jury, the judge has decided that a duty exists as a matter of law. Although juries could veto that decision, this rarely happens (Green, 1928), and the jury will proceed with consideration of matters of fact in the case. The test for duty is "deliberately vague," using the "reasonably prudent person" (Richmond, 1987, p. 905) as the determining factor. This test lends credence to Green's (1928) contention that the judge's personality is "the largest single factor in administration of the law" (p. 1038). It also supports Prosser's (1953) statement that, "There is a duty if the court says there's a duty" (p. 15).

The specifics of duty have continued to develop since the *Palsgraf* opinion was written in 1928. Elements of the concept of duty such as the breach of a duty, the duty to protect, the duty to warn, the duty to provide safe premises, and the duty to respond to hazardous conditions will now be discussed individually.
The Breach of Duty

Black (1979) defines a breach as "any violation or omission of a legal or moral duty. More particularly, the neglect or failure to fulfill in a just and proper manner the duties of an office or fiduciary employment" (p. 171). If the breach involves a contractual matter, it occurs when a party "fails to carry out a term, promise, or condition of the contract" (p. 171).

When a duty has been established between two or more persons, conduct by one of the persons which constitutes a breach of that duty is considered negligent and gives rise to a finding of liability (Shipley, 1965). The breach itself does not create the liability for the person accused of negligence, but merely "subjects him to liability" (Restatement, 1965, Section 4). The duty must have existed prior to this breach, as "if there is no duty, there can be no breach, and thus, no negligence" (Gehring, 1982, p. 31).

The plaintiff in a case alleging a duty breach must first prove, to the satisfaction of the judge, that a duty exists between the plaintiff and the defendant. The establishment of the existence of a duty results in the judge giving the case to the jury. Secondly, the plaintiff must prove to the satisfaction of the jury that a breach of the duty occurred. If the evidence is sufficient to consider the duty as being breached, the jury will examine the evidence related to negligence and liability, although in very clear cases the judge may direct the jury as to which verdict they must return (James, 1953). It should be noted that the plaintiff, in attempting to demonstrate that a duty exists and a breach has occurred, need only "establish a preponderance of evidence rather than beyond a shadow of a doubt" (Moore, 1972, p. 8) as this is a civil litigation matter rather than a criminal one. Despite the fact that this burden of proof is less than would be required.
for criminal matters, Hauserman and Lansing (1981-1982) found this burden of proof to be "a weighty one" (p. 202).

The Duty to Protect

Although the law is vague about the actual duty we possess to avoid doing harm or injury to our neighbor, it is clear that duty is found where "reasonable persons would recognize it and agree that it exists" (Keeton, 1984, p. 359). This does not respond to the more specific concern of our obligations as to protection of another or another's interests.

Under common law there is no general duty to protect others from harm (Ballou, 1981; Raddatz, 1988; Salter, 1986; Twerski, 1983). However, in relation to higher education, the protection of college students, to some degree, is a duty to which institutions must hold (Roe, 1979). "As more assaults and rapes of female students are reported, more institutions are held liable for their safety" (Batson, 1986, p. 121). This duty may also be defined for persons as "one who is required by law to take or voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other" (Restatement, 1965, Section 314A).

The duty to protect arises, in the case of institutions which provide campus residences, from the landlord/tenant relationship which exists as a result of the housing agreement which is not unlike a lease. The law requires a landlord to take reasonable measures to protect tenants from foreseeable criminal activity (Ballou, 1981; Hansen, 1985-1986; Raddatz, 1988). This duty to offer protection exists as a result of the signed lease through which the tenant has "surrendered some of his ability at self-protection" (Duarte, 1978, p. 810). The duty will be enforced by the court if the assault is foreseeable (Hauserman & Lansing, 1981-1982), and the
opinions in Duarte (1978) and Kline v. 1500 Massachusetts Ave. Corporation (1970) stipulate that previous criminal activity results in the foreseeability of additional criminal activity (Weeks, 1980). “An educational institution must provide the security it purports to provide and, at the very minimum, must provide enough security to protect against foreseeable harm” (Raddatz, 1988, p. 8).

The landlord/tenant relationship has been characterized by some courts as a special relationship which requires the landlord to assume responsibility for reasonable security of the facility (Hansen, 1985-1986). This obligation is a more general one and is in addition to the duty which requires the landlord to protect against foreseeable criminal activity. The special relationship which is often found between a college or university and its students is a mixture of obligations. It should be noted here that this special relationship between an institution and students is not always limited to situations in which students reside on the campus, but can be found in community college settings as well. Peterson v. San Francisco Community College District (1984) provides an excellent example of this obligation. The special relationship is founded in the in loco parentis philosophy which encompassed the student/institutional relationship prior to the 1960s and 1970s. The contractual nature of the enrollment of students into postsecondary schools and the contractual nature of the housing agreement which resident students enter (much akin to the landlord/tenant relationship established by a lease agreement) are also important in establishing this special relationship (Duarte, 1978; Young & Gehring, 1979a). Kirp and Yudof (1974), when referring to the combination of the in loco parentis and contractual relationships between the institution and the students, notes that it “grows out of the peculiar and sometimes the seemingly competing interests of the student and the college” (p. 176).
When a special relationship exists it gives one party the right to protection provided by the other (Twerski, 1983). The special relationship compels the more powerful member of the relationship to act in a manner similar to the reasonably prudent person (Weeks, 1980) in efforts to provide protection for the party to whom the duty is owed. An institution of higher education, with the professional staff expertise and the many resources it has available, is in a far superior position than the student to foresee, and take measures to guard against injury. The student, in effect, "must rely on the institution for protection" (Marczynski, Rice, & Souder, 1986, p. 62) and the student "has surrendered control of her security to the institution" (Miller & Schuh, 1981, p. 393). Cases of personal injury litigation which have been decided in the last few years have each required that a special relationship be found to create the duty which is the precursor to a finding of negligence (Szablewicz & Gibbs, 1987; Gibbs & Szablewicz, 1988). Raddatz (1988) asserts that "the duty to protect from foreseeable harm appears to rest on these special relationships" (p. 3).

The duty to act in a protective manner may be created by the presence of the special relationship. When the decision to act is made by the person who owes the duty, the courts may require that the act be done as a result of the likelihood that the person to whom the duty is owed "relaxes his vigilance for his own security based on his reliance on the defendant's assumption of responsibility for his safety" (Twerski, 1983, p. 1025). In determining which precautions must be taken to avoid harm or injury the expense of the protection is evaluated in comparison to the danger which is posed and the probability of the harm occurring if the protection is not provided. The courts will evaluate the individual situation and, as Weeks (1980) states, "in general, common sense arguments prevail" (p. 8).
"The modern college is not an insurer of the safety of its students" ("The student-college relationship," 1980, p. 844). However, the college is certainly in the best position to provide security for students (Weeks, 1980) although, as Weeks mentions "students often perceive themselves as not needing protective care" (p. 8). The policies of virtually every institution which manages residences prohibit students from taking certain precautions which would enhance their level of security. Students may not install deadbolt locks or chains on their room doors. They may not have a weapon or a dog, and they may not hire their own security force. Thus, the institution assumes the responsibility for the student's protection. On the other side of the coin, and despite Weeks' assertion about students' sensitivity to their need for protection, Greene (1988) found that not only students, but parents and the courts as well, "are demanding more measures toward prevention of campus crime" (p. A1). Schuh (1984) found that if institutions are aware of criminal activity, "measures to protect students are essential" (p. 62).

The duty to protect is an obligation, the breach of which can occur through either acts or omissions. The legal terms for the acts or omissions which constitute a breach are nonfeasance, for the failure to act, and misfeasance for the act which causes harm giving rise to a tort seeking recovery for the harm or injury which has occurred.

The legal system is reluctant to impose liability for nonfeasance. A special relationship must exist between the person injured and the person who failed to act in order for a finding in favor of the plaintiff when the defendant failed to act (Keeton, 1984; Salter, 1986; Young & Gehring, 1987). Misfeasance involves "acting in such a way as to cause injury" (Young & Gehring, 1987, p. 748) and requires no special relationship.
In conclusion, from the information cited in this section it is clear that an institution owes a duty to take reasonable measures for the protection of students in relation to foreseeable criminal activity on the campus. In addition, there is an increased duty to exercise care and protection in instances in which a special relationship is found between the institution and the student.

The Duty to Warn

"Clearly the duty to protect includes the duty to warn. In fact, warning students of a potential danger would be a minimal precaution to be undertaken" (Weeks, 1980, p. 7). Although the plaintiff must prove both that a duty exists and that it has been breached, it is generally accepted that a failure to warn of hazards constitutes a breach of a duty (Hauserman & Lansing, 1981-1982).

The common law provides "no general duty to take affirmative action to prevent harm to another" (Twerski, 1983, p. 1014). However, common law will impose a duty to warn if there is a special relationship to a dangerous person or to the person who may be a victim of the danger (Duarte, 1978; Young & Gehring, 1977).

There are two different situations in which the duty to warn is raised. Although the case of Tarasoff v. Regents of the University of California (1974) will be referred to in this study for several of its components, the duty to warn students of a specific threat which has been made against them by another person will not be the main purpose of inclusion of the section on duty to warn in this study.

The second situation in which the duty to warn arises, and the one which is applicable to this study, is in the matter of general warnings about possible or actual dangers on or around college and university campuses and their residence.
units. The officials of an institution have a duty to warn students of hazards when the officials become aware, or should have become aware, of the dangers and when there is no particular reason that the students would become aware of these dangers (Hammond, 1979). Responsibility attaches itself rather naturally to the possession of knowledge leaving those who possess the knowledge to also possess some of the responsibility for outcomes which are a result of the knowledge. It follows that if knowledge is shared, responsibility is shared as well. "Such warnings make students knowledgeable and responsible" (Hammond, 1979, p. 25).

Where a special relationship exists the need for sharing information about criminal activities is even more crucial from a legal standpoint. "The doctrine of special relationships is the cornerstone of the court’s argument in favor of a duty to warn" (Schopp & Quattrocchi, 1984). In matters where a special relationship exists or a duty is owed, sharing of knowledge does not dissolve the relationship or completely fulfill the obligation inherent in the duty. However, "the need to apprise students of the facts is critical, especially when a college has control over the student and the student has minimal power of self-protection" (Weeks, 1980, p. 8).

The duty to warn may not be assumed to only include a simple warning to students of criminal activity, or the threat of it, on or near the campus (Weeks, 1980). There are two particular areas important to this study which are equally as important.

The first additional important area is that of fulfilling an educational role for students related to their own behavior and the dangers present in some of their activities. In residence hall situations these dangers may be defined as propping doors open or leaving them unlocked, leaving first floor windows open or unlocked,
allowing strangers to enter the hall without a stated purpose (Weeks, 1980), and other behaviors which can lead to dangerous situations or harmful incidents. Instructing students in techniques of self-protection (Duarte, 1978, p. 806) and awareness of safety issues in relation to themselves and the security of others can serve as a response to the duty. These activities may not absolve an individual or an institution of any or all responsibility, but the educative function is partially fulfilled and some incidents will perhaps be thwarted.

