

GOING GLOBAL: MANAGING LIABILITY IN INTERNATIONAL EXTERNSHIP PROGRAMS—A CASE STUDY

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The article fills a gap in the current scholarship by recognizing the need for international externship programs and by providing a legal framework for educational institutions, and law schools in particular, to assess the risks involved in the design and implementation of an international externship program. Part II of the article clarifies the current law on an educational institution's potential legal duty to exercise reasonable care in minimizing reasonably foreseeable risks of harm to its students and includes a discussion of the few cases where students have sued their educational institution for injuries received while participating in international programs. Part III of the article discusses the educational institutions' potential duty to an externship placement site to exercise reasonable care

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in the placement of students at an externship site and explores the actions an institution can or should take to fulfill that duty. Part IV of the article utilizes the “facilitator model” first articulated by Robert Bickel and Peter Lake to illustrate how an educational institution can manage risk in the design and implementation of an international externship program. Part IV also discusses whether a law school’s compliance with the ABA Standards for the Approval of Law Schools and the ABA Criteria for the Approval of Foreign Summer Programs is sufficient to establish that the law school has acted reasonably in the design and implementation of its international externship program and has thus satisfied its duty of care to both the student and the placement site. The article concludes that international externship programs expose the law school or sponsoring institution to less risk, are more cost effective and provide the student with greater learning opportunities than do study abroad programs.

As the practice of law continues to become more globalized, and as the demand to graduate students who can competently practice law increases, law schools will need to respond by increasing the number of international educational opportunities available to their students. Graduates with international practice experience who exhibit the cultural competence to work and live in foreign countries will be more marketable. Thus, the new educational opportunities which law schools need to design are international externships. *Going Global* provides law schools with a paradigm by which to design and implement an international externship program while minimizing the risk of harm to its students, to the placement site, and to itself.

I. INTRODUCTION

Globalization is affecting the practice of law and law schools must respond.¹ The globalization of the practice of law is evident from the American Bar Association’s rule of law programs,² as well as the trend by U.S. law firms to open offices in foreign countries.³ In 2007, the U.S.

1. See N. William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years (Part 2)*, AALS NEWS NO. 2005-3 (Ass’n Am. L. Sch., D.C.), Nov. 2005, available at http://www.aals.org/services_newsletter_presNov05.php (“Law schools find themselves racing to keep up with the rapid pace of the changes wrought by advancing globalization.”); see also Jon Mills & Timothy McLendon, *Law Schools as Agents of Change in Justice Reforms in the Americas* 5, 6 (Mar. 25-26, 2006) (unpublished paper, presented at Univ. of Fl. Conf. on Legal and Policy Issues in the Americas), available at http://www.law.ufl.edu/cgr/conference/06confmaterials/5_Panel/5_MillsMcLendon-LawSchoolsasAgentsofChange.pdf.

2. ABA Rule of Law Initiative, <https://www.abanet.org/rol/> (last visited Feb. 22, 2010).

3. See Ted Zablocki, *Moving Abroad*, LEGAL TIMES, June 24, 2002, at 29–30. See also International Law Firms, <http://www.ilflaw.com> (last visited Feb. 22, 2010); Law Firm Alliance, <http://www.lawfirmalliance.org> (last visited Feb. 22, 2010).

exported 1.25 billion dollars of legal work and imported 1.5 billion dollars of legal work.⁴ One hundred forty of the Global 500 companies are U.S. corporations.⁵ Law firms and their clients are operating in an international market. Students are increasingly including an international experience as part of their education.⁶ Future law school graduates will be expected to and will expect that upon graduation they will be able to competently practice law in a global economy.⁷

Legal education's response to globalization must be within the context of its mission to graduate students who are ready for the practice of law.⁸ Two recent reports on the state of U.S. legal education conclude that law schools must do a better job of preparing students for the practice of law by teaching students the law in context.⁹ Teaching the law in context requires that students learn, not just in the classroom, but in the field—solving the real world problems of real world clients.¹⁰ Teaching in context is usually best done through a law school's clinical program¹¹ or through its

4. Hines, *supra* note 1.

5. *World's Largest Corporations*, FORTUNE, June 20, 2009, at F-1, available at <http://www.money.cnn.com/magazines/fortune/global500/2009/countries/US.html>.

6. See *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002); see also Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 309 n.1 (2006). In the 2006–2007 academic year, 241,791 American students studied abroad. Press Release, Inst. of Int'l Educ., U.S. Study Abroad Up 8%, Continuing Decade-Long Growth, (Nov. 17, 2008), available at <http://opendoors.iienetwork.org/?p=131592>. A list of ABA approved law schools with study abroad programs can be found at <http://www.abanet.org/legaled/studyabroad/coop.html>.

7. Hines, *supra* note 1 (“The shrinking of the world through trade, travel and instant communications means that lawyers from county seats to regional cities to Wall Street have a common interest in the legal elements of international economic developments, whether the U.S./Australia Free Trade Agreement, the latest round of GATT negotiations or the continuing ABA debate about multi-jurisdictional practice.”).

8. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS § 301(a), at 19 (2009–2010), available at <http://www.abanet.org/legaled/standards/standards.html> [hereinafter ABA STANDARDS] (“A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”); GREGORY S. MUNRO, INSTITUTE FOR LAW SCHOOL TEACHING, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 88 (2000); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 39 (2007), available at http://law.sc.edu/faculty/stuckey/best_practices/best_practices-02.pdf (“At its core . . . legal education is a professional education, and part of the mission of every law school is to prepare its students to enter the legal profession. It is why law schools exist.”).

9. See STUCKEY, *supra* note 8, at 39–91; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87–125 (2007).

10. STUCKEY, *supra* note 8, at 188–205; SULLIVAN, *supra* note 9, at 120–22.

11. A law school clinic usually operates “in-house” as part of the law school and full-time faculty direct the clinic and supervise student work. STUCKEY, *supra* note 8, at 188–89.

externship program.¹²

A law school that already operates a campus in a foreign country and has appropriate facilities can, if allowed by the foreign country's laws, open a clinic in a foreign country. Most law schools, however, do not operate facilities in foreign countries. The cost and liability of doing so is likely prohibitive.¹³ Law schools are thus often left with the option of creating international externship opportunities.¹⁴ These opportunities generally take two primary forms. The first is an externship that is operated as a component of a study abroad program.¹⁵ The second is an externship that is operated in the same manner as the law school's domestic externship program.¹⁶

The organizational design of a law school's program determines both the ABA Standards which apply to the program¹⁷ and the types of risks, particularly the risk of tort liability, to which the law school may be exposed. While legal scholars have focused on the liabilities and risks of operating study abroad programs,¹⁸ on the general tort liability of colleges

12. Usually, in an externship, a student is placed in a law office and her work is supervised by an attorney who is employed by the externship site. *Id.* at 198; *see also* ABA STANDARDS, *supra* note 8, § 305, at 26–27 (setting forth the minimum standards by which a law school's externship program must operate).

13. For a discussion of the risks of study abroad programs, which include operation of facilities, see William P. Hoye, *The Legal Liability of Risks Associated with International Study Abroad Programs*, 131 ED. LAW REP. 7 (1999).

14. Atlanta's John Marshall Law School's Micronesian Externship Program operates in the Federated States of Micronesia and the Republic of Palau, as well as the Territory of Guam and the Commonwealth of the Northern Marianas Islands. *See* Atlanta's John Marshall Law School, Micronesian Externship Program, <http://www.johnmarshall.edu/academics/Micronesian01.php> (last visited Feb. 22, 2010) [hereinafter Micronesian Externship Program]. *See also* American University Washington College of Law, International Legal Studies Program, <http://www.wcl.american.edu/ilsp/> (last visited Feb. 22, 2010); Seattle University School of Law, International Externships, http://www.law.seattleu.edu/Academics/Externship_Program/International_Externships.xml (last visited Feb. 22, 2010).

15. *See* ABA CRITERIA FOR THE APPROVAL OF FOREIGN SUMMER PROGRAMS, STUDENT STUDY AT FOREIGN INSTITUTIONS, AND APPROVAL OF SEMESTER ABROAD PROGRAMS, *available at* <https://www.abanet.org/legaled/standards/20082009StandardsWebContent/Criteria%20for%20Approval%20of%20Foreign%20Programs%20etc.pdf> [hereinafter ABA CRITERIA].

16. Atlanta's John Marshall Law School's Micronesian Externship Program operates in the same manner as its domestic externship program. Micronesian Externship Program, *supra* note 14.

17. Study abroad programs must comply with ABA CRITERIA, *supra* note 15. Externship programs must comply with ABA STANDARDS, *supra* note 8, § 305, at 26–27.

18. *See, e.g.,* Hoye, *supra* note 13; William P. Hoye & Dr. Gary M. Rhodes, *An Ounce of Prevention is Worth . . . The Life of a Student: Reducing Risk in International Programs*, 27 J.C. & U.L. 151 (2000); Johnson, *supra* note 6.

and universities,¹⁹ and on university liability for extra-curricular activities,²⁰ only one scholar has focused on law school liability in domestic externship programs.²¹ None of these articles focus on the risks to law schools in providing international externship opportunities.

This article explores the risk of liability²² which can arise from the operation of a law school's international externship program.²³ Part II discusses the duty which courts have recognized that educational institutions²⁴ owe their students, both on and off-campus, and in the

19. See, e.g., ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* (1999); Joseph Beckham & Douglas Pearson, *Negligent Liability Issues Involving Colleges and Students: Does a Holistic Learning Environment Heighten Institutional Liability?*, 175 *EDUC. L. REP.* (West) 379 (2003); Helen H. de Haven, *The Elephants in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 *J.C. & U.L.* 503 (2009); Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 *J.C. & U.L.* 621 (2005) [hereinafter Lake, *Rights and Responsibilities Revisited*]; Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 27 *IDAHO L. REV.* 531 (2001) [hereinafter Lake, *Law and Policy Ramifications*]; Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 *MO. L. REV.* 1 (1999) [hereinafter Lake, *Rise of Duty*]; Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From "In Loco Parentis" To Bystander to Facilitator*, 23 *J.C. & U.L.* 755 (1997) [hereinafter Lake, *New Paradigms*]; Ralph D. Mawdsley, *The Community College's Responsibility to Educate and Protect Students*, 189 *EDUC. L. REP.* (West) 1 (2004).

20. See, e.g., Robert C. Cloud, *Extracurricular Activities and Liability in Higher Education*, 198 *EDUC. L. REP.* (West) 1 (2005).

21. See Kathleen Connolly Butler, *Share Responsibility: The Duty to Legal Externs*, 106 *W. VA. L. REV.* 51 (2003). Butler does not discuss cases where students have sued educational institutions for events occurring in the institution's study abroad program. The majority of scholarship on externship programs has focused on the design and/or pedagogy used in teaching in the externship program. See, e.g., Bernadette T. Feeley, *Training Field Supervisors to be Efficient and Effective Critics of Student Writing*, 15 *CLINICAL L. REV.* 211 (2009); Anahid Gharakhanian, *ABA Standard 305's "Guided Reflections": A Perfect Fit for Guided Fieldwork*, 14 *CLINICAL L. REV.* 61 (2007).

22. The sections of this article which discuss the law school's duty of care for its students are also applicable to the law school's operation of domestic externship programs. Likewise, many of the suggested best practices to reduce risk are applicable to the law school's operation of domestic externship programs and to the operation of externship programs in other departments within the university. See discussion *infra* Part II.

23. For discussion of contract and other legal issues triggered for operation of overseas programs, see Hoye, *supra* note 13; Hoye & Rhodes, *supra* note 18; and Johnson, *supra* note 6.

24. "Educational institution" is used as a generic term to refer to all post-secondary educational institutions, including universities and their component parts (departments, colleges, programs, institutes, etc.), colleges, community colleges, vocational institutions, and adult education programs. There is no reason to believe that courts will hold law schools to a lower standard of care, and, as discussed in more detail in Part II.A.1.a., it is more likely that law schools will be held to a higher

operation of study abroad programs. Part III discusses the educational institution's potential duty to the provider of an externship placement site to exercise reasonable care in placing students at the site. Part IV discusses how best to manage risk in a law school's international externship program and whether compliance with ABA Standards can be used to establish that the law school acted reasonably and thus, did not breach its duty. Part IV also provides some best practices for risk management within the context of international externship programs.²⁵ The article concludes by recognizing that international externship programs are low cost and can be low risk, while providing students a unique educational and cultural immersion experience as they live, work, and learn in a foreign country.

II. THE EDUCATIONAL INSTITUTION'S DUTY TO THE STUDENT

Although courts are quick to recognize that an educational institution is not an insurer of its students' safety and welfare,²⁶ courts have also recognized that both students and the institution have rights and responsibilities to each other.²⁷ The duty of care that an educational institution owes its student is an evolving standard.²⁸ When determining both the existence of a duty and the scope of that duty, courts will look to the expectations that the public, students, and students' families have of the educational institution.²⁹ In recognizing that under some circumstances educational institutions owe their students a duty of care and are liable to students when the institution's breach of that duty of care causes the student injury, courts weigh the goal of higher education, which is to assist students to mature and develop into responsible and productive citizens,³⁰

standard of care.