The second area of concern involves representing the campus, and/or the residence units as safe when talking with students, their parents, or prospective students and their parents or in written materials which are distributed either among students or prospective students. The Restatement (Second) of Torts (1965) is very clear about the misuse of information in stating that "one who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information" (Section 311). Greene (1988) found questions about campus safety to be common ones as students and parents visit colleges and arrive on the campus for orientation programs after the decision to matriculate has been made. Knowing of dangers and failing to give a warning, whether through actually issuing warnings verbally or in some written form or representing the campus as safe while knowing of dangerous previous criminal activity, would be considered negligent (Hollander, 1984). The Duarte (1978) case was decided, in part, based upon the misrepresentation of the campus and campus residences as safe places through literature which was distributed as well as statements which were made (Miller & Schuh, 1981; Young & Gehring, 1979a). It was also noted that the university "covered up events so that the extent of violence on campus was not generally known" (Duarte, 1978, p. 806-807). Although it is not directly related to a
residence hall, the Peterson (1984) case was also settled, in part, on the failure to warn despite the duty existing to do so (Kobasic, Smith, & Zucker, 1988).

In conclusion, the duty to warn is a very clear one particularly with respect to those with whom a special relationship exists. The duty to warn also goes beyond issuing warnings to encompass the educational function of teaching students the elements of personal safety. Misrepresenting the level of safety of the campus or concealing the fact that criminal activity has occurred can serve to breach the duty to warn. Empowerment, through sharing information and knowledge, serves the educational function of the institution while limiting the legal dangers which exist surrounding the duty to warn.

The Duty to Provide Safe Premises

Although the issue of providing safe premises was referred to briefly in the section on the duty to protect, this topic must be examined more thoroughly because of the importance it holds in the outcome of the cases which are the focus of this study.

The duty to provide safe premises relates to the obligations which landlords must fulfill related to the safety of their tenants. The special relationship factor is present in some landlord/tenant agreements and definitely is a significant factor in most student/institutional relationships.

The case of Kline v. 1500 Massachusetts Avenue Corporation (1970) confirmed that landlords were required to provide safe premises for their tenants (Adams, 1979). The landlord was identified as the only person possessing "the power to respond to the dangerous situation" (Adams, 1979, p. 202) which exists in leased housing units when incidents of criminal behavior have occurred.

Landlords must "provide reasonable safeguards to protect tenants from
foreseeable crimes on the leased premises” (Hansen, 1985-1986, p. 739). When courts find the landlord/tenant relationship to constitute a special relationship, the landlord has an even greater responsibility in providing security for the tenants (Hansen, 1985-1986). “Recently courts have agreed that landlords should take reasonable measures to protect tenants from foreseeable risk of crime” (Bal-lou, 1981, pp. 111-112). These findings essentially require landlords to provide safe premises within their rental properties.

Postsecondary institutions have consistently been found to have a special relationship with their students. As stated above, this relationship serves to increase the duty of the college or university to offer a safe campus. “Parents, students, and the general community have a reasonable expectation, fostered in part by the colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm” (Mullins, 1983, p. 331). The limitations placed on students by institutional rules prohibiting personal lock installation and other measures to increase their security further the notion that the college has the obligation to provide a safe environment (Marczynski, Rice, & Souder, 1986). Surrendering of personal protection creates a reliance upon the institution (Duarte, 1978). Thus, the duty arises to provide a safe premises. “Adequate security is an indispensable part of the bundle of services which colleges ... afford their students” (Mullins, 1983, p. 336). The student is entitled “to an essentially safe place of residence” (Duarte, 1978, p. 812).

The Duty to Respond to Dangerous Conditions

Closely related to the duty to provide safe premises is the duty to respond to dangerous conditions. The proactive approach to problems is usually preferable as it is preventive and may avoid the problem completely or greatly diminish
the problem’s impact. Responding to a problem is equally necessary, if not more important, as the actual problem has occurred and must be dealt with.

Dangerous conditions can vary dramatically in the severity of the danger present. The “risk of harm must be sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence” (Cuyjet, Gilbert, & Conboy, 1983, p. 63). Any conditions which make such assaults foreseeable must be responded to immediately (Schuh, 1984).

The three cases which are the focus of this study are Duarte v. State of California, Miller v. State of New York, and Mullins v. Pine Manor College. In each case the institution was aware of previous criminal behaviors on or near the campus and the dangerous conditions were not responded to in a reasonable manner (Black, 1987; Duarte, 1978; Hammond, 1979; Mullins, 1983, Young & Gehring, 1983).

In conclusion, Hollander’s (1978) assertion that “the duty is commensurate with the knowledge of possible danger in that particular setting” (pp. 42-43) is important as it speaks to the scope of the duty, the presence of danger which is known, compares the duty to the knowledge, and notes the importance of the facts of the individual situation. A duty to respond to dangerous conditions is a specific and compelling one in limiting liability (Barr, 1988b) as well as supporting and fulfilling the duty to protect and the duty to provide safe premises.

The Reasonable Person

The reasonable person serves as an objective standard for measuring a defendant’s behavior in a given situation (McDowell, 1985). This standard is applied as a test of the duty which is owed to the person allegedly harmed or injured. If the court determines that a duty is owed, the case is passed on to
the jury. One of the jury’s responsibilities is to evaluate the “quality of the defendant’s conduct” (Green, 1961, p. 1420) in relation to the person to whom the duty is owed. The measurement used in this evaluation is the reasonable person test. Black (1979) defines the reasonable person as “the standard which one must observe to avoid liability for negligence is the standard of the reasonable man under all the circumstances, including the foreseeability of harm to one such as the plaintiff” (p. 1138).

Keeton (1984) broadens the scope of this standard in referring to it as the “personification of a community ideal of reasonable behavior.” The definition is not simply of one person, but of a combination of the positive traits of many persons as seen by the “jury’s social judgment” (p. 175). Collins (1977) referred to the reasonable person standard as “the public embodiment of rational behavior” (p. 315). The Restatement (Second) of Torts (1965) defines the reasonable person’s responsibilities as “the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances” (Section 283).

There is some conflict in relation to the various sources used in this section related to the question of gender. The traditional statement, in common practice until the 1970s, referred to the “reasonable man.” Keeton (1984) states that “Most recent opinions speak in terms of the reasonable ‘person’ rather than the traditional reasonable ‘man’” (p. 174). This study will use the term person except in those situations of quotations which cite a specific gender.

Coughlin (1975), Dworkin (1986), Farnsworth (1963), Keeton (1984), and A. R. White (1985) agree that the circumstances of the situation are important in the test of the person’s conduct in addition to the conduct itself. These circumstances are defined by the situation, are different in each situation, and
must be considered in evaluating the behavior rather than a hypothetical set of ideal circumstances.

A. P. Herbert (1930) offers a somewhat lighthearted, but not inaccurate, description of the characteristics of the reasonable person:

He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock: ... who never mounts a moving omnibus and does not alight from any car while the train is in motion; who investigates exhaustively the bona fides of every mendicant before distributing alms, and will inform himself of the history and habits of a dog before administering a caress; who believes no gossip, nor repeats it, without firm basis for believing it to be true; who never drives his ball till those in front of him have definitely vacated the putting-green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbours, his servants, his ox, or his ass; who in the way of business looks only for the narrow margin of profit which twelve men such as himself would reckon to be “fair,” and contemplates his fellow-merchants, their agents, and their goods, with that degree of suspicion and distrust which the law deems admirable; who never swears, rambles, or loses his temper, who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid, in short, of any human weakness, with not one single saving grace, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious creature stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example. (pp. 14-16)

The connection of the reasonable person to foreseeability is the use of this hypothetical individual as the test for whether or not something is, or should have been, foreseeable (Morris, 1961). The test is not what the negligent individual foresaw or should have foreseen, but rather “what a man of reasonable prudence would have foreseen” (Holmes, 1881, p. 54). A breach of the duty which is owed occurs if, under the same or similar circumstances, the jury believes that
a reasonably prudent individual would have foreseen the potential for damage, harm, or injury and taken reasonable measures to avoid the hazard (A. R. White, 1985).

Administration of the reasonable person test measures the balance between the cost of the protection, the level of the harm threatened, and the likelihood that it will occur unless the precaution is taken against the harm (Weeks, 1980). The flexibility of this standard provides the jury a measure of latitude in preparing their verdict. The customs and mores of the community are incorporated into the decision-making process based on this latitude (Keeton, 1984).

Flexibility of decision-making and the idea that the hazard need only be seen in the abstract rather than in concrete terms were cited by Goodhart (1930). These elements generate the frustration which Mosier (1984) described in trying to predict with any accuracy what a reasonable person would, or should, do in a given instance.

From the perspective of the plaintiff who wants, and may need, to be compensated for the injury which has occurred, the flexibility of the reasonable person standard offers a greater opportunity for the recovery to be mandated by a jury. As cited above, the compensatory factor in negligence litigation is a compelling one for society as it allows victims to be granted recovery for their injury as a part of societal mores. While this tradition has a danger of too much flexibility, the court may direct a verdict when circumstances warrant such action.

In conclusion, the reasonable person standard offers the objective measurement of the behavior of persons who owe a duty to another. The flexibility which is offered by this test allows society to have an additional impact upon the interpretation of the law in cases in which foreseeability is a factor for consideration. The influence which this concept has exerted is perhaps best described by Collins.
(1977) in stating that the reasonable person is "an entity whose existence has had a greater impact on the Anglo-American system of jurisprudence than most of the renowned jurists of the last three centuries" (p. 312).

Conclusion

The foreseeability of circumstances or actual occurrences which encourage, or do not sufficiently deter, incidents which result in personal injury litigation have numerous factors which are considered. Liability for negligence may be found if a duty is owed and breached or a special relationship intensifies the duty which is owed. The reasonable person test will be used to measure the conduct of the defendant in such matters.

When negligence is alleged against a postsecondary institution the relationship between the student and the institution is a crucial element in the outcome. A number of theories exist which define the relationship, but no single theory effectively encompasses all the facets of the relationship.

Absolute institutional autonomy characterized in loco parentis, the accepted theory prior to the protests of the 1960s. This autonomy was struck down completely by the Dixon decision in 1961 and the change in the age of majority in 1971. Some services which students have come to expect from institutions today have many of the characteristics of those provided during the era when in loco parentis was the accepted theory.

The constitutional theory was mandated by the change in the legal age of majority and by the outcome of the Dixon case in 1961. College students do have the rights granted to citizens by the Constitution and may not be deprived of those rights by matriculating at a public postsecondary institution.

Contract theory is found in the enrollment contract between the student
and the institution and is also present in the housing contract which students enter when residing on a residential campus. This theory was forwarded and legitimized by the lowering of the age of majority. Almost every college student possesses adult status and may enter contractual agreements with the rights and responsibilities of an adult.

Consumerism has characterized the student/institutional relationship in recent years. As federal financial aid dollars are used to provide access to higher education for a larger segment of the population and smaller numbers of prospective students are graduating from high school, a “buyers” market in the recruitment of students has developed. Consumerism in higher education strives for accountability through a reciprocal relationship between the student and the institution. Open access to information concerning all aspects of the institution, responsiveness to student needs, and active student participation in the institutional decision-making process are each elements of student consumerism.

Combinations of these theories govern the relationships between postsecondary institutions and their students in the litigious climate of today’s society. As decisions are rendered by the courts the student/institutional relationship is slightly altered and will continue to change to reflect societal desires and mores.

The significant increase in litigation involving higher education in recent years has resulted in greater interest in concepts of legal issues among college officials and students. The concept of foreseeability is a significant factor in many lawsuits seeking recovery for injuries allegedly caused by negligent behavior on the part of institutional officials.

Cases claiming negligence following personal injuries in college or university residence units will consider a variety of duties to which the institution may be held. The duty to protect students, including the duty to warn of
hazards of which the institution is, or should be, aware, is a significant requirement reminiscent of the era during which the theory of in loco parentis governed the student/institutional relationship.

The duty to provide safe premises arises from the landlord/tenant relationship between the college or university and the student. The housing contract generates this obligation in the case of the residential institution. The enrollment contract and the special relationship give rise to this duty for students who do not reside on the campus.

The duty to respond to dangerous conditions relates to the duties to protect and to provide safe premises. A natural progression is evident, using the landlord/tenant relationship to justify the need for a prompt response to hazards of which institutional authorities become aware, or should become aware.

This chapter has reviewed the dramatic increase in litigation during the last two decades. Personal injury claims have contributed to this increase. The concept of foreseeability is a significant factor in many personal injury cases. Three cases of particular interest will be examined in the next chapter with a description of the role foreseeability played in the outcome of each case.
CHAPTER III
SIGNIFICANT CASES IN WHICH FORESEEABILITY WAS A MAJOR FACTOR

Introduction

Foreseeability was a significant factor in the outcomes of three cases which were decided in the period of 1978 to 1985. These cases involve personal injury litigation against a college or university. Each of these cases will be reviewed in this chapter. The cases are: Duarte v. State of California (1978), Mullins v. Pine Manor College (1983), and Miller v. State of New York (1984). An examination of these cases will present the facts of the case, the pleading of the plaintiff and defendant, and the outcome of the original hearing and any appeals.

Duarte v. State of California
148 Cal. Rptr. 804 (1978), 151 Cal. Rptr. 727 (1979)

Tanya Gardini was raped and murdered in her residence hall room at California State University at San Diego on December 2, 1974. Her mother, Yvonne Duarte, brought suit against the State of California as a result of this incident.

"Duarte's complaint tendered contract, negligence, wanton and wilful misconduct, and negligent misrepresentation as alternative theories of liability" (p. 806). Mrs. Duarte claimed that "a chronic pattern of violent assaults, rapes and attacks on female members of the university community had been in evidence and was escalating" (Young & Gehring, 1978, p. 325). She also contended that the university was aware of the dangers but continued to represent their housing
facilities as safe, and that no reasonable measures had been taken to protect or warn students of the dangers. The final allegation Mrs. Duarte made was that the agreement which Tanya had entered by signing a housing agreement created a stronger obligation than the traditional landlord/tenant relationship, because she had surrendered more of the control of her safety to the institution than would have been the case in a housing unit away from the campus. These circumstances, Mrs. Duarte claimed, created a special relationship which bound the university to a legal responsibility to remedy the dangerous situation which existed. "The university claimed that even if the allegations were true as stated that the complaint failed to state a claim for which relief could be granted" (Young & Gehring, 1978, p. 326).

The original decision "sustained demurrers to plaintiff's cause of action without leave to amend" (p. 804). This means that objections to the plaintiff's case were raised by the defendant, and the court dismissed the case without offering the plaintiff an opportunity to alter the allegation against the defendant. Mrs. Duarte appealed this decision.

The claim of "wanton and wilful misconduct" (p. 806) was dropped as the appeal was filed. Mrs. Duarte's appeal alleged that the "university expressly and impliedly represented that the housing facilities were reasonably safe and secure for their occupants" (p. 806). The claim also contends that prior to this particular incident "the university was aware there was a chronic pattern of violent assaults, rapes and attacks on female members of the university community, and that this pattern was escalating" (p. 806). In addition to being aware of the criminal activity, Mrs. Duarte's allegation charges that "the university failed to take responsible precautions to reduce the hazard and to protect the residents in the university dormitories or to warn the students or to train the students to
protect themselves" (p. 806). The university and its officials were also “engaged in a pattern of covering up these events so that the true extent of the violence on the campus was not generally known to Duarte or the university campus” (pp. 806-807). The case also makes a compelling statement about the housing agreement which forced Tanya “to submit herself to the control of the university far more extensively than does the university student not living in a resident dormitory” (p. 807). The plaintiff alleges that this “agreement provides far greater control of the student than does the ordinary landlord and tenant relationship” (p. 807), and that both a “special relationship” existed between Tanya and the institution as an outcome of the residence agreement and “a dangerous condition’ existed” of which the university was aware and “for which there is a legal responsibility” (p. 807) arising from the fact that the university is accountable for the campus.

“Duarte contends the university has a duty to provide reasonable security from foreseeable criminal acts against student tenants by third party intruders” (p. 807). She further raises the issue of a “contractual obligation” (p. 807) for the university to “provide ‘a safe residence’” (p. 807) as a landlord would for a tenant and that the defense of “the sovereign immunity doctrine does not shield defendants from liability” (p. 807). The university continued to contend that the plaintiff had not stated “a claim for which relief could be granted” (Young & Gehring, 1978, p. 326).

The appeals court found that Mrs. Duarte “had stated a claim for which relief could be granted” (Young & Gehring, 1978, p. 326). On this basis a rehearing was granted.

On rehearing the case the court reversed the vacated decision of the initial appeal barring recovery. The court “held that the university owed a duty to
students to provide an essentially safe place of residence and the student's mother had stated a cause of action by alleging that the university officials negligently misrepresented the safety of their dormitories" (Young & Gehring, 1979, p. 344).

Citing Kline v. 1500 Massachusetts Avenue Corp. (1970), as the landmark decision in incorporating the landlord's duty to protect, and contract theory in which the duty of care requires that reasonable measures be taken to avoid harm or injury from third parties, Tanya's relationship with the university is termed "a landlord-tenant relationship-plus" and a "special landlord-tenant relationship" (p. 812). The contract established by the housing agreement entitled Tanya to more than simply a residence. She could expect "an essentially safe place of residence" (p. 812), because, by the nature of the special relationship established by the housing agreement contract, she had "submitted her security to control by the university" (p. 812).

"The opinion on rehearing was almost a verbatim copy of the original" (Young & Gehring, 1979a, p. 344). The university was obligated to offer a safe residence. The institution's negligent misrepresentation of the level of safety of its residences resulted in a finding for the plaintiff.

The plaintiff's contention that the institution was negligent in stating that the residence units were safe, when in fact they were not, and university officials knew they were not, was upheld by the court. In the words of the court, "An obligation arose to provide such protective measures which were within the university's reasonable capacity to thwart or diminish the possibility of foreseeable assault" (p. 812).

The issue of foreseeability is significant within this case. The risk of harm was foreseeable based on the previous criminal acts of which institutional officials were well aware. In establishing duty and liability, foreseeability is "the
most important consideration” (p. 805). The officials of the university were also cognizant of the “conditions inviting further assaults” (p. 812).

The Duarte case also dealt with the question of immunity for a state university. The court found that the landlord/tenant contract, the dangerous condition which existed, the failure of institutional officials to protect Tanya, and the fact that, where negligence is established, sovereign immunity is not appropriate. Thus, the court restored the judgment which the first appeal court had reversed.

Mullins v. Pine Manor College

Lisa Mullins, a first year student at Pine Manor College, lived in a campus residence hall as required by college regulations. Between 4:00 AM and 4:30 AM on December 11, 1977 Lisa was abducted from her residence hall room, walked across the campus, and raped in the college dining room. The incident took between sixty and ninety minutes. At least twenty minutes were spent walking outdoors on the campus. Her assailant was never identified or apprehended.

The campus of Pine Manor College was surrounded by a wall, each residence hall entryway and gates into common areas between residence halls were to be locked at night, and two security guards were on duty at the time the incident occurred. One guard was to be patrolling the campus at all times. Although the college “is located in an area with relatively few reports of violent crime” (p. 334), subways and bus stops for transit to Boston are near the campus, and the students were warned by the dean during their orientation about “the dangers inherent in being housed at a women’s college near a metropolitan area” (p. 337).

The residence hall exterior doors, common area gates, and individual residence hall room door locks were easily compromised. Supervision of the night
security force was haphazard. "There was also ample evidence that the guards failed to perform their duties both prior to the attack and on the evening of the attack" (p. 338).

Mullins sued Pine Manor and the Vice President for Operations seeking "to recover for injuries suffered" (p. 47). The College and the Vice President for Operations contended "that they owe no duty to protect students against the criminal acts of third parties" (p. 50). The College also contended that "the criminal attack here was not foreseeable" (p. 54). The Vice President claimed that "he is entitled to the protection of the charitable immunity doctrine and that he cannot be held liable for mere negligence in the performance of a discretionary function" (p. 63).

Testimony at the trial revealed that the system of supervising the security force was haphazard and that, on the night of the incident, several of the gates and doors were either left entirely unlocked or were secured in a manner in which they could easily be entered without a key. The jury awarded Mullins $175,000 (Young & Gehring, 1983b, p. 541). The County Superior Court "entered judgment in favor of the student, after reducing the amount of the jury's verdict to $20,000" (p. 331).

An appeal was filed to the Massachusetts Supreme Court by the institution and the Vice President for Operations. The institution contended that no duty was owed to protect students, that the act was not foreseeable, and that the Vice President was immune as an officer of a charitable organization (Young & Gehring, 1983b).

The court found that "the college had a duty to provide security for its students," that "the college was negligent in performing that duty," "the negligence was the proximate cause of the injuries," and that "the vice president was not
entitled to avoid liability on the grounds that he was an officer of a charitable corporation" (p. 331).

The court affirmed the earlier judgment made against the institution and the vice president of operations. The decision of the court was based upon: the student’s relationship with the institution which caused the duty to protect; the inadequacy of the security system, the failure of which was a proximate cause of the injury suffered; the foreseeability of the incident; and the unavailability of immunity for the vice president.

**Miller v. State of New York**

487 N.Y.S. 2d. 115 (1985)

Madelyn Miller, a junior at SUNY-Stony Brook, was abducted from the laundry room of her residence hall at 6:00 AM on March 9, 1975. Her assailant threatened her with a butcher knife, blindfolded her, took her out of her residence hall and then back into the hall where she was raped. The exterior doors of Ms. Miller’s residence hall were always left unlocked despite previous reports of “various crimes, including a rape” (Young & Gehring, 1985, p. 610).

The Court of Claims heard the case and “imposed liability upon the State on the theory that it was acting in a proprietary capacity as a landlord” (p. 506). The State was found to owe a “duty to protect its tenants from reasonably foreseeable criminal assaults by outsiders” (p. 506-507). The State’s duty was breached “by failing to lock the outer doors of the dormitory” (p. 506) and “the failure to lock the outer doors was a proximate cause of the rape” (p. 507). A $25,000 award was made to the plaintiff (p. 506).

The State appealed to the Supreme Court, Appellate Division, claiming
that "the State does not owe a duty to claimant to provide her with such pro-
tection absent a special relationship between the State and claimant" (p. 436).
The opinion found that "although claimant sought to recover damages predicated
upon the State's liability as a landlord, in actuality, the claim was based upon
the State's failure to provide adequate police protection" (p. 436). The court
reversed the decision of the Court of Claims and dismissed the judgment.