25. The discussion in Part II of the duty owed to students and the discussion in Part III of the duty owed to the externship placement site are applicable to all educational institutions. While the discussion in Part IV focuses on how law schools should manage the risk of international externship programs, the analytical paradigm is applicable to all educational institutions.

26. See *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005) ("College is not an insurer of the safety of its students"); see also *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 312 (Idaho 1999).

27. See, e.g., *Niles v. Bd. of Regents*, 473 S.E.2d 173 (Ga. Ct. App. 1996).

28. Compare *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at *3 (Mass. Super. Ct. Oct. 12, 1994) ("changes with evolving expectations of a maturing society"), with *Univ. of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987) ("fairness under contemporary standards").

29. *Judson v. Essex Agric. and Technical Inst.*, 635 N.E.2d 1172, 1174 (Mass. 1994) (finding no "social values or customs demonstrating that vocational schools . . . have a duty to protect their students during their employment"); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983); *Stanton v. Univ. of Me.*, 773 A.2d 1045 (Me. 2001).

30. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986). The purpose of

against the burden of imposing a duty.³¹ Courts balance public policy considerations,³² including whether the institution can in fact satisfy the duty if imposed and the cost of doing so;³³ whether in fulfilling the duty the institution will need to infringe upon other rights of the student;³⁴ and whether imposing the duty will alleviate the student of responsibility to consider the risks of their behavior, thus providing students protection from their own bad choices which protection the law does not provide to their non-student age peers.³⁵

There are two primary types of tort claims which students bring against their educational institutions. In the first type of claim, the student sues the educational institution alleging that the institution or its employees acted negligently.³⁶ In the second type of claim, the student sues the educational institution alleging that the institution had a duty to protect the student from the acts of third parties.³⁷ There is much confusion in this area of law. This confusion has occurred because sometimes the student's complaint contains both types of claims,³⁸ sometimes the pleadings of the parties are vague and unclear as to the specific type of tort alleged,³⁹ sometimes the courts' opinions do not identify which type of case is under consideration, and sometimes, because the public policy considerations are the same, the

educational institutions

is to educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol

....

Id.

31. See *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999) (finding that the imposition of a duty would have negated the intended educational experience).

32. See *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007) (discussing a student injured while participating in an adult education program and finding that "'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection").

33. *Beach*, 726 P.2d at 418.

34. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987).

35. *Webb v. Univ. of Utah*, 125 P.3d 906, 912–13 (Utah 2005); *Beach*, 726 P.2d at 418.

36. See, e.g., *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941); *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888, at *1 (W.D. Pa. Jul. 30, 2008); *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000).

37. See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991); *Leonardi v. Bradley Univ.*, 625 N.E.2d 431 (Ill. App. Ct. 1994); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

38. See, e.g., *Nova*, 758 So. 2d at 86.

39. *Fed. R. Civ. P.* 8.

law for one type of tort is applied to the other type of tort.⁴⁰ This article attempts to clarify some of the common types of confusion that tend to arise in this area of law.

A. The Educational Institution's Own Acts⁴¹

When a student sues an educational institution alleging that the institution itself acted negligently, the usual rules of tort law apply.⁴² In order for a student to prevail on a negligence claim against the educational institution in this context, the student must establish that the educational institution owed the student a duty of care, that the educational institution breached this duty of care, that the educational institution's breach of its duty of care was the proximate cause of the student's injury, and that the student has suffered injury or damages.⁴³ Because the threshold issue in a student's negligence claim against an educational institution is the existence or non-existence of a legal duty, almost all of the reported cases focus on the educational institution's duty to the student.⁴⁴ Whether the educational institution has a duty of care is a question of law for the court to decide.⁴⁵ Whether the educational institution breached its duty of care and whether the educational institution's breach of its duty was the proximate cause of the student's injury are questions of fact for the jury.⁴⁶

1. The Existence of a Duty

The mere fact that a harm is foreseeable⁴⁷ is not sufficient to establish that a legal duty exists.⁴⁸ When determining whether a legal duty exists,

40. See, e.g., *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at *3 (Mass. Super. Ct. Oct. 12, 1994).

41. Most states have enacted statutes waiving sovereign immunity, thus allowing public educational institutions to be sued and held liable for the same torts as would a private educational institution. See, e.g., *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661, 663-64 (Minn. Ct. App. 1999).

42. See *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888 (W.D. Pa. Jul. 30, 2008). In *Hawkins*, a student sued the college for an injury received while operating an electric saw when building scenery as part of a theater class requirement. *Id.* at *2. See also *Nova*, 758 So. 2d at 89-90 ("There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.").

43. See, e.g., *Webb v. Univ. of Utah*, 125 P.3d 906, 909 (Utah 2005).

44. See, e.g., *Nova*, 758 So. 2d at 86.

45. *Nero v. Kan. State Univ.*, 861 P.2d 768, 772 (Kan. 1993).

46. *Id.*

47. The concept of "foreseeability" in determining whether a duty exists is often confused with the concept of foreseeability in determining whether there is proximate cause. See *Knoll v. Bd. of Regents of the Univ. of Neb.*, 601 N.W.2d 757, 763 (Neb. 1999).

48. *McClure v. Fairfield Univ.*, No. CV000159028, 2003 WL 21524786, at *2

courts in many U.S. states tend to apply the following risk/utility analysis:

(1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature that plaintiff suffered was likely to result, and (2) a determination, on the basis of public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or to the particular plaintiff in the case . . . The first part of the test invokes the question of foreseeability, and the second part invokes questions of policy.⁴⁹

As early as 1941, courts have found that educational institutions have a duty to "exercise ordinary care."⁵⁰ The exercise of ordinary care requires that the educational institution furnish "instruction and supervision" at a level equivalent to that provided by similar institutions under similar circumstances.⁵¹ At a minimum, educational institutions must exercise ordinary care when they are designing and implementing curriculum.

The educational institution, however, does not owe the same duty of care to all of its students for all of the school-related activities in which the student may participate. In determining whether an educational institution owed a duty of reasonable care to the student at the time of the injury under the circumstances giving rise to the injury, the court balances the following factors:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.⁵²

Most of the courts addressing the issue of duty have focused on the type of student involved (undergraduate versus graduate, minor versus adult)

(Conn. Super. Ct. Jun. 19, 2003).

49. *Id.* (citing *Gazo v. Stamford*, 765 A.2d 505 (Conn. 2001)).

50. *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836, 840 (10th Cir. 1941) (student injured in chemistry lab explosion while engaged in a class assignment).

51. *Id.* at 841. In *Lillywhite*, a student who was injured in chemistry lab explosion was allowed to introduce evidence of how other area educational institutions supervised their students when the students conducted experiments in the lab. *Id.*

52. *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007) (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)); *see also Stockinger v. Feather River Cmty. Coll.*, 4 Cal. Rptr. 3d 385, 401-402 (Cal. Ct. App. 2003).

and the amount of control that the educational institution had at the time of the injury. In addressing the characteristics of the student, courts tend to combine foreseeability of harm, degree of certainty of the injury, and moral blame. In addressing the amount of control exercised by the educational institution, the court tends to focus on foreseeability, the closeness of the connection between the educational institution's conduct and the student's injury, the policy of preventing future harm, and the extent of the burden on the educational institution. By focusing on the characteristics of the student and the amount of control exercised by the educational institution, the court can address all of the traditional balancing factors in a manner which is tailored to the unique relationship between students and their educational institutions.

a. The Characteristics of the Student

When the court's duty analysis centers on the characteristics of the student, the court is usually looking at who has the most knowledge and training to be able to identify the risk involved. When students have special needs, the educational institution has been held to owe a higher standard of care.⁵³ Courts have required an educational institution to provide more supervision and instruction to undergraduate students, who by definition have less knowledge and training, than they have usually required institutions to provide to doctoral candidates, especially when the doctoral candidate has the specialized knowledge and training to identify the risks for himself; under such circumstances, the graduate student is required to act with prudence and care.⁵⁴ Nevertheless, when an instructor has knowledge of a risk and injury to the student from the risk is foreseeable, the instructor has a duty to minimize the risk to the student.⁵⁵

53. See *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (finding that the college had a fiduciary duty to a disabled student); see also *Rydzynski v. N. Shore Univ. Hosp.*, 692 N.Y.S.2d 694 (N.Y. App. Div. 1999) (holding that the operators of an educational rehabilitation program owed a duty of care akin to *in loco parentis* to a mentally handicapped adult who was injured by another student).

54. Compare *Fu v. State*, 643 N.W.2d 659, 867 (Neb. 2002) (lesser duty owed to graduate student injured in chemistry lab explosion; student should have acted as "reasonably prudent graduate student with [his] level of education and experience"), and *Niles v. Bd. of Regents*, 473 S.E.2d 173 (Ga. Ct. App. 1996) (no duty to warn owed to graduate student), with *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941) (duty owed to undergraduate student injured in chemistry lab explosion where undergraduate student was inexperienced in chemistry and chemical reactions). See also *Regents of the Univ. of Cal. v. Roettgen*, 41 Cal. App. 4th 1040, 1046 (Cal. Ct. App. 1996) (stating that the existence of a duty is determined by the "facts surrounding [the student's] levels of experience and/or [the student's and instructor's] relationships to one another in the activity resulting in the plaintiff's injury").

55. *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293 (M.D. Ala. 2004). In *Molinari*, a veterinary student was injured by a cow while performing a required surgical procedure during class and the instructor was aware that the cow was

The mere fact that the injured student is a graduate or doctoral student is not sufficient to relieve the educational institution of its duty of care.⁵⁶ In determining the duty of care owed, the focus is on whether the student is already deemed to be a professional.⁵⁷ When a graduate student has already earned a degree which provides the basic training required to practice within the profession, there is no duty to supervise the student or warn the student of dangerous situations which should be obvious to an individual with their training.⁵⁸ Where, however, the graduate student has not yet received the basic training required to practice within the profession, the educational institution has a duty to supervise the graduate student.⁵⁹ The amount and type of supervision and instruction owed the graduate student is dependent on the risks posed by the specific type of graduate program.⁶⁰

An educational institution must exercise its duty of ordinary care in designing curriculum to insure that students receive the degree of supervision and instruction that is appropriate based on the student's level of knowledge and training in the area and to insure that the amount of supervision and instruction given is equivalent to that given by other institutions to their students in similar programs.

b. The Amount of Control Exercised by the Educational Institution

In determining whether the educational institution owed a duty to the student at the time of the injury, courts have made distinctions between those activities which take place on-campus during class time, those activities which are school-sponsored and a required part of the course curriculum, and those activities which students are engaged in for their own benefit and pleasure.⁶¹ The more control the educational institution has over the student and the activity at the time of the injury, the more likely a court will find that the educational institution owed the student a duty of

uncooperative. *Id.* at 1296–97.

56. *Mizutani v. Cal. State Univ. Long Beach*, No. B152490, 2002 WL 31117258 (Cal. Ct. App. Sept. 25, 2002). In *Mizutani*, the University owed a duty of care to a graduate student who was assaulted by professor during class. *Id.* at *9.

57. *Niles*, 473 S.E.2d at 175 (“Ordinarily, there is no duty to give warnings to the members of a profession against generally known risks. There need be no warning to one in a particular trade or profession against a danger generally known to that trade of profession.”).

58. *Id.*

59. See *Roettgen*, 41 Cal. App. 4th at 1040.

60. *Molinari*, 339 F. Supp. 2d at 12968–99. In *Molinari*, the veterinary school knew of the cow's dangerous propensity and failed to make restraining equipment available during surgical procedures. *Id.* at 1301–02.

61. Compare *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007), and *Mizutani*, 2002 WL 31117258, at *1, *9, with *Ochoa v. Cal. State Univ.*, 72 Cal. App. 4th 1300, 1306 (Cal. Ct. App. 1999).

care.⁶² If a student is acting for his own benefit and making his own choices, it is less likely a court will find that the educational institution owed the student a duty.⁶³ An educational institution can be in control even when the injury occurs off-campus.⁶⁴

In determining control, the court looks to factors such as: whether the injury occurred while participating in a curricular activity which was required for a grade;⁶⁵ whether the instructor altered the academic environment, thereby creating additional risk to students;⁶⁶ whether the educational institution provided sufficient equipment for the academic activity;⁶⁷ and whether the educational institution approved the location of off-campus curricular work.⁶⁸

A nice bright-line rule would be that if the event occurs while the student is participating in a class activity, then the educational institution has a duty of care. Courts, however, have not developed such a bright-line rule, because such a rule would have the tendency to blur the distinction between acts of the educational institution and acts of third parties, particularly the acts of other students. Educational institutions cannot always foresee when one student will act to injure another.

For example, in *Webb v. University of Utah*,⁶⁹ a student was injured while on a required trip as part of his earth science class to explore fault lines.⁷⁰ The faculty member in attendance instructed the students to walk across sidewalks covered in ice and snow to view the fault lines.⁷¹ Applying the proposed bright-line rule to these facts, the university would have had a duty of care to prevent the student's injury. The student, however, was not injured by an act of the instructor, but was injured when another student slipped and grabbed onto the student for support.⁷² Although the injury to the student occurred during a curricular activity, the injury was caused not by the institution's act, but by the act of a third party, another student.⁷³

62. See *Patterson*, 66 Cal. Rptr. 3d at 377.

63. See *Ochoa*, 72 Cal. App. 4th at 1306.

64. See *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000); see also *Webb v. Univ. of Utah*, 125 P.3d 906 (Utah 2005).