The plaintiff appealed to the Court of Appeals contending that "The State
of New York has the same proprietary liability as a private landlord for injuries
sustained by its negligence in operation, management and control of its buildings"
(p. 507) and that "Where more than one theory of liability is presented, judgment
for claimant should be affirmed if any one theory of liability is supported by the
evidence" (p. 508).

The State's position asserted that the lower court had correctly found that
the State's failure to provide adequate police protection was the theory upon
which Miller's claim was founded. The State also contended "that since she
failed to establish that respondent had any special duty owing to her to provide
police protection, she failed to prove a cause of action for damages occasioned by
a rape" (p. 508).

"The Court of Appeals reversed and remitted the case to the Appellate
Division for further proceedings" (p. 507). The decision was based upon the
reasoning "that when the State operates housing, it is held to the same duty
as private landlords in maintenance of physical security devices," "that having
locked doors in the dormitory falls within the scope of the State's proprietary
function as a landlord, and that there was sufficient evidence to support the Trial
Judge's conclusion that the State's failure to lock the outer doors was a breach
of the State's duty and a proximate cause of the rape" (p. 507). Miller, in the
additional proceedings, based her claim upon "the ground of inadequacy" (p. 115) of the judgment in the earlier award for damages. "Upon remittal, the Supreme Court, Appellate Division, held that considering the horror of the rape itself and the consequences that followed, award of $400,000 was in order" (p. 115). The judgment was increased from $25,000 to $400,000 based on the facts of the case.

Conclusion

The three cases which are the focus of this study have been presented in this chapter. The facts of each case, the claims of the plaintiff and defendant(s), and the outcomes of the original hearings and any appeals are offered for a better understanding of each case.
CHAPTER IV

ANALYSES OF SELECTED CASES

Introduction

Duarte v. State of California (1978), Mullins v. Pine Manor College (1983), and Miller v. State of New York (1984) contain several elements which are important in case analysis. The concept of foreseeability is of particular significance in each case, and it was a factor in the final decision rendered in each instance. This chapter will present analyses of the three cases. Emphasis will be placed upon the role which foreseeability played in the decisions rendered. Each case will be analyzed using the following elements: the presence of foreseeability; the student/institutional relationship; the various duties which the institution owed the student; the nature of the breach of the duties which were breached; the presence of negligence; and the imposition of liability.


The Duarte case was decided in favor of the plaintiff. The decision was based upon: (a) the duty which the university owed students to offer a "safe place of residence", (b) the fact that university officials knew of previous criminal behavior which created a foreseeable danger to students, and (c) the fact that institutional officials persistently misrepresented the campus and university housing facilities as safe, when in fact they were not, and the officials knew of the hazards which existed.

The element of foreseeability stands out in this case because of the previous
criminal assaults which occurred and the fact that an escalating pattern of violent behavior was documented. Officials of the institution were aware of these assaults and the escalating pattern which was developing, but no measures were taken to enhance the security of the residences or the campus.

The foreseeability of the dangerous condition and the potential hazard for the students gives rise to a duty to offer protection to these students. This obligation is intensified in several ways in this case. The first is the special relationship between the institution and the victim. She had surrendered an ample portion of her ability to provide self-protection by residing in a residence hall which the institution presented as being secure and safe. The second factor which led to an intensified obligation was the failure on the part of the institution to warn the students of a potential hazard. Notifying the students of the incidents which had occurred in the past and offering additional security measures are options which would have partially fulfilled the institution's duty to warn obligation. An effort to empower students to protect themselves would have been another appropriate measure. Empowerment could have been achieved through educational programming focused on safety awareness and self-protection techniques. Distribution of information making students aware of the hazards would have made the students somewhat more responsible for their own safety. As demonstrated below in the discussion of the Mullins (1984) case, the warning alone is not sufficient to fulfill the obligation. The presence of the special relationship requires the university to institute additional security measures when previous criminal activity has occurred. The evidence at trial indicated that a concerted effort was made by the institution to conceal the facts about the pattern of violent behavior which had developed. This effort left the students unaware of the danger. Officials, in both written and oral communications continually misrepresented the campus,
and the residence facilities, as safe. The awareness of previous incidents, coupled with the institution's misrepresentation of the level of safety present, strengthens the obligation created by the foreseeability factor. The risk of additional assaults was great. As Weeks (1980) notes, when discussing Duarte, "a rash of criminal attacks made repetition foreseeable" (p. 7).

The duty which was owed to the victim was breached in several ways. The failure of the institution to take reasonable measures to remove the danger which existed by taking additional measures to enhance security was a significant factor. Secondly, misrepresenting the campus and the residence halls as safe when the university officials knew that they were unsafe. Also, failing to warn the students that the dangers were present. Lastly, the overall concern of failing to offer Tanya Gardini a safe place of residence.

The existence of a special relationship between Tanya Gardini and the university was also important in the outcome of this case. The landlord/tenant relationship, as established by the housing agreement which Tanya entered with the university, is one element which leads to this special relationship. Another factor is the enrollment contract which was entered by virtue of her attendance at the university.

The dangerous condition was present and the duty the institution owed the student, through the special relationship, obligates the university to take reasonable measures to remove the danger. In this case the university took no measures to enhance the level of security or to warn the students of the present danger.

Several of the citations used to establish the special relationship, which created an extra obligation for the institution, are also important to this discussion. Tarasoff v. Regents of University of California (1976) stated "when the
avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim" (p. 434-435). Section 315b of The Restatement (Second) of Torts (1965) defines the obligation as "a special relation ... between the actor and the other which gives to the other a right of protection." Prosser (1971) listed "carrier and passenger, innkeeper and guest, school district and pupil, employer and employee, landlord and tenant" (p. 174) as relationships which are legally understood to bear some legal obligation for protection on the part of the dominant party. As Prosser adds, "The list and the concept has a general elasticity, characteristic of tort law principles" (p. 174). This "elasticity" has spread to include court defined relationships such as the one which existed between Tanya Gardini and the University of California.

In addition to the three citations discussed in the previous paragraph, Young and Gehring (1979) found that Duarte set the stage for later cases by establishing the special relationship through Gardini's housing agreement. Miller and Schuh (1981) found that "the difference between a traditional landlord/tenant relationship and her 'special relationship' was that she had surrendered control of her security to the institution" (p. 393).

The duty to protect in the sense of providing a safe residence is a strong obligation when coupled with the fact that the institution consistently misrepresented the residences as safe in literature which was distributed, as well as verbally during orientation sessions with students and parents. The Duarte court stated that the institution should have taken "reasonable steps to protect residents from criminal assaults under circumstances where an attack is foreseeable" (Buckner, 1988, p. 235). The attack was clearly foreseeable based upon the previous
criminal activity of which the institution was aware. The fact that the institution concealed the knowledge of the previous criminal activity from the university community intensified the obligation which the institution owed because of the misrepresentation of the level of safety on the campus.

Negligence is found in this case as it is negligent to fail to make a reasonable response to a dangerous condition of which one is aware, or should be aware, if one has entered a relationship with another which would be considered special in nature or if one has a duty to another person or group of persons. A number of these elements are clearly present in the Duarte case. The institution possessed an obligation to the victim as a product of her housing agreement and the enrollment contract. The relationship was a special one because of the nature of the contractual arrangement through which she relinquished much of her ability to provide self-protection. It is equally clear that the danger was present, known to the institution, and that the university chose not only to fail to respond, but to conceal the nature of the threat of harm from the university community by negligently misrepresenting the atmosphere on campus and in the residence units as safe and secure. All of these factors combine to create the state of affairs which results in a finding of negligence on the part of the institutional officials with the presence of a duty and the breach of the duty being the key determining factors.

Negligence is now established on the part of the university officials. This negligence subjects them to liability for the harm which occurred because of the duty which existed and the breach of the duty. Liability was imposed in the Duarte case because of the reasonably foreseeable result of the negligent behavior of the defendants. The university officials clearly failed to fulfill their obligations to the victim. They knew of previous criminal behavior, including assaults, but failed to issue a warning or to take reasonable steps to remove or reduce the
hazard. Their overt action in concealing the information that the residences were not safe was an additional factor contributing to the finding of negligence.

Chapter II presented a brief discussion of the limitations placed upon liability. Proximate cause is one element which may contribute to the limitation of liability. In Duarte the failure of the institution to respond appropriately to the danger was a proximate cause of the injury which occurred. This removed proximate cause as a potential limitation upon the liability which was imposed. Contributory negligence is another factor in limiting liability. This factor was not present, nor even alleged, in the Duarte case. The scope of the foreseeable risk of unreasonable harm is the determining factor in this instance. Previous criminal activity made the incident foreseeable. The duty which the university owed, as a result of the housing agreement and the enrollment contract, make the harm which Gardini endured unreasonable. The negligent misrepresentation of the level of safety in the residence hall, the victim's reliance upon this false information, the failure to warn the victim (with no evidence presented to indicate that the victim was aware of the danger which was present), and the failure to provide a safe premises (with the victim again relying upon the university to fulfill the obligation to offer a safe and secure environment in the residence hall), result in the university being found liable for the harm which occurred when the victim was assaulted and murdered in her residence hall room.

When the reasonable person test is applied to the behavior of the university officials, negligence is clearly present in their actions. Their failures to respond to the present danger and to warn the victim are very important in relation to the reasonable person test.

In Chapter II liability is discussed in terms of deterrence and compensation. The Duarte case relies equally on both of these elements. It is clear that the
university must be forced to alter the policy of misrepresenting the environment as a safe and secure one. The blatant nature of the misrepresentation makes the deterrence element more important. This is not a case of a mistake which was honestly made, but an error in judgment which institutional officials perpetuated over a period of time. University officials must also be deterred from failing to respond to future dangers when they are aware of them or when they should be aware of the hazards.

The compensation element is fulfilled in the Duarte case. The court and the jury establish that relief is necessary for the wrongful death which occurred and the need to allow the victim’s mother to recover damages from the university as a result of this incident.

In conclusion, the Duarte case serves as a landmark decision in negligence litigation involving personal injuries in college or university residence halls. As demonstrated in this discussion, foreseeability is a significant factor in establishing the obligation which the university owed to the victim. The failure of institutional officials to fulfill this obligation was the proximate cause of the harm which occurred. The institution was found to have been negligent as a result of failing to fulfill the obligation. Liability was then imposed as a result of the negligent behavior.


The Mullins case emphasized the importance of the duty to protect. Reasonable measures must be taken to offset foreseeable dangers. The failure of Pine Manor College to develop an adequate security system in response to the dangers which were foreseen was the primary legal responsibility which the institution failed to fulfill.
The duty owed to Lisa Mullins was a significant one because her enrollment contract compelled her, as a first year student, to reside on the campus. If she had merely chosen to live on campus and had no other connection with the institution, the landlord/tenant relationship would have been the sole obligation owed to her by the college. However, enrolling as a student at the college and being thus required to reside in a campus residence hall, a special relationship arose creating an increased level of obligation for the college to provide a safe environment in the hall. All five judges who heard this case on appeal concurred "that the College had a duty to protect students against criminal acts of third persons" (Young & Gehring, 1983b, p. 542).

Foreseeability is an extremely important element in the Mullins case. "The risk of such a criminal act was not only foreseeable but was actually foreseen" (Mullins, 1983, p. 337). As stated in Chapter III, the dean had warned the students during their orientation regarding the dangers which were present. The institution attempted to base a defense against the foreseeability of a violent incident upon the fact that no previous criminal activity had been reported. The court responded by asserting that the "standard of foreseeability turns on examination of all the circumstances" and that "prior criminal acts are simply one factor among others that establish the foreseeability of the act of the third party" (Mullins, 1983, p. 337). The dean's warning clearly established that the institution was aware of, and concerned about, the safety of the students to the degree that they would issue a blanket warning during the orientation period for all new students. That demonstrates the fact that the danger was foreseen. The fact that danger was foreseen, when combined with the special relationship established by the housing and enrollment contracts, generates an extremely strong obligation for the institution to fulfill.
The Mullins decision repeatedly mentions the importance of security and the institutional responsibility to maintain security. "Adequate security is an indispensable part of the bundle of services which colleges, and Pine Manor, afford their students" (Mullins, 1983, p. 336). Speaking to the more general duty to protect, the Mullins (1983) court stated "Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm" (pp. 331 & 336) and "it is quite clear that students and their parents rely on colleges to exercise care to safeguard the well-being of students" (p. 336). This statement reinforces the duties to protect, to provide safe premises, and to respond to hazardous conditions. Despite the knowledge that a danger existed and the actual warning which was given, the security system of the college was inadequate and, following the warning, no reasonable measures were taken to improve the security or to diminish the risk.

The college's security system consisted of two guards at night (one of whom was to be patrolling the campus at all times), a wall around the campus, and locks on gates to commons areas, locks on front doors of residence halls, and locks on the room doors within the halls. The activities of the two guards were only randomly checked rather than having a consistent and reliable supervision pattern. Evidence presented during the trial indicated that the guards were not fulfilling their responsibilities on the night of the incident or at other times. The locks of gates, hall doors, and room doors were easily bypassed without the benefit of a key.

The various duties owed to Lisa Mullins by Pine Manor College were breached in several ways. The first breach is the failure to establish and maintain a reasonable security system given the circumstances, and particularly because
of the warning issued relative to the danger. Consistent supervision of the guards would have been a minimal measure to be taken in this instance. Secondly, the inadequacy of the mechanisms used to maintain the residences as secure is a factor. The locks, as stated above, could easily be compromised. The third aspect of the breach is the failure of the institution to take additional security measures to protect students following the warning which the dean issued, confirming the danger. When a special relationship exists it is not enough to simply issue a warning and rely upon those to whom the special relationship grants an obligation to protect themselves thereafter. Despite the warning the college must still fulfill the duty to provide safe premises and respond, with more than a warning, to hazardous conditions.

Negligence is found because the response to the foreseeable danger is not a reasonable one. Repairing or replacing the locks, directing students to keep these locks secured, having trained security officers consistently checking the exterior gates and doors, and providing a system of supervision for the security staff would have removed, or dramatically reduced, the hazard. Such measures would have also diminished the exposure to negligence for the College. However, these measures were not taken. Nor were any other measures taken despite a foreseen danger. Thus, a finding of negligence was the outcome.

Liability was imposed as a result of the negligent failure to respond to the dangers. The presence of the duty, through the foreseen hazard, and the breach which occurred as a result of negligent behavior (actually an omission in this instance) resulted in liability being imposed on the institution.

The negligence of the college was certainly a proximate cause of the injury to Lisa Mullins. Although Pine Manor accused Mullins of contributing to the negligence by her behavior the night of the incident, the court found no evidence
sufficient to limit the liability based upon contributory negligence on the part of the plaintiff. Limiting the liability in this instance to the scope of the reasonable foresight does not provide a great limitation. The danger was clearly foreseen by institutional officials as demonstrated by the warning issued during orientation at the beginning of the school year.

When the reasonable person test is applied to the behavior of Pine Manor College, the failure to improve the security system and repair or replace the locks on the gates and doors are the deciding factors in evaluating the defendant's conduct. Knowledge of the threat, as demonstrated through the dean's warning, confirms the failure on the part of the college to pass this test.

Mullins serves as the case in which the duty to protect is decidedly emphasized for the first time. Duarte implied that such a duty exists but stopped short of the emphasis which Mullins places upon the obligation. This emphasis provides a contradictory scenario when the student's relationship with the institution is considered. When considering other issues the courts have found that college and university students have the legal status of adults. As such, they receive a variety of privileges which characteristically accompany the adulthood classification. The contradiction presented by the Mullins decision is the obligation of the institution to protect the student who possesses the adult status. A duty to protect goes beyond the typical landlord/tenant relationship which requires the landlord to provide a safe premises and respond to dangerous conditions. The obligation of protection is an affirmative requirement which is customarily imposed when one has custody of a child or an adult who is incapable of caring for him/herself. Relegating college and university students to that category of person is a dramatic contradiction to their legal status as adults. The duty to protect, as established by the Mullins court, further complicates the difficulties already
present in the student/institutional relationship by introducing the requirement of protection of students who legally possess the status of adults.

Szablewicz and Gibbs (1987) stress the importance of the expectation which students have that the college or university will protect them. They contend that a “new defacto in loco parentis” (p. 457) is being created. Student’s expectations that the institution will be responsible for protection is a dramatic change from the 1960s when students wanted to eliminate institutional controls. It is also interesting to note that when referring to the duty to protect, the Mullins court lists parents before students or the community in the written opinion of the court. Although this may be coincidental, mentioning the parents first, or at all, contradicts the student/institutional relationship theories which focus on the student as an adult and do not mention any role for the parents.

In conclusion, Mullins confirms the existence of the duty to protect as an obligation for institutions which assume responsibility for security of residence facilities into which students move as a result of their enrollment and housing agreement contracts. The outcome of this case rested upon the institution’s knowledge of a dangerous condition and the failure on the part of the institution to take reasonable measures to respond to the danger.

The Mullins case also raises questions about the nature of the student’s relationship with the institution. The wording and the references to the duty to protect are presented in a manner which may be the beginning of a shift back toward certain institutional responsibilities associated with in loco parentis. Courts customarily incorporate societal expectations into their decisions. Several statements in the Mullins opinion lead to this conclusion: “Adequate security is an indispensable part of the bundle of services which colleges, and Pine Manor, afford their students” (Mullins, 1983, p. 336); “Parents, students, and the
general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm (Mullins, 1983, pp. 331 & 336); and "students and their parents rely on colleges to exercise care to safeguard the well-being of students" (Mullins, 1983, p. 336). These statements demonstrate a more conservative societal viewpoint than would have existed five or ten years prior to the Mullins decision.

Although the perceived nature of a small private college, like Pine Manor, may contribute to the conservative orientation of the opinion of the court, the orientation is presented in the opinion nonetheless, and provides a strong statement for the future of private higher education in the sense of the nature of the institution's relationship with students. The Mullins decision will be cited as a precedent as other, similar assaults occur at private colleges.

Case precedents may come to include public institutions as well. This may lead to a body of case law which supports the reemphasis of a doctrine not unlike in loco parentis in the nature of the legal responsibility which it requires of postsecondary institutions in protecting their students in matters related to residence halls.


The concept of foreseeability stands out in the Miller decision. Evidence at trial established that institutional officials had been made aware of the problem of unescorted men in the hall. Other crimes, including a rape, had been reported, and the student newspaper of the institution had documented some of the criminal activity prior to the incident in which Miller was involved.

The creation of the duty, owed to Miller by the institution, occurred through
Miller's enrollment contract and her housing agreement with the institution. The foreseeability of the danger, as described by the previous paragraph, confirmed the duty which the institution owed to Miller. Several duties are involved in this case. The duty to protect arises from the landlord/tenant relationship entered through the housing agreement. It is interesting to note that the duty to protect was affirmed despite Miller's failure to establish the existence of a special relationship between herself and the university. The duty to warn exists, because the institutional officials were made aware of the danger through the reports and complaints they received of previous incidents, nonresidents being present in the halls, and the student newspaper's documentation of the dangers. Institutional awareness of the hazards gives rise to the duty to respond to dangerous conditions and the duty to provide a safe premises. The various obligations were significant ones because of the foreseeability of the dangers and the nature of the relationship between the student and the institution.

Great emphasis is placed upon the significance of the institution's failure to take the token security measure of locking the exterior doors of the residence hall in which Miller lived. Although other measures were also neglected, this minimal step became a central focus of the case as it was termed a proximate cause of the harm which occurred.

The Miller case also confirmed that management of campus residences was not a "discretionary exercise of governmental function" (Young & Gehring, 1985, p. 610) even when performed by the state. As a proprietary function, the customary legal responsibilities associated with the landlord/tenant relationship were required of the state when it served as a landlord. This was significant in the Miller case, because the state attempted to avoid liability by claiming immunity from prosecution for liability based upon the claim that management of the halls
was a governmental function.

The breach of the duty to provide safe premises in Miller occurred when the institution failed to respond to the danger of which the institutional officials were aware. No additional security measures were instituted despite the knowledge of the existence of the dangerous condition arising from the previous criminal activity which was reported. Failing to respond to a hazardous condition, when a duty exists, constitutes a breach. The duty to protect was breached when Miller was abducted and raped. The duty to protect and the duty to warn were less significant issues in this case than in Duarte and Mullins as the emphasis was placed upon the failure to respond to the dangerous condition which existed by locking the outer doors of the residence hall in which Miller lived.

Negligence is evident in the failure of the institution to fulfill the obligations imposed by the duties which were owed to Miller. Leaving the outer doors of her residence hall unlocked at all times was a negligent act when coupled with the duty which imposed a legal responsibility to provide a safe premises in which Miller could reside.

The negligence of the institution was found to be a proximate cause of the harm which followed. The court found no contributory negligence on the part of Miller. The scope of the reasonable foresight limitation is negligible based upon the clear foreseeability of the danger because of the previous criminal behavior and the fact that the institution had taken no additional security measures to off-set the hazard which existed.

Liability was imposed following the finding of negligence. There was a duty owed to the plaintiff which was breached by the defendant's negligent conduct, and the court imposed liability as a result.

The reasonable person test, although not specifically mentioned in the text
of the decision, would have been decided in favor of the plaintiff if it had been applied. The failure on the part of the institution to respond to the previous criminal activity with any measures to enhance the level of security in and around the residence hall make the outcome of this test apparent.

In conclusion, the Miller case was similar to Duarte and Mullins in the sense that foreseeability was a significant determining factor in the outcome. Miller was decided based upon the duties owed to provide a safe premises and to respond to dangerous conditions. These two duties arose from the institution's function as a landlord. The institution was made aware of the conditions through reports by resident students and documentation in the student newspaper. No additional measures were taken to remove the foreseeable risk of harm, the injury occurred when Miller was abducted and raped, and the institution was held liable for the negligence of failing to respond to the known dangers.

Conclusion

Foreseeability is a very significant factor in the outcome of each case reviewed in this chapter. Although the foreseeability issue was somewhat different in each instance, the presence of foreseeable dangers was instrumental in establishing the duty which each institution failed to uphold. The result in each matter was the same: a finding of negligence as a result of the breach of the duty established by the foreseeability of criminal activity.