65. See *Nova*, 758 So. 2d at 89; see also *Webb*, 125 P.3d at 910.

66. *Webb*, 125 P.3d at 911.

67. *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293, 1301-02 (M.D. Ala. 2004) (finding that the university should have had sufficient cow restraining equipment for all veterinary students to use when an unrestrained cow kicked a student performing an in-class surgical procedure).

68. See *Nova*, 758 So.2d at 89; see also *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at *3 (Mass. Super. Ct. Oct. 12, 1994).

69. 125 P.3d 906 (Utah 2005).

70. *Id.* at 908.

71. *Id.*

72. *Id.*

73. *Id.*

It does not appear that the student made the argument that his injury was caused by an act of the instructor, because neither he nor the other student would have been on the ice but for the required field trip and the instructor's directive to cross the ice.⁷⁴ Even if the student had made such an argument, the court applying the balancing principles could have determined that a college student residing in an area which is known for snow and icy conditions should either know how to safely cross the snow and ice or should not do so. Thus, in finding a duty of care in this situation, the court would have been providing the student with more protection from the law than if he was not a student.⁷⁵ For the law to provide students with more protection than non-students is contrary to public policy.⁷⁶

The *Webb* Court analyzed the facts under the "special relationship" doctrine,⁷⁷ which was applicable because the student's injuries were caused by the act of a third party, another student. As part of its "special relationship" analysis, the Court addressed the issue of control, stating that:

[D]espite the relative developmental maturity of a college student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience. This is a phenomenon that should, and certainly does, at least unconsciously guide all decisions made by instructors relating to the selection of an environment for learning.⁷⁸

The *Webb* Court refused to find that "every college student is responsible for his own protection in any school-related activity, regardless of the risk."⁷⁹ The *Webb* Court focused on whether the student was engaged in an activity directly related "to the academic enterprise of the class" at the time of the injury.⁸⁰ The court concluded that the instructor's directive to walk on the ice and snow was "tangential", because "it is not reasonable to believe that any student" would believe that obtaining a good grade requires them to ignore the open and obvious risk of walking across ice.⁸¹ The *Webb* court held that the instructor had not created a "special

74. *Cf. Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993). In *Nero*, the court held that the university, who controlled the placement of a known sex offender in a co-ed dormitory, had breached the duty of care owed to other students in the dormitory. *Id.* at 782-83.

75. There was no discussion in the case of the liability of the premises owner for snow and ice removal. If such liability exists under Utah law, then the person injured is in the same position with regard to the law regardless of whether or not the person was a student at the time of injury.

76. *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986).

77. See "special relationship" discussion *infra* Part II.B.1.

78. *Webb*, 125 P.3d at 911-12.

79. *Id.* at 912.

80. *Id.*

81. *Id.* at 912-13.

relationship”, because the instructor did not exercise control over the student’s common sense⁸² at the time of the injury.

Likewise in *Nova Southeastern University, Inc. v. Gross*,⁸³ in finding that the University owed the student a duty of care, the Court focused on the “amount of control the school has over the student’s conduct.”⁸⁴ The student, a doctoral student in the University’s psychology program, was injured when she was attacked in the parking lot of the placement site while participating in a mandatory off-campus internship.⁸⁵ “There was evidence that prior to the [attack on the student], Nova was aware of a number of other criminal incidents which had occurred at or near the [internship’s] parking lot.”⁸⁶

The Florida Supreme Court applying ordinary tort principles held that the University owed the student a duty of care.⁸⁷ Focusing on the amount of control that the University exercised over the student in choosing the internship site,⁸⁸ the Court held that the University had a duty “to act with reasonable care”, because the University had undertaken to locate, approve, and assign students to internship sites.⁸⁹ A duty is created when the University’s actions create “a foreseeable zone of risk.”⁹⁰ Although the University’s duty does not rise to the level of duty required in the school-minor context,⁹¹ the University has a duty to “use ordinary care in providing educational services and programs to one of its adult students.”⁹² The duty to use ordinary care can include, “but is not necessarily limited to warning of the known dangers at [a] particular practicum site.”⁹³ An educational institution’s duty to its students to exercise ordinary care in the design and implementation of its educational programs includes minimizing the student’s unnecessary exposure to a known risk of harm when engaging in required curricular activity.⁹⁴

82. Courts have limited an educational institution’s liability to a student based upon the affirmative defenses of the assumption of the risk and inherent dangerousness of the activity. *See* *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293 (M.D. Ala. 2004); *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337 (Cal. Ct. App. 2007). These issues are not addressed in this article.

83. *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000).

84. *Id.* at 89.

85. *Id.* at 87.

86. *Id.* at 88.

87. *Id.*

88. *Nova*, 758 So. 2d at 89.

89. *Id.*

90. *Id.*

91. *Id.* at 90.

92. *Id.*

93. *Nova*, 758 So. 2d at 90.

94. Based upon the same theory of duty of supervision, an educational institution owes a duty to the placement site to assign students who are not a risk to others working at the placement site, particularly if the institution controls the assignment of

Although decided under different theories of liability, for both the *Webb* and *Nova Southeastern* courts, the key to the educational institution's liability was the amount of control that the university exerted over the student at the time of the injury. The Florida Supreme Court was willing to recognize the fact that even graduate students "inevitably relinquish a measure of behavioral autonomy"⁹⁵ to the institution when required by the institution to do so. In *Webb*, the student had available alternative means of accomplishing the educational endeavor, such as crossing the ice and snow at a safer location, wearing different shoes, and avoiding inexperienced students. In *Nova Southeastern*, the student was given no alternative means for completing the curricular requirement. Where there are no alternative means for completing a curricular requirement and the educational institution controlled almost all aspects of the design and implementation of the curricular requirement, the fact that the injured student is a graduate student will not alleviate the educational institution of its duty to use ordinary care in the design and implementation of the institution's program.

When the college or university controls the actors or the facilities which cause the injury, it has been held to have a duty to the student,⁹⁶ regardless of whether the student could have satisfied a curricular requirement through a different activity⁹⁷ or whether the injury occurred off-campus.⁹⁸ Where the educational institution does not have control, the court is unlikely to find that the institution has a duty to the student.⁹⁹ An

the student and has superior knowledge concerning the student. *See* *Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at *1 (E.D. Pa. Aug. 14, 2008); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *see also* discussion *infra* Part II.

95. *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005).

96. *See, e.g., Mizutani v. Cal. State Univ. Long Beach*, No. B152490, 2002 WL 31117258, at *5 (Cal. Ct. App. Sept. 25, 2002) (finding that, where a teacher inflicted injuries on graduate student during class time, "[i]mposing liability on a college that fails to discipline a professor who repeatedly batters innocent students in the classroom is not incompatible with a college's purpose or the freedom of its students or faculty.").

97. *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888, at *6 (W.D. Pa. July 30, 2008) (finding that the college had a duty to "act with reasonable care in training [the student] and supervising his use of . . . equipment" where student was injured when using college's workshop and tools to fulfill theater course requirement, even though the student could have fulfilled course requirements through different activities and regardless of student's prior experience with power tools.)

98. *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343-47 (Cal. Dist. Ct. App. 2007) (finding that a duty existed because event was required, and the institution chose the location and type of event and chose and provided the equipment when a student was injured while working on a required community activity intended to provide student with practical experience).

99. *See, e.g., Mintz v. State*, 362 N.Y.S.2d 619, 620 (N.Y. App. Div. 1975) (finding that because the students were "assumedly cognizant of perilous situations and were able to care for themselves," and because the risk of the squall was not foreseeable, the University did not have a duty to two students killed while on canoe trip during a sudden squall); *Judson v. Essex Agric. and Technical Inst.*, 635 N.E.2d

educational institution can have no duty either because it lacks control over the premises¹⁰⁰ or because the student, and not the educational institution, controlled the location of the employment.¹⁰¹

When there is an off-campus event which includes times when the educational institution is in control and times when the student is acting in their own interests, the court will look to see whether the event occurred as part of the educational enterprise or during the student's recreational activities.¹⁰² When the student's injury occurs during the non-curricular portion of the off-campus activity and is a result of the student's voluntary intoxication, the educational institution does not owe the student a duty of care.¹⁰³ When the student is not engaged in the academic enterprise at the time of her injury, courts are loathe to provide protection to the student which is not available to non-students.¹⁰⁴

1172, 1174–75 (Mass. 1994) (finding no duty where school's agreement with employer required employer to obtain workman compensation insurance to cover the student, when the student was injured after falling from a barn loft while working at a local farm, even though the student was responsible for finding own employment, employment related to coursework was required); *Marshall v. Univ. of S. Cal.*, No. B187931, 2007 WL 602984, at *5 (Cal. Ct. App. Feb. 28, 2007) (finding that the university owed no duty to student who was at work at the time of the injury and who recovered under employer's worker's compensation policy). *But see Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at *3 (Mass. Oct. 12, 1994). *Silvers* was decided three months after *Judson*. The court found a duty in *Silvers* where the school's placement office had forwarded the student's resume to an employer. *Id.*

100. See *Judson*, 635 N.E.2d 1172, 1174–75 (finding that the educational institution had no control over the employer's premises).

101. *Compare Nova Se. Univ. v. Gross*, 758 So. 2d 86, 89 (Fla. 2000), with *Judson*, 635 N.E.2d 1172.

102. The educational enterprise does not include homework. See *Stockinger v. Feather River Cmty. Coll.*, 111 Cal. App. 4th 1014 (Cal. Ct. App. 2003) In *Stockinger*, the student was injured off-campus when she was thrown from the back of a pick-up truck driven by another student, while working on a group homework assignment; the purpose of the assignment was to provide students with an opportunity to develop the requisite leadership and practical skills needed to learn responsibility. *Id.* at 1020. The court found that the college had no duty to ensure that the student had safe transportation, stating, "a college must be able to give its students off-campus assignments, without specifying the mode of transportation, and without being saddled with liability for accidents that occur in the process of transportation." *Id.* at 1035.

103. See *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986). *Beach* is the first in a line of cases in which courts were unwilling to hold educational institutions liable when the student's injuries were due in part to their own voluntary intoxication. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979); *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552, 562 (Ill. App. Ct. 1987); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

104. *Beach*, 726 P.2d at 418:

Had she not been a college student, but an employee in industry, she could not argue realistically that her employer would be responsible for compensating her for injuries occurred by her voluntary intoxication if she violated state liquor laws during her off-hours while traveling on company business. We do not believe that [the student] should be viewed as fragile and

In exercising its duty of care in designing and implementing the curriculum, an educational institution can design assignments which require a student to accept responsibility and take on leadership roles because assisting students to develop into mature, responsible citizens who will be future leaders in the community is one of the goals of the educational institution.¹⁰⁵ Even when participating in the required assignment, students are not deemed to have relinquished all of their autonomy to the institution, but are deemed to have retained sufficient autonomy to exercise common sense and avoid those risks which an average citizen would recognize and avoid.¹⁰⁶ Nevertheless, when the educational institution removes all choice from the student in determining how the curricular requirement will be satisfied or when the educational institution has the ability to remove the risk of harm, the educational institution is in control and owes the student a duty of care.¹⁰⁷

B. The Educational Institution's Duty to Protect Against the Acts of Third Parties

The idea that a college or university has a duty to protect its students against the acts of third parties is a relatively recent development.¹⁰⁸ As courts have struggled to define the nature and scope of the duty that may be owed to a student, courts and litigants have focused on two tort concepts – the special relationship doctrine and voluntary assumption of duty. Educational institutions usually assert that they do not have a duty because college students are usually adults and thus, the doctrine of *in loco parentis* does not apply.¹⁰⁹ The student-university relationship alone is not sufficient to create a duty.¹¹⁰ Students, relying on Section 315 of the Restatement Second of Torts, counter that there is a special relationship between themselves and the educational institution.¹¹¹ Students also counter by claiming that, by its actions, the educational institution has voluntarily assumed a duty¹¹² pursuant to Section 323 of the Restatement

in need of protection simply because she had the luxury of attending an institution of higher education.

105. See *Stockinger*, 11 Cal. App. 4th at 1020.

106. *Webb v. Univ. of Utah*, 125 P.3d 906, 911–912 (Utah 2005).

107. *Nova Se. Univ. v. Gross*, 758 So. 2d 86, 89–90 (Fla. 2000).

108. For a discussion of the evolution of higher education law from no duty and application of *in loco parentis* to duty see BICKEL & LAKE, *supra* note 19, at 105–58.

109. *Webb*, 125 P.3d at 911.

110. *Id.*

111. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

112. Voluntary assumption can be the basis of finding a duty both when the student's cause of action is based on the acts of the educational institution and when the student's cause of action is based on the acts of third parties. See *Nova*, 758 So. 2d at 90.