Knowledge of previous criminal activity was the basis for foreseeability in Duarte (1978) and Miller (1984). The statement of warning by the dean during the orientation period in Mullins (1983) indicated that college officials foresaw the danger of criminal activity. The general threat of harm was either foreseeable or foreseen in all three cases. The duty of protection owed to the students became
a stronger obligation by virtue of the foreseeability of the threat of harm.

Examining all the facts of a situation is important as decisions regarding foreseeability are considered. The duty to protect the students is the most evident duty. The duty to provide a safe premises and the duty to respond to dangerous conditions are also important issues. The institutions in the Mullins (1983) and Miller (1984) cases were, or should have been, aware of the deficiencies in the security systems used to protect their campuses and individual halls on the campuses. The facts about previous criminal activity were concealed from students in a fraudulent manner in the Duarte (1978) case. As stated above, the previous criminal behavior in Duarte (1978) and Miller (1984) intensified the duty to take reasonable measures to respond.

The duty to warn element of the duty to protect was exercised in Mullins (1983), but it must be accompanied by additional preventive measures on the part of the institution. Miller (1984) does not speak to warnings issued about criminal behavior, but no efforts appear to have been made to secure the outer doors of the residence halls or to respond to the reports of non-residents in the halls.

Each factor described contributed to a stronger duty on the part of the institution to respond in a reasonable manner to the dangers which were present and of which institutional officials were, or should have been, aware. The courts found, in these three cases, that the danger was foreseeable and that the institutional response to the danger was insufficient given the circumstances of the case.
CHAPTER V

IMPLICATIONS FOR HIGHER EDUCATION

Introduction

There has been a dramatic increase in litigation involving postsecondary educational institutions during the last two decades. The three cases reviewed in this study are products of this increase and demonstrate the importance of the concept of foreseeability as it relates to personal injury litigation for colleges and universities. Although there are numerous implications for the higher education community as a result of the increase in litigation and the importance of foreseeability in personal injury litigation, this study focused on three broad categories which are significant. The first category is represented by the relationship between the student and the institution of attendance. The second relates to the imprecise nature of the concept of foreseeability and the resultant difficulties which arise for officials of institutions of higher education. The third is the decline in the autonomy of the decision-making processes at colleges and universities. A number of implications are inherent in each of these broad categories. Each will be discussed in this chapter in an attempt to achieve a better understanding of the impact these implications have for the future within the higher education community.

The Student/Institutional Relationship

The nature of the student/institutional relationship is, and will be, an evolving one. This relationship will be dependent upon current societal opinion
and legislative enactments. Court interpretations of the enactments and societal opinions and changes which institutions and students negotiate regarding their relations with one another are also very important in shaping the relationship between the student and the college or university. Chapter I of this study described the evolution of the legal relationship between students and postsecondary educational institutions. Each of the theories presented has an impact on some aspect of the total relationship.

The legal environment in society over the last twenty years has resulted in different theories being more appropriate at different times as the legal climate changes and societal mores dictate the necessity of judicial review. The lowering of the age of majority and the decline in the autonomy of public institutions following the Dixon (1961) decision are two significant changes which have transformed the student/institutional relationship from one of administrative fiat, under the concept of in loco parentis, to a more reciprocal arrangement which combines the contractual relationship of the enrollment contract with the consumerism philosophy in which the student actively contributes in decision-making regarding the educational enterprise.

There is presently no dominant theory which effectively encompasses all aspects of the student/institutional relationship. The courts are continually making modifications which reflect the current thinking of the legal community and their interpretations of the values which society would consider important in reviewing this issue. What may be expected is continued change in this relationship. Colleges and universities were conditioned to expect change to occur very slowly before the in loco parentis theory was struck down by the Dixon court in 1961. Little had changed in the legal relationship between the institution and the student from the Gott decision in 1913 until the early 1960s. Student protests in
the 1960s and the lowering of the age of majority in 1971 significantly accelerated the rate of change.

Contract theory placed the student and the institution in a more business-like arrangement with each other. Contract theory is valid today for some aspects of the relationship between the student and the college or university. However, the complexity of the relationships during the multiple-year period of a student’s matriculation, to say nothing of the number of relationships entered during that time, make contract theory inappropriate as the primary descriptor of the relationship which exists between the institution and the student. The contract itself, as delineated in the college catalog and other institutional publications, is one which only the institution is able to change. The institution can make these changes by altering the catalog from one year to the next with no input from students. Such a one-sided contract loses credence as acceptable for the student who has consistently seen his/her influence grow within the existing relationship.

The student has become a “consumer” of education in a “buyers” market. The power students possess in the decision-making process has effected the structure of traditional higher education. Administrators must use persuasion to achieve consensus and commitment as policy decisions are considered. Prior to the changes which began in the 1960s institutional officials had been able to rely upon the authority which the influence of their position in the relationship allowed.

The relationship between the student and the college or university has changed dramatically from a legal perspective. The de jure relationship, or the relationship as defined by law, is one in which the student retains basic constitutional rights and privileges not customarily offered to students by postsecondary educational institutions unless legal actions dictated their imposition.
However, de jure and de facto relationships can be quite different, particularly in tradition-bound environments like higher education. The de facto relationships, those which exist whether legally supported or not, have been slower to change as tradition gives way to legal decisions. Thus, day-to-day relationships are also effected by the alteration of the legal status through which these entities relate to one another. However, the relationship is still an evolving one, and one which is educational in nature. In this sense the student will derive the greatest benefit by achieving positive educational outcomes which are enhanced by the level and influence of the participatory role which the current legal climate has made available to the student. Institutions which espouse a more enlightened view of the educational process, and those whose traditions and local mores can cope with consensual decision-making and shared objectives, risk fewer legal actions for failing to recognize the legitimacy of active student participation in institutional governance and administration.

Another point which deserves consideration regarding the relationships which the student develops during the college years is the fact that a very small percentage of students will take legal action against the institutions which they attend. Although the legal relationship between the college or university and the student is an important issue for study and research, it is not an issue which the typical college student will spend any significant amount of time contemplating.

Traditional-age students enter college eager to develop relationships with other students and members of the faculty and staff of the institution, eager to be accepted, and determined to prepare themselves to begin their lives apart from the parental home setting. They remain relatively unconcerned about what their legal relationship is with the institution. Students are too busy struggling to survive academically, socially, and emotionally to be concerned about legal
relationships.

The nature of the legal relationship only comes into play when a crisis arises in which a student is considering litigation over a dispute with the institution. When such a dispute arises and litigation is considered the legal relationship becomes a factor of importance to the student. It must be noted however that while few students become actively involved in litigation, the outcomes of court cases have an impact upon institutions, their officials, and the relationships between students and the college or university far beyond the few students who are actively involved in the specific case which is heard. A specific college or university policy or procedure which is challenged in court and found to be unfair must be reviewed by personnel at all colleges and universities. It may then be necessary to change or remove specific policies to avoid future negligence judgments which could threaten the financial stability of a college or university.

The financial cost of compliance with a legally mandated change in policy or procedure can be significant. The three cases reviewed in this study are good examples. The inadequate security systems which allowed the assaults to occur in each instance must be changed by each institution. Costly measures to update the security systems effect tuition levels, other institutional fees such as room charges, and are an increased financial burden for taxpayers when public institutions incur these expenses. The specific damage award is often a large single amount which is also a drain on resources, but the cost of increasing the number of security personnel employed and making physical changes to security systems is an operating expense which continues beyond the initial outlay and becomes an increase in the yearly budget.

From the frame of reference of the institution, the legal relationship is a much more pressing concern. A certain number of crises, with the potential for
litigation to follow, are inevitable considering the number of students attending colleges and universities and the propensities of that age group for involvement in behaviors which involve significant risk of harm or injury. These tendencies of students, coupled with society's current willingness to use litigation to resolve disputes, almost insures that every institution will either be sued, become involved in a situation where a suit is likely, or that a court decision involving another institution will have implications which will effect the operation of other institutions even though each college or university has not actually been a party to the litigation.

The institution will be named in suits alleging negligence surrounding many of the injuries which occur on campus or at college-sponsored events. The "deep pockets" theory, which involves suing the party with the most money in the hope of achieving a large settlement or judgement, combined with the philosophy of some courts which provide compensation for injured victims regardless of fault, leaves institutions vulnerable to litigation in matters of personal injury. Thus, the advantage, from the perspective of the institution, of establishing a firmer definition for the student/institutional relationship is a significant one. Without a firm and consistently applied definition of the student/institutional relationship, institutional officials are always unsure as to how a court will interpret the relationship when a dispute is adjudicated. The flexible nature of the relationship, as it is presently interpreted in the literature and by the courts, offers some guidance but no simple, single-dimension theory upon which to base policies and procedures for institutional action.

The responsibility owed to the student by the institution is also important in a discussion of the student/institutional relationship. Despite the status of students as adults, society, and the courts, have the expectation that the
institution will assume a great deal of responsibility in offering protection to students on the campus. Many institutions either state or imply their commitment to offer a secure campus environment as a part of their pre-enrollment literature or during their orientation sessions for students and parents. Such a commitment, voluntarily entered by the institution, will be viewed legally as an obligation which must be fulfilled with reasonable care.

The responsibility for offering protection to students is particularly compelling for colleges and universities offering residence halls where, much like a landlord/tenant relationship, the student has given up a good deal of the ability to enhance self-protection. The housing agreement, though contractual in nature, becomes a greater obligation when it is combined with the enrollment contract which creates a special relationship between the institution and the student. In addition, some institutions require students to reside on campus. The obligation is increased by the one-sided nature of the contractual relationship and by the enforcement of the policy requiring students to reside in a particular environment in which the institution is responsible for security.

College students who live in campus residence halls are much more interested in freedom of access than in security measures. Most student residences on college and university campuses are designed to offer ease of access rather than to promote monitoring of visitor traffic or other security measures.

The responsibility for security is an institutional obligation, but is one which presents difficulties for institutional officials. Students have achieved adult status and are unwilling to be burdened with many restrictions upon their freedoms. At the same time, institutions are held to the duties of providing protection, warning of dangers, responding immediately to dangerous situations and conditions, and taking prompt action to remedy any hazard or danger which might result in
harm or injury to a student or a visitor. These protective services must at times be foisted upon a resistent group of young adults who, as an aspect of their recently achieved status as adults, have been granted a more influential role in institutional decision-making.

The result of the responsibility which institutions have for their students is that colleges and universities have less control or influence over students but an equal, if not increased, measure of responsibility for their protection or for furnishing compensation in the event of a harm or injury. Much of the control factor has been removed in the last twenty years, but the legal responsibility remains a significant one.

The student/institutional relationship on a day-to-day basis can quickly deteriorate to an adversarial one even without litigation. Conflicts may arise when students who are not particularly concerned about security measures for their protection are confronted by officials who are responsible for maintaining a safe environment and are attempting to institute measures to avoid hazards which may be barely foreseeable to the student. Such dangers will frequently become obviously foreseeable should a harm or injury occur and litigation result.

In summary, the student/institutional relationship is an evolving one influenced by the mores of the individual institution, the values of the surrounding community, and legal decisions. The typical relationship in today’s higher education is one which combines three elements. Contract theory governs the overall relationship and several smaller components within the enrollment contract. Student consumerism represents the student-as-citizen philosophy which is generally accepted in today’s higher educational marketplace. Certain aspects of the traditional in loco parentis philosophy have recently been accepted as they have been modernized to eliminate the aspect of control of student’s morals while
retaining the elements of service and concern for students which characterized
in loco parentis before its demise.

The importance of the student/institutional relationship in higher education
is that it serves as the basis for establishing the duty which an institution
owes the student when legal issues arise. One difficulty which is inherent in the
change process, as it relates to the relationship and legal issues, is the matter
of the perspective from which the relationship is viewed when a dispute arises.
As described above, there are several authors who believe that certain aspects of
in loco parentis continue to be valid as expectations of the institution. Conflicts
quickly arise when a service or duty is seen as the institution's responsibility by
students, parents, or the attorneys for one or the other. Such situations custom­
arily arise after a crisis in which some harm or injury has occurred for the student.
There is no opportunity after the fact to negotiate the different elements of the re­
lationship, as the harm or injury for which recovery is sought cannot be removed.
The courts are left with the task of determining the nature of the relationship
under the circumstances of the particular case in question. This responsibility
entails decisions of law based upon statutes, established precedents, the facts of
the matter, and societal needs and desires of the times.

The legal duty which is in question when a student and a postsecondary
institution have a dispute regarding a personal injury in a campus residence hall,
arises out of the relationship between the institution and the student. Although
each case is different, depending upon the facts, the institution owes a duty to
the student because of the contractual nature of the housing agreement, just
as a traditional landlord/tenant relationship compels the landlord to observe
certain duties in relation to the tenants. A special relationship is often found
which increases the level of the obligation owed by the traditional landlord/tenant
relationship. If no specific duty is found by the court, there can be no negligence, and no liability. The presence or absence of a duty is determined by the court as a matter of law.

The foreseeability of harm, in the specific situation at hand, is the test used to establish a legal duty. The judge uses the foreseeability test, the reasonable person standard, and the individual circumstances of the case at trial to arrive at a decision regarding the presence of a duty. If a duty is established, the case is given to the jury to determine questions of fact unless the outcome is so obvious that a directed verdict is invoked by the judge.

The student's relationship with the institution is the foundation upon which the duty is established when litigation is entered by a student, or on behalf of a student, against the institution. The evolving nature of the relationship must be consistently monitored and further study would be beneficial. A consistent and firm definition of the nature of this relationship would be extremely helpful to the future of higher education. This is particularly true as the tendency toward litigation increases.

The Imprecise Nature of the Foreseeability Concept

The concept of foreseeability is defined in Chapter I as a very flexible and vague measure used to assess the acceptability of a defendant's conduct when litigation is brought for negligence. Foreseeability is the primary test of the scope of the duty which is owed. Thus, higher educational institutions are confronted with a concept which is vague and flexible but one which is a significant determining factor in cases where large monetary judgments may be awarded by the courts in the event of a harm or injury which was, or should have been, foreseen by
those in the position to respond with reasonable measures to remove the hazard or avoid the injury.

The position of responsibility which the institution assumes was discussed in the previous section of this chapter. Possessing the responsibility and having the scope of the responsibility measured by a test which offers great leeway for decisions is a significant implication for higher education.

The overall test for foreseeability is not the only concern in this regard. The reasonable person standard, which is applied within the foreseeability test, is another problem confronting educational administrators. The reasonable person is defined as an objective standard for evaluating the conduct of a defendant in a negligence case. The reasonable person test is a difficult measure for use in behavior comparison because of the infallibility of judgement and accuracy of action of the hypothetical "reasonable person." As the epitome of prudence and sound decision-making, the reasonable person is a formidable measuring stick for anyone to have their conduct measured against. It is particularly difficult because the test, of necessity, is always applied in the aftermath of an incident. The harm or injury has occurred, cannot be removed, and compensation for the victim can be viewed as distinctly compelling. The institution is placed in a difficult defensive position with little hope of achieving a favorable outcome.

The definition of foreseeability reveals that practically anything is foreseeable or can be made to seem foreseeable. If the judge who is hearing a case decides that the evidence indicates that a duty is owed and the case is passed to the jury for decisions about the factual questions, societal pressures for compensation of victims of harm or injury make a judgement favorable to the plaintiff seem probable. This is particularly true of horrible crimes such as rape. The obligation to compensate which is felt by the members of the jury may leave fault as much less
important than might otherwise be true.

The responsibility for the behavior of students, who are legally considered adults but who are generally recognized by society as "college kids" and who are not held to a standard of responsibility commensurate with their status as adults, creates conflicts for college and university officials. The situation becomes more difficult when the dimension is added which allows these college students to have significant input into institutional policy decisions. Although such input would theoretically result in a greater commitment to the decisions which are made and a better quality of decision in the final analysis, officials who were accustomed to making such decisions unilaterally in the past find it difficult to adjust to the new decision-making processes.

The most pressing difficulty of the entire foreseeability matter is based in a lack of control or a change in the locus of control of the institution. Judicial review of administrative decisions in higher education was almost unheard of until the last twenty years. Now it is a frequent occurrence and is often difficult to accept for those who were accustomed to absolute autonomy in their decisions. The shoe is now on the other foot as decisions are made related to the concept of foreseeability with the institution having little or no input into the definition of foreseeability or what constitutes the behavior of a reasonably prudent person in the eyes of the law.

Decline in the Autonomy of the Decision-Making Process of Colleges and Universities

Educational excellence has been, in part, supported by the fact that post-secondary institutions operated with a sense of autonomy in their decision-making processes. The collegial tradition of colleges and universities was bolstered by a
confidence that decisions were not subject to external scrutiny. A trend has developed during the last twenty years which demonstrates an increasing willingness of the courts to review matters within the higher education community. Institutional decisions are no longer automatically given unquestioned legal support as they were, in almost every instance, prior to the 1960s. Application of the law to issues on the campus is continuing to grow as a major influence within the higher education community and is destined to continue to become more influential. Legal decisions have now permitted the intrusion of nonacademic elements into the decision-making processes within the higher education community. The result has created a shift in the legal perspective of higher educational management. Institutional legal counsel play an integral role in the creation of policy and the review of procedures on an ever-increasing number of campuses.

The influence of legal issues on the campus and judicial scrutiny of decisions which are made has taken such a pronounced step into academe in the last twenty years that the response of higher education sometimes appears to neglect the importance of the fundamental educational responsibility of the institution. Most administrators are not well versed in legal knowledge or trained as legal scholars. Uncharacteristically, they have been forced to rely upon the knowledge, skills, and abilities of legal counsel. Embarking into a field with which administrators are unfamiliar can lead to the problem of responding to crises or questions with a fearful rather than a reasoned approach and deliberate consideration.

Legal counsel offer opinions from a base of knowledge of the law. These opinions must be integrated with other considerations as decisions are made about educational programs and institutional philosophies. The fields of legal knowledge and higher education management or administration are not the same.

Academic institutions have not been organized or managed in the past with
a legal philosophy which is paramount, or even a primary factor, in the decision-making process. The focus on legality and litigation in higher education today will necessitate reconsideration of that philosophy. The key is integrating the legal knowledge and opinions into the framework of higher educational administration so that it may play a proper role without allowing the dominance which would result in the replacement of sound educational principles with legal considerations when questions of institutional philosophy and mission are debated.

Legal considerations must also find a proper place in the daily management of the institution. The process of defining the proper level of influence for legal review and considerations must remain within the strategy of the higher education community rather than being dictated from the outside if it is to achieve a level of commitment rather than merely a grudging acceptance. The question becomes how to encourage incorporation, toward the goal of commitment, into a tradition-bound institution such as higher education without incurring the alienation inherent in a process which essentially forces the issue upon the higher education community.

An interesting conflict exists within the topic of the decline in institutional autonomy. Student consumerism, the “buyers” market in higher education, and visible changes which have occurred in institutional management, as outcomes of the protests of the 1960s and legislation and litigation since the 1960s, all point toward a decline in the autonomy of the academy as an exclusively self-governing entity. While a legacy of change has developed and is strengthened by what has occurred, the amount of real change may actually be less than would be expected in a fast-paced society where “change” has become a watchword. Admittedly, the rate of change in higher education has increased markedly compared to the era before the 1960s. However, higher education remains comparatively
tradition-bound and slow to change despite the increase in the amount of change during the last two decades. Legislation and litigation have mandated certain alterations in some policies and procedures, but the basic control of the institution remains intact, and decidedly internal in orientation. Trustees, faculty members, and administrators are still dominant in the decision-making mechanisms. This is witnessed, as described in Chapter I, by the percentage of court decisions which have affirmed the decisions which educational administrators have made.

Students have achieved a larger share in the decision-making influence in recent years. However, this influence is often exercised with a paucity of experience and guidance by an ever-changing group of young adults. Thus, although a greater challenge is present than before, the internal locus of authority remains essentially the same. The influence from an inconsistent and transient population of students presents a problem.

The fundamental responsibility of the institution is to offer a dynamic educational experience within an atmosphere designed to enhance the growth of the student in a holistic manner. Pursuit of the elusive "educational excellence" necessitates that control of the institution remain predominantly internal. External influences have been more significant factors over the last twenty years, but the essential character of the institution is still internally controlled. Changes mandated by external influences, when viewed in retrospect, confirmed the rights of the student as a citizen and presented post-secondary educational institutions with the impetus to offer an additional dimension to students, one which was unavailable prior to 1961.

Decisions which are made out of a fear of potential litigation are dominated by a single dimension, that of the legal. Decisions made in this manner run the risk of undermining the decision-making process in higher education. Too great
a sensitivity to the legal aspects of an issue also risk the dilution of the very freedom of interaction and the incentive to closely study all aspects of issues which an educational enterprise is founded upon. Single dimension responses to issues are not adequate in a community or institution which is genuinely committed to scholarly review and interpretation. The delicate balance which exists between rights and responsibilities for students and the integrity of the educational process cannot be predicated upon legal considerations alone when decisions must be made, defended, and followed with appropriate action. Relationships have always been a primary ingredient in the educational process at postsecondary institutions. The changes in these relationships, as a result of legal considerations becoming so important to educational decision-making, are positive ones from the legal perspective but are somewhat less positive when viewed from the interpersonal and educational perspectives. The collegial tradition thrived on these relationships and will suffer if the legal perspective becomes paramount in higher education.

One aspect of the decline in the autonomy enjoyed by educational institutions relates to the increase in the participation of students in the decision-making process. This element has both positive and negative aspects. On the positive side, active participation in institutional decision-making offers those students who take advantage of this opportunity an outstanding educational experience as well as a tremendous opportunity to have an impact on the institutional structure for future generations of students at their particular institution. Another positive side to the participation by students is the fact that such involvement of those for whom the educational enterprise holds the greatest potential is long overdue in higher education. Students have much to offer in the way of innovative suggestions and represent a strongly vested interest, by virtue of their investment
in time and tuition dollars, in the development of excellent programs within the college or university. Students are approaching these decisions from a perspective which has not been given a voice in educational decision-making until the last twenty years. The changes in the decision-making process are traumatic for some institutions but offer others a new dimension to the decisions which dramatically shape the college experience.