Second of Torts.¹¹³ Regardless of whether the relationship between the educational institution and student is deemed a “special relationship” or whether the educational institution “voluntarily” assumed a duty, the court must still determine as a matter of law what the scope of the duty is.¹¹⁴

1. The “Special Relationship”

Where students have sued their educational institutions for injuries caused by the act of a third party, courts have consistently applied Section 315 of the Restatement (Second) of Torts,¹¹⁵ which provides:

113. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

114. See *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993) (“The determination that the College owes a duty of care to its intercollegiate athletes could merely define the class of persons to whom duty extends, without determining the nature of the duty or demands it makes on the College.”). Circuit Judge Samuel Alito dissented in *Kleinknecht* on the grounds that the facts alleged were insufficient to establish that the College had breached its duty to the student. *Id.* at 1375.

115. Reference is to the Restatement (Second) of Torts because that is the provision the courts relied upon in deciding the cases discussed in this section. See, e.g., *Hawkins v. Waynesburg Coll.*, No. 07-5, 2008 WL 2952888 (W.D. Pa. Jul. 30, 2008); *Webb v. Univ. of Utah*, 125 P.3d 906 (Utah 2005); *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000); *Knoll v. Bd. of Regents of the Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999); *Judson v. Essex Agric. and Technical Inst.*, 635 N.E.2d 1172 (Mass. 1994); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337 (Cal. Ct. App. 2007); *Stockinger v. Feather River Cmty. Coll.*, 111 Cal. App. 4th 1014 (Cal. Ct. App. 2003); *Mizutani v. Cal. State Univ. Long Beach*, No. B152490, 2002 WL 31117258 (Cal. Ct. App. Sept. 25, 2002); *Mintz v. State*, 362 N.Y.S.2d 619, 620 (N.Y. App. Div. 1975).

Section 40 of the Restatement (Third) of Torts provides:

(a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.

(b) Special relationships giving rise to the duty provided in Subsection (a) include:

- (1) a common carrier with its passengers,
- (2) an innkeeper with its guests,
- (3) a business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises,
- (4) an employer with its employees who are: (a) in imminent danger; or (b) injured and thereby helpless,
- (5) a school with its students,
- (6) a landlord with its tenants, and
- (7) a custodian with those in its custody, if: (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and (b) the custodian has a superior ability to protect the other.

RESTATEMENT (THIRD) OF TORTS § 40 (Tentative Draft No. 5, 2005) (emphasis added).

Subsection (b)(5) is a new addition. Comment 1 primarily focuses on the duty owed to elementary and secondary schools to their students. RESTATEMENT (THIRD) OF TORTS § 40 cmt. 1 (Tentative Draft No. 5, 2005). Comment 1 leaves open the possibility that Section (b)(5) applies to college students when it states “because of the wide range of students to which it is applicable, what constitutes reasonable care is

There is no duty so to control the conduct of a third person so as to prevent him from causing physical harm to another unless

(a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relationship exists between the actor and the other which gives to the other a right to protection.¹¹⁶

The determination of whether a "special relationship" exists is a question of law for the court to decide.¹¹⁷ The scope of the duty owed when a "special relationship" exists is limited to the risks, which "arise within the confines of the relationship" and are usually limited by "geography and time."¹¹⁸ The duty applies regardless of whether the source of the risk is the educational institution or a third party.¹¹⁹

When determining whether a special relationship exists, courts have consistently held that the student-university relationship is not sufficient in itself to create a special relationship.¹²⁰ Those courts which have found that a special relationship exists have determined that at the time of the student's injury the educational institution's relationship with the student was the same as that of the business invitee,¹²¹ property owner,¹²² or landlord-tenant.¹²³ Because the educational institution was providing the same type of services to the students that any business would provide an invitee, any property owner would provide one legally on their property, or any landlord would provide a tenant, the educational institution was held to the same duty of care as that owed by non-educational institutions in similar situations.¹²⁴ The courts provided students with the same protection

contextual – the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students." *Id.*

116. RESTATEMENT (SECOND) OF TORTS §315 (1965).

117. RESTATEMENT (THIRD) OF TORTS § 40 cmt. e (Tentative Draft No. 5, 2005).

118. *Id.* at cmt. f.

119. *Id.* at cmt. g.

120. *See, e.g., Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993) ("[T]he university-student relationship does not in and of itself impose a duty upon universities to protect students from actions of fellow students or third parties.").

121. *See Leonardi v. Bradley Univ.*, 625 N.E.2d 431, 435 (Ill. App. Ct. 1994) ("While we might agree with plaintiff that a student can be a business invitee of a university while engaged in various activities conducted by the university, such as attending classes or participating in university-sponsored activities, we cannot agree that a special relationship exists" when student is attending a fraternity party and is sexually assaulted.).

122. *See Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at *1 (E.D. Pa. Aug. 14, 2008).

123. *See Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (finding an alternative ground for recovery was the student's status as an invitee on University property).

124. *See Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000).

of the law on-campus as they had off-campus. Thus, courts have been consistent in treating students and non-students alike in the eyes of the law.

In determining the scope of duty owed by educational institutions to their students, the focus often has been on reasonable foreseeability.¹²⁵ For an event to be reasonably foreseeable does not require that the educational institution have actual knowledge that the event would occur, but only requires that when taking into account all of the circumstances, whether “the ordinary man under such circumstances should reasonably have foreseen” that the event would occur.¹²⁶ In order for a duty to arise when an event is reasonably foreseeable, “the risk of harm [must be] sufficiently high and the amount of activity needed to protect against the harm [must be] sufficiently low to bring the duty into existence.”¹²⁷ When engaging in this balancing test, the court applies the same factors as it does to determine foreseeability when the student alleges that the institution itself acted negligently.¹²⁸ Courts have consistently refused to impose a duty on educational institutions that would result in impossible or impractical standards.¹²⁹

When student injuries occur on the educational institution’s property, particularly in student housing, courts tend to impose the same duty on the educational institution as has been imposed on other landlords.¹³⁰ An educational institution has “a duty to exercise reasonable care in taking such measures as were reasonably necessary for [the student’s] safety in

125. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 815 (Cal. Ct. App. 1981).

126. *Id.* at 815–16.

127. *Id.* at 816 (citing *Bartell v. Palos Verdes Peninsula Sch. Dist.*, 147 Cal. Rptr. 898, 902 (Cal. Ct. App. 1978)).

128. *Id.*

[T]he degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id.

Courts have also described the test as a “risk-utility test”, which takes into account: “(1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.” *Sharkey v. Bd. of Regents of the Univ. of Neb.*, 615 N.W.2d 889, 900 (Neb. 2000).

129. *Christiansen v. Univ. of Minn. Bd. of Regents*, No. 69DU-CV-05-2027, 2006 WL 6191767, at *10 (Minn. Dist. Ct. Mar. 22, 2006) (finding that the university was not in a position to protect student); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) (finding that the duty would have been “realistically incapable of performance”).

130. *But see Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552, 562 (Ill. App. Ct. 1987) (“[Under Illinois law,] the landlord-tenant relationship has not been considered a special relationship which could create the existence of a duty.”).

light of all then existing circumstances.”¹³¹ In determining the measures reasonably necessary, most jurisdictions apply a totality of the circumstances test,¹³² while a minority of jurisdictions require that a similar prior criminal act have occurred on the premises.¹³³ Reasonable care requires that the educational institution maintain the premises in good order, including locks on doors and windows,¹³⁴ provide warnings to students of criminal activity in the area and advise students on safety measures,¹³⁵ and provide adequate security.¹³⁶

Courts have also found a special relationship between the educational institution and the student when the educational institution has exerted control.¹³⁷ Control focuses on the amount of autonomy retained by the student in relation to the actions taken by the educational institution.¹³⁸ As discussed in detail above,¹³⁹ the more control the educational institution exercises, the more likely a special relationship will be found. Courts have found a special relationship between the educational institution and students participating in intercollegiate sports, but not for students participating in intramural sports.¹⁴⁰ Courts are split over whether a special

131. *Stanton v. Univ. of Me.*, 773 A.2d 1045, 1048 (Me. 2001) (citing *Schultz v. Gould Acad.*, 332 A.2d 368, 370 (Me. 1975)).

132. *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999) (applying totality of circumstances with focus on knowledge landowner had or should have had with regard to foreseeability of the injury).

133. *See L.W. v. W. Golf Ass'n*, 712 N.E.2d 983, 985 (Ind. 1999) (finding that no similar events had occurred on premises); *Agnes Scott Coll. v. Clark*, 616 S.E.2d 468, 470–71 (Ga. Ct. App. 2005) (holding that no similar criminal activity had occurred on premises or in the area).

134. *See Delaney v. Univ. of Houston*, 835 S.W.2d 56, 60 (Tex. 1992) (finding that the university had a duty to repair locks on doors to prevent criminal acts of third persons).

135. *See Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993) (holding that the university had duty to warn the student that a fellow student had been charged with sexual assault when university placed charged that student in co-ed housing); *see also Stanton*, 773 A.2d at 1050 (“[T]he University owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety.”).

136. *See e.g., Delta Tau Delta*, 712 N.E.2d at 974 (foreseeable sexual assault); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336–37 (Mass. 1983) (student abducted from room and sexually assaulted on campus); *Sharkey v. Bd. of Regents of the Univ. of Neb.*, 615 N.W.2d 889, 901 (Neb. 2000) (wife sexually harassed by fellow student, husband also attacked by student).

137. *See Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005); *see also supra* notes 111–16 and accompanying text.

138. *See Webb*, 125 P.3d at 911; *see also supra* notes 111–16 and accompanying text.

139. *See* discussion *supra* Part II.A.1.b.

140. *Compare Davidson v. Univ. of N.C.*, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001) (duty to junior varsity cheerleader injured during warm-up for game), *and Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1369 (3d Cir. 1993) (duty to lacrosse player injured at practice), *with Ochoa v. Cal. State Univ.*, 72 Cal. App. 4th 1300, 1308 (Cal. Dist. Ct. App. 1999), *aff'd* 85 Cal. Rptr. 2d 768, 773 (Cal. Ct. App. 1999) (no

relationship exists between an educational institution and a student who has committed suicide.¹⁴¹

The largest number of cases which have been decided under the special relationship doctrine are cases which involve a student's voluntary intoxication. Until recently, courts have refused to find that educational institutions had a duty to protect students from injuries due to their own or a fellow student's voluntary intoxication.¹⁴² In finding no duty, courts focused on the lack of a close connection between the educational institution's failure to prevent voluntary alcohol consumption and the injury.¹⁴³ Other courts found that a duty to protect students against the voluntary consumption of alcohol was both impossible and impractical for the educational institution to accomplish.¹⁴⁴ Moreover, imposition of such a duty would require that the educational institution limit other freedoms of students, which would be against public policy.¹⁴⁵ It was clear, however,

duty to student playing intramural soccer).

141. *Compare Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 610 (W.D. Va. 2002) (citing *Mullins*, 449 N.E.2d at 336) (finding "special relationship" and imposing duty because "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 students from foreseeable harm[,] and reasoning that harm was foreseeable where an institution believed a student likely to harm him- or herself based on college's interventions), *with Jain v. State*, 617 N.W.2d 293, 298-99 (Iowa 2000) (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)) (finding no duty because no affirmative act of the institution "increased the risk of harm" to the student).

142. *See, e.g., Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Univ. of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987); *Brooker v. Lehigh Univ.*, 800 F. Supp. 234 (E.D. Pa. 1992); *Barran v. Kappa Alpha Order*, 730 So. 2d 203 (Ala. 1998); *L.W. v. W. Golf Ass'n*, 712 N.E.2d 983 (Ind. 1999); *Robertson v. State*, 747 So. 2d 1276 (La. Ct. App. 2000); *Garofalo v. Lamda Chi Alpha Fraternity*, 616 N.W.2d 647 (Iowa 2000); *Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003); *Hall v. Moravian Coll.*, No. 1999-C-9238, 2002 WL 34103009 (Pa. Ct. Com. Pl. Apr. 1, 2002); *Christiansen v. Univ. of Minn. Bd. of Regents*, No. 69DU-CV-05-2027, 2006 WL 6191767 (Minn. Dist. Ct. Mar. 22, 2006); *Pawlowski v. Delta Sigma Phi*, No. CV-03-0484661S, 2009 WL 415667 (Conn. Super. Ct. Jan. 23, 2009). *But see, Knoll v. Bd. of Regents of the Univ. of Neb.*, 601 N.W.2d 757 (Neb. 1999) (applying landowner liability theory, the court found a "special relationship" because the University had knowledge of hazing, which made the student's injury foreseeable, and the University could have controlled the behavior of the hazers through its Student Code of Conduct).

143. *Baldwin*, 176 Cal. Rptr. at 816.

144. *See e.g., Christiansen*, 2006 WL 6191767, at *10 (finding that the university was not in a position to protect student); *Beach*, 726 P.2d at 418 (finding that the duty would have been "realistically incapable of performance").

145. *Pawlowski*, 2009 WL 415667, at *5 (holding that the imposition of a duty would be against public policy because it would require acts by the university which were against public policy); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987) (citing *Beach*, 726 P.2d at 419) (imposing a duty would encourage University to limit student choice creating a "repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education"); *Booker*, 800 F. Supp. at 241

that courts were placing the moral blame for the injury not on the educational institution, but on the student who had voluntarily consumed alcohol to excess.¹⁴⁶

To the extent that the educational institution has knowledge of an unreasonably dangerous condition and has the ability to eliminate the dangerous condition or diminish the risk of harm posed by the dangerous condition, the educational institution has a duty to take reasonable action to eliminate or diminish the risk of harm to the student, even when the dangerous condition may be another student.

2. Voluntary Assumption of Duty

Where students have sued their educational institutions for injuries caused by the act of a third party, courts have consistently applied Section 323 of the Restatement (Second) of Torts,¹⁴⁷ which provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

His failure to exercise such care increases the risk of such harm, or

The harm is suffered because of the other's reliance upon the undertaking.¹⁴⁸

Educational institutions can voluntarily assume a duty either by contract or by the actions they take.¹⁴⁹ Courts have split on whether the adoption of a policy or a provision of a student handbook or code of conduct is evidence

(imposing such a duty would infringe on other rights of students); *Beach*, 726 P.2d at 418 (finding that the existence of a duty would have been "fundamentally at odds with the nature of the parties' relationship").

146. *Robertson*, 747 So. 2d at 1284 (refusing to protect the student from "his deliberate act of recklessness"); *Baldwin*, 176 Cal. Rptr. at 816.

147. Reference is to the Restatement (Second) of Torts because that is the provision the courts relied upon in deciding the cases discussed in this section. *See cases supra* note 115. Section 42 of the Restatement (Third) of Torts provides:

An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking; or

(b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

RESTATEMENT (THIRD) OF TORTS § 42 (Tentative Draft No. 5, 2005).

148. RESTATEMENT (THIRD) OF TORTS § 42 (Tentative Draft No. 5, 2005).

149. *Id.* at cmt. a.

of a voluntary assumption of duty.¹⁵⁰ The first question for the court is whether the educational institution had knowledge that its “undertaking will reduce the risk of harm to another.”¹⁵¹ The second question is whether the educational institution’s act increased the risk of harm “beyond that which existed in absence of the actor’s undertaking.”¹⁵² Reliance by the student on the educational institution is just one way that risk of harm can be increased.¹⁵³

In *Silvers v. Associated Technical Institute, Inc.*,¹⁵⁴ the court found that the vocational school’s contractual obligation to provide its students with job placement services was a voluntary assumption of a duty and required the school to exercise due care in providing the placement services. When the placement office received a job posting for a “[f]emale tech for Communications switching complex a lot of travel part-time,”¹⁵⁵ due care required the school to make some effort to investigate the potential employer in order “to avoid placing [students] with an employer likely to harm them.”¹⁵⁶ The court applied “existing social values and customs, and . . . appropriate social policy” to determine that a job order that requested only female applicants should have been sufficient to put the school on notice that the employer may not be reputable.¹⁵⁷ Moreover, the student acted reasonably in “[a]ssuming that [the school] would only refer [her] name to legitimate employers which it had screened.”¹⁵⁸

Likewise, in *Nova Southeastern v. Goss*,¹⁵⁹ the University could be viewed as having voluntarily assumed a duty when it designed a required internship program, chose the placement sites, and assigned students to the placement sites.¹⁶⁰ Once the University exerted control, the University assumed the duty to exercise due care in choosing placement sites and placing students in those placement sites. The duty to exercise due care includes protecting students from foreseeable dangers. Foreseeable dangers include those dangers the University had actual knowledge of; in

150. Compare *Brooker*, 800 F. Supp. 234 (language is aspirational), and *Jain*, 617 N.W. 2d 293 (finding that a policy of notifying a parent of student’s self-destructive behavior was not an assumption of a duty to prevent suicide), with *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) (assumption of duty).

151. RESTATEMENT (THIRD) TORTS § 42 cmt. d (Tentative Draft No. 5, 2005).

152. *Id.* at cmt. f.

153. *Id.*

154. *Silvers v. Associated Technical Inst.*, No. 934253, 1994 WL 879600, at *3 (Mass. Oct. 12, 1994) In *Silvers*, the student, who used the school’s employment placement services, was sexually assaulted and harassed by her employer.

155. *Id.* at *1.

156. *Id.* at *3.

157. *Id.* at *4 (citing *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070 (Mass. 1989)).

158. *Id.* at *2.

159. 758 So. 2d 86 (Fla. 2000); see discussion *supra* pp. 11–12.

160. *Nova*, 758 So. 2d at 87–88.

this case, other criminal activity near the placement site which made the risk of harm to the student reasonably foreseeable.¹⁶¹ Because of the amount of control exerted by the University in the implementation of its internship program, the student “relied” upon the University to only place her at sites deemed safe, and the student suffered injuries due to her reliance on the University.¹⁶² In addition, the University’s failure to warn the student of the known dangers of the placement site was a failure to exercise due care which failure increased the risk that the student would be injured at the placement site,¹⁶³ because the student did not have the knowledge she needed to take precautions to protect herself.

In alcohol consumption and fraternity cases, courts that have refused to find the existence of a special relationship may find that the educational institution has voluntarily assumed a duty.¹⁶⁴ In *Furek v. University of Delaware*,¹⁶⁵ the student was injured during a fraternity hazing event,¹⁶⁶ which was held at the fraternity house located on University property, but leased to the fraternity.¹⁶⁷ The University’s Student Guide to Policies stated that “[h]azing, the subjection of an individual to any form of humiliating treatment and the violation of the rights of other students, have no place in the University community.”¹⁶⁸ Despite the University’s policy, hazing continued on campus, and campus officials had knowledge that hazing was occurring.¹⁶⁹ When notified of the student’s injuries due to hazing, the University instituted its own investigation, but was unable to initiate disciplinary proceedings due to lack of cooperation.¹⁷⁰ The court found that even though the doctrine of in loco parentis did not apply to the University-student relationship, the University still maintained a residual duty of control and stated that “where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the

161. *Id.* at 88.

162. RESTATEMENT (SECOND) OF TORTS § 323(b) (1965).

163. *Id.* at § 323(a).

164. *McClure v. Fairfield Univ.*, No. CV000159028, 2003 WL 21524786, at *8 (Conn. Super. Ct. Jun. 19, 2003) (finding that because the University had advertised and offered a shuttle service, the University had voluntarily assumed a duty to protect students “who traveled to and from parties at the beach area.”); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 310–12 (Idaho 1999) (declining to find special relationship, but leaving open the possibility that the University had voluntarily assumed a duty of care because it had provided supervision at the fraternity party where the underage student voluntarily became intoxicated).

165. 594 A.2d 506 (Del. 1991).

166. There is no mention that alcohol was involved in the hazing event. *See id.* at 506.

167. *Id.* at 509.

168. *Id.* at 510 n.2.

169. *Id.* at 510–11.

170. *Furek*, 594 A.2d at 511.

university cannot abandon its residual duty of control.”¹⁷¹ Applying Section 323 of the Restatement, the court held that the “University’s policy against hazing, like its overall commitment to provide security on its campus . . . constituted an assumed duty which became ‘an indispensable part of the bundle of services which colleges . . . afford their students.’”¹⁷² In coming to its conclusion, the court relied upon the expectations of students, parents, and the community to protect students from these types of dangerous activities.¹⁷³

The *Silvers*, *Nova Southeastern*, and *Furek* cases indicate that courts are willing to expand an educational institution’s duty to its students under a voluntary assumption of duty analysis.¹⁷⁴ The problem for educational institutions under a voluntary assumption of duty analysis is that if the institution is fulfilling its duty of care in designing and implementing its curriculum, then the institution has already taken into account how it can reduce the risk of harm to its students while still creating opportunities for the students to take on responsibility and leadership roles. Under a *Furek* type analysis, almost any action taken by an educational institution can be deemed to be a voluntary assumption of duty. The exception then becomes the rule and provides students with more legal protections than non-students, which is against public policy. In determining whether an educational institution has voluntarily assumed a duty, the court should only find that the educational institution assumed a duty when there is an increased level of risk, the educational institution knows or should know of the increased level of risk, and the educational institution can control the risk. These three factors were present in all three cases. In *Silvers*, the placement office should have known of the increased risk of sexual harassment because the request was only for female applicants and the placement office could have refused to accept the placement request. In *Nova Southeastern*, the University had knowledge of recent criminal activity near the placement site and the University controlled the selection of sites and placement of students at sites. In *Furek*, the University knew or should have known that hazing was occurring on campus and the University, as evidenced by its actions after the events, had the authority to punish students and student organizations participating in hazing. Again, it is the educational institution’s knowledge and control of the risk which creates the duty to the student.

171. *Id.* at 520.

172. *Id.* at 520 (citing *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983)).

173. *Id.*

174. *But see* *Guest v. Hansen*, No. 06-cv-0500, 2007 WL 4561104, at *1 (N.D.N.Y. Dec. 18, 2007); *Rogers v. Del. State Univ.*, 905 A.2d 747, 747 (Del. 2006); *Ingato v. Wilmington College, Inc.*, 882 A.2d 761, 761 (Del. 2005).

C. Litigation Arising Out Of Study Abroad Programs

Although the primary focus of this article is on international externship programs, the author could find no reported cases regarding international externship programs. In fact, there are very few reported cases where students have sued their college or university for events which occurred during their study abroad program.¹⁷⁵ While injuries to students abroad have often made headline news,¹⁷⁶ few of these events appear in reported cases. The reason for this phenomenon is unknown.¹⁷⁷ Given the breadth and diversity of locations in which U.S. students study abroad, it seems unlikely that the lack of reported cases is simply because these students are in a safer environment when studying abroad than they are at home in the United States. In *The Rights and Responsibilities of the Modern University: Who Assumes the Risk of College Life?*,¹⁷⁸ Peter Lake surmises that the dearth of reported cases addressing college and university tort liability and the fact that most reported cases are resolved in the college's or university's favor has occurred because college and university policy makers and college and university counsel settle cases which would make bad law for the university and only litigate those cases where there is an opportunity to develop law favorable to the college or university.¹⁷⁹ Perhaps, because international incidents result in bad publicity and institutions want and need good publicity in order to continue to attract students, universities are settling these cases. Or, perhaps because the events occurred in a foreign country, U.S. courts are perceived as not having jurisdiction over all the necessary parties.¹⁸⁰

175. In 1999, in *The Legal Liability of Risks Associated with International Study Abroad Programs*, William Hoye identifies two reported cases. Hoye, *supra* note 13, at 8 n.2 (Furrh v. Ariz. Bd. of Regents, 676 P.2d 1141 (Az. Ct. App. 1983) (student with mental disorder restrained in Mexico); Sipple v. Bd. of Governors, 318 S.E.2d 256 (N.C. Ct. App. 1984) (student sued college for refund when tour operator went into bankruptcy and stopped operating)). In 2006, in *Americans Abroad: International Educational Programs and Tort Liability*, Vincent Johnson identified six cases where students sued their university for events occurring in the study abroad program. Johnson, *supra* note 6, at 312–13.

176. See Mary Beth Marklein, *Students Abroad and Alone: No Government or School Agency Oversees Programs*, USA TODAY, May 28, 2009, at Life 1D.

177. Fewer cases filed in the United States for incidents occurring overseas, subject matter and personal jurisdiction problems, and other factors may play a role in this phenomenon.

178. See BICKEL & LAKE, *supra* note 19.

179. *Id.* See also Lake, *Rights and Responsibilities Revisited*, *supra* note 19.

180. FED. R. CIV. P. 19. See also Phillips v. Saint George's Univ., No. 07-CV-1555, 2007 WL 3407728, at *5 (E.D.N.Y. Nov. 15, 2007) (refusing to find jurisdiction even though university solicited students and accepted funds in United States, because University was located in Grenada, West Indies, and all acts occurred in Grenada, West Indies); Paneno v. Centres for Academic Programmes Abroad, Ltd., 118 Cal. App. 4th 1447 (Cal. Dist. Ct. App. 2004) (finding jurisdiction where corporation designing and marketing overseas study programs divided duties between United States and United

Regardless of why there are so few reported cases arising out of study abroad programs, the reported cases show a trend that U.S. courts are willing to hear such claims and are not willing to allow educational institutions to shield bad behavior behind waivers and exculpatory clauses¹⁸¹ or behind claims that the court does not have jurisdiction because the events occurred outside of the United States.¹⁸² These cases are a wake-up call. Educational institutions, including law schools, need to assess the risks of their study abroad programs and take measures to reduce the risk of foreseeable injury from events the institution can control and thus, be held to have had a duty to exercise reasonable care to protect the student. To the extent that international externship programs include similar risks, a court may find that the college or university had a duty to exercise reasonable care to protect the student.

1. Medical Treatment

The courts of New York and Pennsylvania have taken opposing positions regarding whether an educational institution has a duty to supervise the medical treatment provided a student participating in a study abroad program.¹⁸³ The New York Court of Appeals found that because New York did not apply the doctrine of *in loco parentis* to universities, the university had no obligation to supervise the medical treatment received by the student.¹⁸⁴ The Court of Common Pleas of Pennsylvania found as a matter of law that because Theil College required all of the students participating in the study abroad program to execute a consent for medical treatment, the College owed the student a special duty of care.¹⁸⁵ These cases are distinguishable both on their facts and on public policy grounds.

a. McNeil v. Wagner College

The student was participating in Wagner College's study abroad program in Austria when she slipped on ice and broke her ankle.¹⁸⁶ It is unknown whether, at the time of the injury, the student was actively participating in a curricular component of the study abroad program or

Kingdom corporations in order to avoid jurisdiction of United States court).