On the negative side, the lack of maturity, experience, and education which students bring to the decision-making process leaves them more likely than other constituencies to approach the process without the necessary tools or the background to match the influence which they now possess. Again, the quality of the decision-making process may thus be threatened by the tendency to place too much emphasis upon the input from students without effectively combining their ideas with those of other constituencies to the detriment of the outcomes which are achieved. Lack of maturity, experience, and education are not, in and of themselves, reasons for ignoring, or diminishing, student's input. However, they are elements which must be considered as important decisions are made.

Participation, in name only, and actual involvement are two different things. Students who are given the opportunity to become involved must be certain to take full advantage of the opportunity which is presented. The institutional leadership plays a key role in the empowerment process for these students in becoming prepared and able to assume roles of active participation. Openness is necessary to make information available to students as they prepare to become involved in institutional decision-making.

Another potentially negative aspect of student involvement in institutional decision-making is that it can be viewed as "tokenism" or may actually only be a token input which is not seriously considered in the final phases of the
decision-making process. Some institutions may mistakenly feel that the legal propensities of some constituents can be satisfied by merely involving students in the process without offering them a real voice in the decisions. Their presence on institutional governance committees serves as nothing more than window dressing to appease those who would otherwise be inclined to seek legal action to achieve their involvement.

The practice of only marginally involving students is counterproductive in several ways. It deprives the institutional decision-making process of strong input from those who may well be most effected by the decisions which are made. It also creates a superficial atmosphere of dishonesty when students are patronized by allowing their presence but not really considering their input. There is always the risk of alienation, a further break-down of the trust which is crucial to a genuine and open process of decision-making, and further litigation which, at that stage, could only serve to be more counterproductive to the institution and all constituencies concerned with the issues and decisions being considered.

Student involvement in decision-making is only a by-product of the litigation in which higher education has been involved for the last twenty years. However, it may have the greatest impact over time.

Conclusion

The issues of foreseeability and factors used to establish negligence from questions of foreseeability are characterized by more flexibility than the traditional view of law would suggest. This flexibility is evident in the evolving nature of the legal relationship between postsecondary institutions and students.

The sincere desire on the part of institutional officials to fulfill the obligation to educate the “whole person” bears an inherent conflict with the legal
responsibility to the student. Administrators who have the legal responsibility for many of the issues which may result in litigation, should harm or injury occur, feel the responsibility to nurture interpersonal relationships which are instrumental in the development of the person beyond the realm of cognate knowledge.

The cognate dimension of a college education may be obtained by attending lectures and reading independently. These pursuits are important to the process of education, but the total educational experience for college and university students also includes, among other things, the human interaction found in personal relationships with individual members of the faculty and staff and other students as well as involvement in extracurricular activities.

The difficulty arises as legal and interpersonal responsibilities conflict with each other. Priorities imposed upon postsecondary institutions by legal mandates often work at cross purposes with those which have been achieved by consensus through decision-making mechanisms within the educational community. The conflict provides particular frustration for professionals who are genuinely concerned about the potential for legal entanglements and are equally concerned about the total educational experience which students achieve while attending a postsecondary institution. The higher education community is exposed to the hazard of having institutional officials who feel obliged to make a priority choice between advocating nothing which involves a measure of legal risk and educational programs or services which contain elements of legal risk but which are invaluable educational experiences for students.

An example of this may be found in the Miller case. One primary concern in this case was failure on the part of the institution to lock the outside doors of Miller’s residence hall. Although the text of the trial does not speak to this point, it is quite likely that a majority of the students supported this procedure and may
have suggested its implementation or simply begun leaving the doors unlocked with the outcome that the doors were constantly unlocked. A court would insist, as occurred in the *Miller* decision, that the institution must assume responsibility for locking these doors or accept the compensatory consequences should a harm or injury result from this failure. From the perspective of educational experience, the development of an intentional democratic community in which the consensus of the group of residents determines policy and procedural decisions, is appropriate, and would result in the outcome which occurred in *Miller* where the outside doors of the residence hall were continually left open.

Although a measure of conjecture is present in this discussion, the principle is a valid one. Administrators of postsecondary institutions are held legally accountable for behavior over which, from an educational perspective, it is not in their best interest to exercise control. Such an administrative conundrum presents difficult choices to be made by institutional authorities. Here again, educational leaders are confronted with the problem of educational value for the student versus legal risk of liability for negligence. The educational benefit of the procedure or method of decision-making is balanced against the executive responsibility to protect the organization from the risk of a large liability judgment.

The careful stewardship of institutional resources is another issue pertinent to this discussion. Sophisticated security systems can be installed to partially offset the threat of harm or injury for students in campus residence halls. However, great expense is incurred in these improvements. Limited resources require prioritized spending. Money invested in security systems and security personnel is unavailable for educational programs in other areas. The cases reviewed in this study each revealed institutional security deficiencies which were known by institutional officials either because of previous criminal behavior, as in *Miller*
and Duarte, or the threat of criminal behavior, as foreseen in Mullins. Misjudgment, benign neglect, or overt decisions to place institutional priorities in areas other than security expenditures resulted in situations which were termed, in the aftermath of an assault, unreasonable dangers.

Consideration of prioritized decisions returns the discussion to the decision-making process. Even if institutional authorities want to invest in better security systems to remove potential hazards, they must often convince the students who are now an influential element of the decision-making process. The students may be less willing to invest in security systems of which they are skeptical. Their priority is frequently less concerned with the legal aspects of a situation than with the practical. In this instance limitations on student and visitor access to the residence facility may be of greater importance to the students than a hypothetical legal problem voiced by institutional authorities. The student's perception of the concern raised by institutional officials may be that the college or university is attempting to exercise more control over student behavior than the students wish to endure. Again the situation boils down to one of accountability where the institution will, from a legal standpoint, be responsible for retaining a stronger measure of control over students than either the students or the institution desire. The difference is that societal mores and student's wishes are not the same. Society, as represented by the courts in their decisions in cases brought before them, insists upon greater accountability than college or university officials want to accept. Students, prior to any harm or injury occurring, by and large, share the view of the institutional officials about the level of control they should have over student behavior. The compensatory opportunity which the current legal climate offers is too great a temptation for the injured student or visitor to resist when a harm or injury occurs. If an equitable outcome is to be achieved,
there must be a narrowing of the differences between the opinions of students, higher education officials, and the courts who interpret the feelings of society on specific issues which must be adjudicated. The present status favors only those who would stress the legal side of the question. Priorities, from a holistic educational standpoint, and the desires of the majority of educators and students are presently not the focal points receiving emphasis.

There is little alternative to the inherent conflict between educational programs and security measures when:

1. The student/institutional relationship is not bounded by one theory which may readily be applied to nearly every legal dispute which arises between the student and the college or university.

2. The concept of foreseeability, as it is applied to litigation for personal injuries in college and university residence units, provides so much flexibility as to stretch the bounds of negligence and liability.

3. The institutional environment for decision-making has changed so radically during the period in which students have exerted their influence without, oftentimes, possessing the skill, experience, knowledge, or long-term commitment to the institution which would justify a more equal partnership in decision-making within the institution.

These three implications indicate the present instability of the facets of higher education which they describe.

The possibility exists that higher education is in a transition period in which much rapid change has effectively upset the traditional apple cart of the nature of higher education management from the perspective of legal responsibility for personal injuries which occur as a result of assaults or abductions in campus residence units. A new order is gradually taking shape in higher education
before stabilization, at a new plain of stability, can settle over this aspect of the higher education community. The transition has been a traumatic one as traditional elements of higher education, such as the autonomy of decision-making, are replaced by court or legislative mandates requiring change but not always directing the focus of the change.

The benefit of a transition period for higher education is the opportunity to direct the focus of change with a well-considered strategy which will benefit students through a commitment to their growth as persons and by empowering them for influential involvement in the process of constructive change. Monitoring legal and legislative developments provides another opportunity for the higher education community to seize the initiative in directing the changes in higher education in ways which are advantageous to individual institutions and to higher education as a whole.

This discussion is not to imply that the transition period for higher education is ending or near an end. The legal nature of the student/institutional relationship is by no means a firmly established one. Foreseeability is, by nature, destined to be flexible, although it would stabilize somewhat if the student/institutional relationship was more firmly decided. The problems inherent in the increased role of students in institutional decision-making will have to be addressed through leadership and direction from faculty and administrators who are also involved in the decision-making process.

Stability was once a cherished characteristic of higher education. The change to a state of instability which has occurred is difficult to embrace while it is in process, as many outcomes remain uncertain.

Further study of the entire change process, and individual elements within the process, is extremely important. The intrusion of the legal community into
higher education is destined to expand for the near future, making the study of the concept of foreseeability of particular importance to the higher education community.

Monitoring court decisions and legislation is equally important. Awareness of trends and future directions is crucial to postsecondary education given the increased importance of legal issues. Although the future is uncertain, indications forecast a continued increase in litigation. Such an eventuality necessitates careful preparation and consideration as strategies are developed to prevent legitimate educational endeavors from sinking into a quagmire of legal disputes. The final outcome has not been determined. The responsibility for educational personnel to make a significant contribution remains. The integration of legal requirements with sound educational principles offers a good beginning point from which to expand toward the creation of an atmosphere in higher education which will continue to offer a dynamic educational experience to students while satisfying the protection and compensation mandates of society as interpreted by the legal system.
Appendix A

Glossary of Legal Terms
GLOSSARY OF LEGAL TERMS

appeal - "Resort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or administrative agency" (Black, 1979, p. 88).

breach - "the breaking of a law, obligation, or duty either by commission or omission" (Black, 1979, pp. 170-171).

common law - "Those principles and rules of action, ... which derive their authority solely from usages and customs of immemorial antiquity, ... particularly the ancient unwritten law of England" (Black, 1979, pp. 250-251).

de facto - "In fact." "a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate" (Black, 1979, p. 375).

de jure - "Descriptive of a condition in which there has been total compliance with all requirements of law." "legitimate; lawful; by right and just title" (Black, 1979, p. 382).

demurrer - "An allegation of a defendant, which, admitting the matters of fact alleged by complaint to be true," shows that the allegation is insufficient to proceed (Black, 1979, p. 389).

foreseeability - "The ability to see or know in advance; hence the reasonable anticipation that harm or injury is a likely result of acts or omissions" (Black, 1979, p. 584).

in loco parentis - "In place of a parent; ... charged ... with the parent’s rights, duties, and responsibilities" (Black, 1979, p. 708).

liability -An obligation for a loss or injury-a duty which must be performed.
negligence - "The omission to do something which a reasonable man, ... would do or the doing of something which a reasonable and prudent man would not do" (Black, 1979, p. 930).

plaintiff - "A person who brings an action: The party who complains or sues in a civil action" (Black, 1979, p. 1035).

proximate cause - "That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred" (Black, 1979, p. 1103).

reasonable person - A standard, using a hypothetical individual, by which conduct is measured in the determination of negligence.

recovery - "The obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose. The amount finally collected, or the amount of judgment" (Black, 1979, p. 1147).

sovereign immunity - A traditional immunity from tort liability for governments and their officials when acting in capacities of their responsibilities. Most jurisdictions have abandoned these traditions or strictly limited them.

tort - "A private or civil wrong or injury, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages" (Black, 1979, p. 1335).
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