181. For a discussion of the types of documents that an institution of higher learning should consider, including waivers, assumption of risk, and exculpatory language, see Hoye & Rhodes, *supra* note 18, at 157–62 and Hoye, *supra* note 13, at 18–21.

182. See *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 786–88 (E.D. Mich. 2002).

183. Compare *McNeil v. Wagner*, 667 N.Y.S.2d 397 (N.Y. App. Div. 1998), with *Fay v. Theil Coll.*, 55 Pa. D. & C.4th 353 (Pa. Ct. Com. Pl. 2001).

184. *McNeil*, 667 N.Y.S.2d at 398.

185. *Fay*, 55 Pa. D. & C.4th at 363.

186. *McNeil*, 667 N.Y.S.2d at 398.

whether the student was pursuing her own interests.¹⁸⁷ The student claimed that the administrator of the study abroad program “assumed the duty to act as an interpreter for [the student] in the Austrian hospital and that she suffered nerve damage due to the [administrator’s] failure to inform her of the treating physician’s recommendation that she undergo immediate surgery.”¹⁸⁸

The student’s theory of liability was based on Section 323 Restatement (Second) of Torts¹⁸⁹ that the administrator had “voluntarily assumed a duty of care by acting as her interpreter at the hospital and that his breach of that duty placed [the student] in a more vulnerable position than she would have been otherwise.”¹⁹⁰ The court refused to find that the administrator had assumed such a duty when the evidence submitted by the College established that the treating physician could speak English.¹⁹¹ Moreover, the student failed to offer any evidence that the administrator had been “told of the recommendation of immediate surgery and negligently withheld that information from [the student].”¹⁹²

The court held that an institution which assists its student in obtaining medical treatment in a country with modern medical practices from a doctor who speaks the same language as the student has taken reasonable steps to protect its student from foreseeable risk. There was no evidence before the court that the student could not communicate directly with the doctor herself or that the student was required to rely upon the translation provided by the program’s administrator. Nor was there any evidence before the court that the program’s administrator knew and understood that the recommendation was for immediate surgery. The court focused on the college’s duty to the student and thus, did not discuss the difficulty the student would have had in proving that the failure of the program’s administrator to translate proximately caused the student’s nerve damage. Moreover, if the same injury (slipping on ice in the town square) had occurred to the student while in the United States, the College would have had no duty to insure that the student received appropriate medical

187. *Id.* When addressing the issue of duty for injuries occurring in the U.S., courts have distinguished between those events which are curricular or which are done in furtherance of the institution’s interests and those events which are done for the student’s own recreation. *Compare* Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927–98 (N.C. Ct. App. 2001) (duty to junior varsity cheerleader injured during warm-up for game), *and* Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1369 (3d Cir. 1993) (duty to lacrosse player injured at practice), *with* Ochoa v. Cal. State Univ., 85 Cal. Rptr. 2d 768, 773 (Cal. Ct. App. 1999) (no duty to student playing intramural soccer).

188. *McNeil*, 667 N.Y.S.2d at 398.

189. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

190. *McNeil*, 667 N.Y.S.2d at 398.

191. *Id.*

192. *Id.*

treatment. The court was holding the College to the same duty in its study abroad program as the College has in operating its domestic programs. Moreover, the court was providing the student the same protection of the law as is provided to non-students.

b. Fay v. Thiel College

The student was participating in Thiel College's study abroad program in Peru,¹⁹³ under the supervision of three of the College's faculty members.¹⁹⁴ In order to participate in the trip, all students were required to execute a "Waiver of Liability" and a "Thiel College Consent Form".¹⁹⁵ While on the trip, the student became ill and was admitted to a medical clinic in the city of Cuzco.¹⁹⁶ After the student was admitted, the faculty members and the other students left on a prescheduled trip.¹⁹⁷ The student, who was not fluent in Spanish, was left alone at the clinic¹⁹⁸ where a missionary, whom the student had not met until her admission to the clinic, acted as the student's translator.¹⁹⁹

When the student was informed through the missionary/translator that surgery was going to be performed, the student requested to be transferred to a hospital in Lima, to fly home, and to talk to her parents.²⁰⁰ All of the student's requests were denied.²⁰¹ The missionary/translator authorized the surgery.²⁰² The student was "subjected to the unnecessary surgical removal of her appendix."²⁰³ The student was conscious during and after the procedure, during which time the surgeon and anesthesiologist sexually assaulted her.²⁰⁴

The court found that the waiver of liability agreement²⁰⁵ was an invalid "contract of adhesion," because (1) the waiver of liability agreement was a

193. *Fay v. Theil Coll.*, 55 Pa. D. & C.4th 353, 354 (Pa. Ct. Com. Pl. 2001).

194. *Id.* at 354–55.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 355.

199. *Fay*, 55 Pa. D. & C.4th at 355–56.

200. *Id.* at 356.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Fay*, 55 Pa. D. & C.4th at 357–58. The exculpatory clause provided:

As a condition of my participation in the study or project, I understand and agree that I am hereby waiving any and all claims arising out of or in connection with my travel to and from and/or my participation in this project or study that I, my family, my heirs or my assigns may otherwise have against Thiel College and/or its personnel.

Id.

requirement of participation in the study abroad program, (2) the terms of the agreement were not bargained for between the student and the College, and, (3) the student could not alter the form.²⁰⁶ In response to the College's claim that it had no special relationship with the student, owed the student "no special duty beyond that of a reasonable standard of care," and did not violate the reasonable standard of care when it left the student in the Peruvian medical clinic,²⁰⁷ the court found "as a matter of law" that the College owed the student "a special duty of care as a result of the special relationship²⁰⁸ that arose between Thiel College and [the student] pursuant to the consent form that she was required to execute prior to participating in the Thiel-sponsored trip to Peru."²⁰⁹

Relying upon Section 448 of Restatement (Second) of Torts,²¹⁰ the College claimed that it could not be "liable for the unforeseeable sexual assault and/or medical malpractice of the Peruvian medical staff."²¹¹ Because the surgical room was in a restricted portion of the clinic, the presence of a faculty member at the clinic would not have prevented the surgery or sexual assault.²¹² The doctors' acts were a superseding cause of

206. *Id.* at 360–61.

207. *Id.* at 361.

208. *Id.* at 363; *see also* Bird v. Lewis & Clark Coll., 303 F.3d 1015 (9th Cir. 2002).

A special relationship arises when "one party has authorized the other to exercise independent judgment in his or her behalf" and, as a result, the party owing the fiduciary duty must take care of certain affairs belonging to the other. What makes a relationship special is not its name, but the roles assumed by the parties.

Id. at 1023 (quoting Conway v. Pacific Univ., 924 P.2d 818, 824 (Or. 1996) (citing Strader v. Grange Mut. Ins. Co., 39 P.3d 903, 906 (Or. Ct. App. 2002)).

Because the College had "assured" the student and her parent that the program would accommodate the disability, because the College represented to the student that the Australian company making the arrangements had experience in accommodating the needs of individuals with disabilities such as hers, because the faculty member in charge of the program represented that there would be "adequate facilities" for the outdoor portion of the program, and because the College had made substantial modifications to its home campus to accommodate the student's disability, there were sufficient facts for the jury to find that the College and the student had a "special relationship." *Id.* at 1023.

209. *Fay*, 55 Pa. D. & C.4th at 363.

210. Section 448 of the Restatement (Second) of Torts provides:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS § 448 (1965).

211. *Fay*, 55 Pa. D. & C.4th at 364.

212. *Id.*

the student's injuries for which the College cannot be held liable.²¹³ The Court found that the purpose of Section 323 of the Restatement (Second) of Torts,²¹⁴ was "to relax the degree of certainty required of a plaintiff's evidence to provide a basis upon which a jury may find causation."²¹⁵ The Court held that the student need only prove that the College's negligence increased the risk of harm to the student and that the increased risk of harm "was a substantial factor in bringing about the harm."²¹⁶ The student is not required to prove that a faculty member's presence would have prevented the harm, just that the absence of one increased the risk that the harm would occur.

The court held that the issue of whether the college breached its duty of care to the student,²¹⁷ and whether the absence of a faculty member increased the risk of harm to the student, were questions of fact for the jury.²¹⁸ There was sufficient evidence for a jury to determine that the absence of a faculty member increased the risk that the Peruvian medical staff would harm the student.²¹⁹

One way that an educational institution which establishes a program in a country where the student is not fluent in the local language or the doctor is not fluent in the student's primary language may attempt to meet its duty of care to students and to minimize the risk to the student by providing translation services. In addition, if the program is operating in a developing country where the medical practices are not considered to be of the same level as the United States, the educational institution would be well advised to minimize the risk that the student will be exposed to unnecessary medical procedures. An educational institution which abandons its student to seek medical care from a rural clinic whose doctors do not speak English has breached its duty of care to the student.

213. *Id.*

214. Section 323 of the Restatement (Second) of Torts provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965).

215. *Fay*, 55 Pa. D. & C.4th at 364.

216. *Id.* at 366.

217. *Id.* at 363.

218. *Id.* at 366-67.

219. *Id.*

2. Personal Injury—Student Housing

There are no reported cases in which a U.S. court has addressed a college or university's duty to provide students in its study abroad program with safe housing. Students have, however, sued companies operating study abroad programs for injuries from accidents occurring in program provided housing. In *Paneno v. Centres for Academic Programmes Abroad, Ltd.*,²²⁰ the student enrolled in a study abroad program in Florence, Italy, operated by the Centres for Academic Programmes Abroad ("CAPA").²²¹ CAPA contracted with a company experienced in locating student housing to obtain apartment housing for students enrolled in the Florence Program.²²²

In September of 2000, the student traveled to Florence, Italy, and commenced his studies without problem.²²³ During the program, the student resided with other students participating in the Program in an apartment to which he had been assigned by the Program.²²⁴ On October 21, 2000, while on the balcony to the apartment, the student leaned against the balcony railing which gave way, fell six stories, and is now paralyzed.²²⁵

The issue before the court was CAPA's motion to quash service; the court did not address the merits. When the court does address the merits, it will likely apply the same legal standard as it would if the injury had occurred in the United States, and find that there is a special relationship between the educational institution and the student which creates a duty for the educational institution to exercise reasonable care in choosing and maintaining safe housing for students participating in its study abroad program,²²⁶ because in most programs, the educational institution controls where the student lives while participating in the program. Moreover, to find a duty of care provides the student with the same type of legal protection as non-students in similar circumstances.

3. Sexual Assault—The Duty to Warn

In *Bloss v. University of Minnesota Board of Regents*,²²⁷ the University

220. 13 Cal. Rptr. 3d 759 (Cal. Ct. App. 2004). The issue before the California Court of Appeals in *Paneno* was whether the defendant was subject to the jurisdiction of California courts. *Id.* at 760.

221. *Id.* at 760–61.

222. *Id.* at 762.

223. *Id.*

224. *Id.*

225. *Id.* at 763.

226. See discussion *supra* Part II.B.1.

227. 590 N.W.2d 661 (Minn. Ct. App. 1999). The court found that the university was protected by statutory immunity, which is only available to state-owned, post-secondary institutions. Statutory immunity is a reservation of protection from the

exercised discretion when it designed its study abroad program, including the location of student housing, to meet particular educational goals.²²⁸ At the time of the sexual assault, the student was participating in the “University’s Spanish in Cuernavaca Program at the Cemanahuac Educational Community,” a “cultural immersion program.”²²⁹ While participating in the program, students live with host families²³⁰ and either walk to school or commute via public bus or taxi.²³¹ The University, however, had “no written guidelines governing the distance of host families from schools or transportation for the program.”²³²

Students, including the student assaulted, “attend mandatory orientation sessions at which they receive explicit oral and written warnings relating to safety in Cuernavaca.”²³³ In this case, the warnings the student received “included specific admonitions that it was dangerous for women to go out alone at night, that [students] should call for a taxi at night rather than hail a taxi on the street, and that women should never sit in the front seat of taxis.”²³⁴ In the eighteen years the Program was operating prior to the sexual assault of the student, there had been no sexual assault of a student in the Program, nor did the University have any knowledge of a sexual assault of a tourist.²³⁵

At the time of the sexual assault, the student was riding in the front seat of a taxi which she had hailed on the street at night.²³⁶ The student was on her way to a friend’s house when the taxi driver sexually assaulted her.²³⁷ The student sued the University claiming “negligence in its failure to secure housing closer to the Cemanahuac campus, failure to provide transportation to and from campus, failure to adequately warn about risks, and failure to protect students from foreseeable harm.”²³⁸

Designing the Program required the University to engage in balancing “competing public policy considerations,”²³⁹ including “academic,

waiver of sovereign immunity usually contained in a state’s tort claims act. Sovereign immunity usually protects the state agency when in its discretionary, policy making activities. *Id.* at 664, 667.

228. *Id.* at 662.

229. *Id.*

230. Host families must meet a set of criteria in order to participate in the Program. Students unhappy with their host family are allowed to select another family. *Id.* at 663.

231. *Id.* All host families are located within walking distance or on a bus line.

232. *Id.*

233. *Paneno*, 590 N.W.2d at 663.

234. *Id.* at 666.

235. *Id.* at 663.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Paneno*, 590 N.W.2d at 665.

financial, political, economic, and social considerations,”²⁴⁰ in order to meet the educational goals of the study abroad program. The court indicated that it was not persuaded that the University could have done more to protect the student when the student acknowledged that she engaged in the very behavior that she was warned against during the mandatory orientation session.²⁴¹ The court concluded by holding that the University is not a guarantor of student safety; it is both physically impossible and unrealistic to believe that a University can protect all of its students, all of the time while the student is participating in a study abroad program.²⁴²

Educational institutions have discretion to design study abroad programs to meet particular, identified educational goals. In exercising that discretion, educational institutions must not only identify reasonably foreseeable risks to students, but must warn students of the risks and provide students with strategies to avoid these risks. Educational institutions have not been, and should not be, held to impossible standards.

4. Federal Civil Rights Statutes²⁴³—Title IX,²⁴⁴ the Rehabilitation Act,²⁴⁵ and Title III of the Americans with Disabilities Act²⁴⁶

Although there are few cases, U.S. courts have applied federal civil rights statutes to U.S. schools operating study abroad programs when the alleged violation of the civil rights statutes occurred overseas.²⁴⁷ The courts’ rationale has been that it was the intent of Congress that the protection of these statutes apply to all education programs and activities operated by U.S. educational institutions.²⁴⁸ Congress did not include an explicit exception for study abroad programs.²⁴⁹ Because the role of the

240. *Id.*

241. *Id.* at 666.

242. *Id.*

243. The cases discussed in this section, although based upon statutory duties, illustrate additional types of behavior which create risks for the educational institution in its study abroad and international externship programs.

244. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2009).

245. Rehabilitation Act of 1973, 29 U.S.C. §§ 791–94 (2009).

246. Title III of the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12181–89 (2009).

247. *See e.g.*, *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (Rehabilitation Act and Title III of the ADA); *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002) (Title IX); *Philips v. Saint George’s Univ.*, No. 07-CV-1555, 2007 WL 3407728, at *1 (E.D.N.Y. Nov. 15, 2007) (Title IX).

248. *King*, 221 F. Supp. 2d at 790–91. Because the female students were enrolled in a U.S. university, the female students were “persons within the United States” for purpose of Title IX, even if the education program that they were participating in and the harassing acts occurred in a foreign country. *Id.*

249. *Id.* at 788.

court is to apply the statute as intended by Congress, the court was not in a position to create an exception that both Congress and the executive branch agency charged with enforcing the statute had refused to create.²⁵⁰ The court emphasized that “[s]tudy abroad programs are an integral part of college education today. A denial of equal opportunity in those programs has ramifications on students’ education as a whole and detracts from their overall education.”²⁵¹

The mere fact that the events at issue occurred in a foreign country as part of an educational institution’s study abroad program is not sufficient to relieve the institution of its duty to its student. In the few reported study abroad cases, courts have been consistent in holding educational institutions to the same legal duty to its students in both its domestic and foreign educational programs. The good news is that the educational institution knows what its obligations to its students are and can therefore exercise reasonable care in the design and implementation of its study abroad programs.

III. THE EDUCATIONAL INSTITUTION’S DUTY TO THE EXTERNSHIP PLACEMENT SITE

Over the past decade, courts seem to have been leveling the playing field by treating students and non-students alike in the eyes of the law and by treating educational institutions and businesses/landowners alike in the eyes of the law. It is likely that this trend will continue. And, if it does, it is not difficult to predict that a court will find that under certain circumstances an educational institution owes a duty of care to non-students.²⁵² Such circumstances are likely to include externship programs, particularly when the educational institution has knowledge about a student that makes it reasonably foreseeable that the student may cause harm to another at the placement site. Although no court has yet to address this issue, educational institutions have knowledge of their students’ behavior and usually exert sufficient control in the design and implementation of their externship programs for a duty to exercise reasonable care to arise.

When an educational institution has knowledge that one of its students is likely to injure another person, the institution should act with reasonable care to prevent the injury. Knowledge means information that the educational institution actually knows, which, at a minimum, includes the information contained in a student file, but likely also includes that information which staff and faculty have that should have been reported to an individual with authority to act on the information.²⁵³ Where the

250. *Id.*

251. *Id.* at 791.

252. *See Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

253. *See Schieszler v. Ferrum College*, 236 F. Supp. 2d 602 (W.D. Va. 2002)

educational institution does not have the ability to control the acts of the student,²⁵⁴ the duty of reasonable care may be limited to warning the non-student of the potential harm.²⁵⁵ The educational institution is “in control” when it has the ability to remove the risk—here the student—from the program or facility. When the educational institution is “in control,” a court is likely to find that the institution’s duty of reasonable care includes more than just warning the individual likely to be harmed. When the educational institution is “in control,” it may need to take steps to limit the ability of the dangerous student to harm others.²⁵⁶

Although *Tarasoff v. Regents of the University of California*²⁵⁷ is not a school case, and did not involve an international program, it establishes the rationale and parameters for when public policy requires the recognition of a duty of reasonable care to protect third parties from a dangerous individual. In *Tarasoff*, the underlying event was Prosenjit Poddar’s murder of Tatiana Tarasoff.²⁵⁸ Prior to the murder, during his voluntary outpatient treatment at Cowell Memorial Hospital at the University of California Berkeley, Poddar informed his therapist that he was going to kill a girl (who was easily identified as Tatiana Tarasoff) when she returned home from her summer travels.²⁵⁹ The therapist recommended that Poddar be committed for observation in a mental hospital, and campus police were notified of the request for commitment.²⁶⁰ Campus police took Poddar into custody, but upon determining that he was “rational, released him on his promise to stay away from Tatiana.”²⁶¹ The plaintiffs’ alleged that the therapist’s “negligent failure to warn Tatiana or others likely to apprise her of her danger” was the proximate cause of Tatiana’s death. The University claimed that it had no duty of care to warn Tatiana or her parents of Poddar’s threat.²⁶² The California Supreme Court stated that “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

(finding a duty to protect where college had knowledge that student was dangerous to himself).

254. An educational institution’s lack of authority to control the acts of a student may come from a variety of sources, including state and federal law.

255. See *Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at *1 (E.D. Pa. Aug. 14, 2008). But see *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993).

256. *Nero*, 861 P.2d at 780.

257. 551 P.2d at 334.

258. *Id.* at 339.

259. *Id.* at 341.

260. *Id.*

261. *Id.*

262. *Id.* at 342.

relationship to the *dangerous person or to the potential victim*.”²⁶³ Applying Section 315 of the Restatement Second of Torts, the court found that a special relationship exists between the doctor/therapist and patient and that “[s]uch a relationship may support affirmative duties for the benefit of third persons.”²⁶⁴ In balancing the patient’s privacy interest, the interest in confidential dialogue between patient and doctor, and the protection of the public, the court held that the therapist had “a duty to exercise reasonable care to protect Tatiana.”²⁶⁵ The duty to exercise reasonable care required the therapist to notify the patient’s potential victim or the potential victim’s family member of the threat.²⁶⁶

In *Nero v. Kansas State University*,²⁶⁷ the injured student was sexually assaulted in the basement recreation room of a co-ed residence hall by a male student during a summer session.²⁶⁸ Approximately one month earlier, the male student had been accused of raping J.N., a female student living in his residence hall, which resulted in criminal charges.²⁶⁹ After being released on bond, the male student was assigned to an all male residence hall for the remainder of the academic year.²⁷⁰ For the summer session, the only campus housing available was a co-ed dormitory, and the male student moved to the co-ed residence hall.²⁷¹ The University did not warn the female students living in the co-ed residence hall that the male student had been charged with rape.²⁷² The court determined that because the University was providing housing to its students, it was in competition with private landlords, and thus, owed the same duty of care to its students as a private landlord owed to its tenants.²⁷³ The court held that the University had “a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and *within the university’s control*.”²⁷⁴ The court emphasized that the University knew that the male student had been charged with rape and that

263. *Nero*, 861 P.2d at 342–43 (emphasis added).

264. *Id.* at 343; *see also* *Merchs. Nat’l Bank & Trust v. United States*, 272 F. Supp. 409 (D. N.D. 1967) (holding that where Veteran’s Administration arranged for mentally ill patient to work, but did not inform employer of patient’s mental illness, Veteran’s Administration liable for wrongful death of patient’s wife when patient left work and killed wife during work hours.).

265. *Tarasoff*, 551 P.2d at 348 (holding that the plaintiff could amend her complaint against the therapist and other defendants for breach of duty of reasonable care).

266. *Id.* at 347–48.

267. *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993).

268. *Id.* at 771.

269. *Id.*

270. *Id.*

271. *Id.* at 772.

272. *Id.* at 768.

273. *Nero*, 861 P.2d at 779.

274. *Id.* at 780 (emphasis added).

the previous semester the University had taken reasonable steps to protect other students.²⁷⁵ The court also emphasized that the University could have refused to rent the male student a room in the co-ed residence hall during the summer session.²⁷⁶ Because the University had both the knowledge that the student was dangerous and the ability to control the dangerous student in order to reduce the risk of harm to the injured student, the University owed the injured student a duty of care.

In *Fitzpatrick v. Universal Technical Institute*,²⁷⁷ Fitzpatrick's Estate sued the Institute claiming that the Institute's students had used the knowledge learned at the Institute and the Institute's facilities to alter their cars so that the cars could be driven faster during drag races held near campus.²⁷⁸ The Estate claimed that the school was aware of its students' racing as it had enacted "a policy of dismissing students seen exhibiting this behavior."²⁷⁹ The Estate also claimed that the Institute's failure to "properly police its students was negligent and was a proximate cause of the accident," which killed Fitzpatrick.²⁸⁰ The Institute contended that it had no duty "to prevent its students from harming others, even if the harm is foreseeable."²⁸¹ The court applied the general property rule that a property owner has a duty to police the use of his property, if he "has reason to expect that a person will use that property in a manner likely to cause injury to others."²⁸² Thus, if the Institute knew or should have know that its students were using the Institute's facility to alter their cars for the purpose of drag racing, then the Institute owed a duty of care to those persons who could foreseeably be injured by the students use of the altered cars.

Arguably all three cases are premised upon a "special relationship" with either the student or the third party – therapist/patient, landlord/tenant, and property owner. An educational institution could argue that because the student/university relationship itself is not sufficient to create a special relationship, the educational institution offering an externship program to its students does not have a duty to the placement site or anyone at the placement site. Moreover, in an externship relationship, it is the placement site that is in the position of premises owner vis-à-vis the student as business invitee, not the educational institution. Thus, if a special relationship exists it is between the placement site and the injured person,

275. *Id.*

276. *Id.*

277. *Fitzpatrick v. Universal Technical Inst.*, No. 08-1137, 2008 WL 3843078, at *1 (E.D. Pa. Aug. 14, 2008).

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at *2.

not the educational institution and the injured person.

Because the courts' primary focus in these analogous cases was not on the relationship between the various actors, but on the knowledge that the institution had and the public policy of protecting innocent third parties from violence,²⁸³ it seems a court is unlikely to accept such an argument from an educational institution. As between the placement site and the educational institution, it is usually the educational institution that has superior knowledge about its student's background, criminal record, prior bad acts, and level of dangerousness, if any. A court is more likely to find that when the educational institution has knowledge that one of its students is dangerous and has the ability to control the student's participation in the externship program, the institution has a duty to protect not only its students, but others who could foreseeably be injured by the dangerous student. An institution can control the dangerous student's participation in the externship program by refusing to allow the student to enroll in the program or by removing the dangerous student from the program. If the educational institution cannot control the student, the institution still has a duty to warn those whom it is foreseeable that the student might injure.

In order for the educational institution's duty of reasonable care to be triggered, the institution must have knowledge that the student is a danger. An educational institution is not required to investigate each of its students prior to allowing the student to participate in the externship program. If, however, the educational institution has knowledge that one of its students has physically injured or assaulted another student or a third party, the institution then could well have a legal duty to exercise reasonable care in placing that student in an externship program. Because knowledge can be received by the institution in different offices and by different people, the educational institution must be sure to communicate within its administration in order to fulfill its duty of care to both its students and other third parties.

As discussed in more detail above,²⁸⁴ an educational institution voluntarily assumes a duty when there is an increased level of risk, the educational institution knows or should know of the increased risk, and the educational institution can control the risk. In the externship setting, there is an increased level of risk when it is reasonably foreseeable that a dangerous student is known to be likely to harm others at the placement site. An educational institution can mitigate or control the risk by the manner in which it designs and implements the externship program. For example, the educational institution can and should reserve the discretion to admit or deny students into the externship program or to limit student

283. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 346-48 (Cal. 1976).

284. *See* discussion *supra* Part II.

placement to particular sites.²⁸⁵ The educational institution can create internal methods of communication so that the externship director can try to reasonably determine if a student is dangerous and should not be placed at a particular site. A voluntary assumption of duty should only be found where the educational institution had knowledge that a student was dangerous. Moreover, it would be reasonable, and consistent with public policy, for the placement site to rely upon the educational institution to not send students to the placement site that the institution knows are dangerous.

IV. MANAGING RISKS AND DEFINING DUTIES IN AN INTERNATIONAL EXTERNSHIP PROGRAM

International externship programs are one way for a law school to meet its goal of graduating students who can competently practice law in the global market. In order for graduates to competently function in the global market, law schools must not only teach students legal doctrine, but also provide students with opportunities to take responsibility and develop leadership skills.²⁸⁶ With responsibility comes risk, and with risk comes the possibility of injury.²⁸⁷ Just as the university is not an insurer of student safety,²⁸⁸ a law school is not an insurer of a law student's safety.²⁸⁹ And, just as the university owes a duty to its students to exercise reasonable care in the design and implementation of its curriculum, so too does a law school.

A law school can fulfill its duty to exercise reasonable care in the design and implementation of its international externship program if it has clearly defined educational goals for the program, identifies the reasonably foreseeable risks that students participating in the program will be exposed to, and takes reasonable action to minimize the risk to students. An international externship program has some of the same inherent risks as a study abroad program,²⁹⁰ and some unique challenges of its own. Because one of the purposes of developing an international externship program is to

285. A student may be deemed dangerous for one placement site, but not another. For example, in *Nero*, the male student was deemed too dangerous to be placed in a co-ed residence hall, but not a male residence hall. *See Nero v. Kan. State Univ.*, 861 P.2d 768, 780 (Kan. 1993). *But see Butler*, *supra* note 21, at 114–15 (recommending allowing a student to choose her placement site as a means of limiting the institution's duty to the student).

286. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

287. *See id.*

288. *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005) (citing *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003)).

289. *See Butler*, *supra* note 21; *see also Donnell v. Cal. W. Sch. of Law*, 246 Cal. Rptr. 199, 204 (Cal. Ct. App. 1988) (finding that a law school had no duty to student injured on public sidewalk adjacent to law school property).

290. For a discussion of some of these risks, see generally Hoye, *supra* note 13, Hoye & Rhodes, *supra* note 18, and Johnson, *supra* note 6.

transition the law student from student to practitioner, identifying and managing risk in such a program is best done by using a facilitator model.²⁹¹ This section provides a brief explanation of the facilitator model and then applies the model to the challenge of implementing and designing an international externship program.

A. The Facilitator Model

In *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?*,²⁹² Robert Bickel and Peter Lake suggest that a responsible and efficient way for educational institutions to manage risk is through the implementation of a “facilitator model.”²⁹³ When the educational institution acts as a facilitator, the institution acts as “a guide who provides as much support, information, interaction, and control as is reasonably necessary and appropriate to the situation.”²⁹⁴ In a facilitator model, students take responsibility for their own actions, but the facilitator can limit the choices which can be made.²⁹⁵

Information, training, instruction and supervision, discussion, options and in some cases, withdrawal of options are all appropriate for facilitators. A facilitator . . . is keenly aware of aberrant risks and risks known only to the more experienced. A facilitator is very aware of the types of students and the particular university community.²⁹⁶

Contrary to the business/invitee model used by some courts, under a facilitator model, the students are not merely consumers and educational institutions do not provide goods or services in the same manner as other businesses.²⁹⁷ Both students and the educational institution must act in a manner that furthers the institution’s goal to “educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future.”²⁹⁸ In order to mature, students must be given responsibility.²⁹⁹ Giving students responsibility means giving them choices. And, sometimes, choices and responsibilities include risks. It is the duty of the educational institution to prepare the student, through adequate instruction and supervision, to make choices and assume responsibility. Once students are adequately prepared,

291. BICKEL & LAKE, *supra* note 19, at 159–214.

292. *Id.*

293. *Id.*

294. *Id.* at 193.

295. *Id.*

296. *Id.*

297. BICKEL & LAKE, *supra* note 19, at 194.

298. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987) (quoting *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986)).

299. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981).

they must take responsibility for their own actions.

The facilitator model does not hold the educational institution to a higher standard of care than courts have already articulated. The facilitator model does, however, provide a manner by which educational institutions can constructively assess and address risk in order to reduce risk, thereby reducing student injury and institutional liability. A facilitator model places the educational institution in the position of being proactive instead of reactive. When a student sues an educational institution, the institution is reacting to the events, is in a defensive mode, and is not in control of defining the legal issues. When an educational institution is a facilitator, the institution is proactive; it is in an offensive mode and can define and eliminate legal issues. As facilitator, the educational institution is in control and can act to protect itself and its students in the design and implementation of its educational programs.

Key to the facilitator model is determining what is reasonable. “A proper line of facilitation draws at what is reasonable. A facilitator cannot and does not eliminate all risks, but neither does it ask students to assume those unreasonable risks that would arise from lack of proper university planning, guidance, instruction, etc.”³⁰⁰ The facilitator allows for the inherent risk, but not the unreasonable risk.³⁰¹ In order for the institution as facilitator to provide adequate “[i]nformation, training, instruction and supervision, discussion [and] options,” the educational institution must identify the reasonable risks that the “information, training, instruction and supervision, discussion, [and] options” are meant to address.³⁰² The risks are those risks that are reasonably foreseeable to a prudent person. In determining whether a risk is reasonably foreseeable, the facilitator model utilizes the same balancing factors used by the courts. Those factors are:

- Foreseeability of harm;
- Nature of the risk;
- Closeness of the connection between the college’s act or omission, and the student injury;
- Moral blame and responsibility;
- The social policy of preventing future harm (whether finding duty will tend to prevent future harm);
- The burden on the university and the larger community if duty is recognized; [and]
- The availability of insurance.³⁰³

300. BICKEL & LAKE, *supra* note 19, at 195.

301. *Id.*

302. *Id.* at 193.

303. *Id.* at 202. Compare *id.* with *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2007) (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)); with BICKEL & LAKE, *supra* note 19, at 202.

The educational institution should “use reasonable care to prevent foreseeable risks.”³⁰⁴ By using the same balancing test to identify risks as a court will use in imposing a duty on the educational institution, the institution is ensuring that it is satisfying its duty to its students at the same time it is designing the educational program.³⁰⁵ The program should undergo periodic review to ensure that no new risks have developed either during the implementation of the program or by the passage of time.

Use of the facilitator model does not mean that the educational institution will not be sued by a student. Nor does it mean that there is no risk of injury to a student in the educational institution’s program.³⁰⁶ By using a facilitator model, an educational institution should be making conscious decisions as to what types of risks are appropriate and perhaps necessary to create the type of learning opportunities that students need to develop into mature, responsible, and productive citizens.³⁰⁷ The educational institution can decide what risks students should not be exposed to, what risks the institution is willing to insure against, and what risks students should insure against. By using a facilitator model, the educational institution knows and understands the risks and the duties imposed by those risks.

B. Facilitating the International Externship Opportunity

In designing an international externship program, an educational institution, acting as a facilitator, needs to balance the educational goals for the students and the needs of the placement site. In creating an international externship program, the institution is creating an international community. It must consider the nature of the risks present in the new international community and the cultural competency required for students and supervising attorneys or employers to adequately function within this new community.

The mere fact that most of the externship program will occur in a foreign country does not alleviate the law school of its duty to its students or the placement site.³⁰⁸ Nor does it alleviate the requirement that the law school comply with the ABA Standards for the Accreditation of Law Schools.³⁰⁹

304. BICKEL & LAKE, *supra* note 19, at 203.

305. In addition, the institution’s records should be organized in a manner that allows the institution’s counsel to understand the steps taken to both identify and minimize risk, making it easier for counsel to defend the institution in the event of litigation.

306. The facilitator model allows for inherent risk. *See* BICKEL & LAKE, *supra* note 19, at 195.

307. *See* Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661, 664–66 (Minn. Ct. App. 1999).

308. *See* discussion *supra* Part III; *see also* BICKEL & LAKE, *supra* note 19, at 205 (“The boundaries of a campus are more elastic than geographical.”).

309. ABA STANDARDS, *supra* note 8, at 26–28 (governing study outside the

The law school's international externship program should be shaped in part by the law school's duty to its students to exercise reasonable care in the design and implementation of its curricular programs and in part by the ABA Standards, which establish minimum criteria³¹⁰ for the program.

1. The Community—The Students and The Placement Site

At first blush, it would seem that because law students are graduate students, the law school owes its students a lesser duty of care than the undergraduate institution owes to its students.³¹¹ This analysis is faulty. In those cases where an educational institution was deemed to owe the graduate student a lesser duty of care, the graduate student's lower level degrees had provided the student with the basis of specialized knowledge as to the risks involved in the behavior that the student was engaging in.³¹² Law students do not come to the laboratory of legal practice with a standardized basis of knowledge. It has been recognized that the practice of law can be dangerous.³¹³ Moreover, the practice of law in a foreign country includes the risks inherent in foreign travel, primarily the risk of the unknown. The risk of foreign travel is, however, a risk that makes life worth living.³¹⁴ An international externship experience includes the types of risks inherent in the practice of law and inherent in foreign travel. Because these are the types of experiences that assist students to mature from student to practitioner, these risks are reasonable. Nevertheless, because law students do not usually have specialized knowledge of risk in the workplace or risk in foreign travel, a law school should presume that it owes its students a duty of care similar to the duty an undergraduate institution owes its adult students.

This duty of care is not overly burdensome; it merely requires that the law school, particularly the faculty designing the program, do what it teaches its students they will do in the practice of law – identify risks and then create risk avoidance strategies. This is exactly what the facilitator model requires. Thus, by using the facilitator model to design the international externship program, the law school is modeling good lawyering skills for its students.³¹⁵

classroom).

310. *Id.* at viii (“The Standards for Approval of Law Schools of the American Bar Association are . . . minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.”).

311. See discussion *supra* Part II.A.

312. See *Fu v. State*, 643 N.W.2d 659, 672–73 (Neb. 2002); see also *Niles v. Bd. of Regents of the Univ. Sys. Of Ga.*, 473 S.E.2d 173, 175–76 (Ga. Ct. App. 1996).

313. See *Butler*, *supra* note 21.

314. See *BICKEL & LAKE*, *supra* note 19, at 195.

315. See *STUCKEY ET AL.*, *supra* note 8, at 128–29.

The law school also owes a duty to the externship site.³¹⁶ Unlike a domestic externship, it is unlikely that the foreign placement site will have an opportunity to meet and interview a student prior to the student's placement at the site. The placement site will be relying upon the law school to screen student applicants such that only those students that meet the requirements of the program will be placed at the externship site. Such reliance by the placement site on the law school is reasonable.

2. The Duty

Law schools owe students participating in the school's curricular programs a duty of care.³¹⁷ Because students earn academic credit for their participation in international externship programs,³¹⁸ such programs are curricular programs and thus, law schools owe their students a duty of care in the design and implementation of the program.³¹⁹ The extent of that duty is determined by the application of ordinary tort principles.³²⁰ In determining the nature of the duty, the law school's educational goals in creating an international externship opportunity for its student³²¹ should be balanced against the burden of imposing the duty,³²² including whether the imposition of the duty would defeat the educational aspects of the program.³²³ In determining whether the law school has met its duty of care, a court will look to the industry standard, which for law schools is compliance with the ABA Standards.³²⁴

316. See discussion *supra* Part III.

317. See discussion *supra* Part II.

318. ABA STANDARDS, *supra* note 8, at 26–27 (“A law school may grant credit toward the J.D. degree for courses or a program that permits or requires student participation in studies or activities away from or outside the law school.”).

319. See *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941).

320. See *Hawkins v. Waynesburg Col.*, No. 07-5, 2008 WL 2952888, at *6 (W.D. Pa. Jul. 30, 2008).

321. For an example of an international externship program's goals see MICRONESIAN EXTERNSHIP PROGRAM, *supra* note 14:

[T]he Micronesia Externship Program aims to provide students experience in the following areas: (a) working in an international environment; (b) understanding the role of the United States in the development of the law of other nations; (c) understanding how the law develops in various communities; (d) understanding cultural differences and how those differences help to shape the law; (e) understanding alternative dispute resolution models as they relate to cultural needs and understandings; and (f) understanding the intersection between local culture and tradition and the law.

322. See *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 346–47 (Cal. Ct. App. 2007).

323. See *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999) (court refused to impose duty that would defeat “cultural immersion” aspect of program).

324. ABA STANDARDS, *supra* note 8, at 26–28 (governing externship programs). The ABA Criteria for Approval of Foreign Summer Programs is also instructive. See

The law school does not need to eliminate all risk from its externship program.³²⁵ The law school may knowingly include risks if those risks are the type of risk that will assist the student to accept responsibility, to develop leadership skills, and to make the transition from law student to global practitioner of law.³²⁶ Inclusion of such risks will only be deemed reasonable if (1) the risks further the educational goals of the program,³²⁷ (2) the program informs the students of the risk, (3) the program provides the student with strategies that will assist the student to avoid the risk, and (4) the risk is no greater than the risk the student would be exposed to if they were in the foreign country as a tourist.³²⁸ By providing the student with the knowledge of the risk and the training to address the risk in a safe manner, the law school is acting as a facilitator. If the risk to the student is no greater than if the student were a tourist, the law school has not voluntarily assumed a duty, because there is no increased level of risk. Moreover, because public policy requires that students and non-students be provided with the same legal protections,³²⁹ educational institutions should not be held to a higher standard than other businesses; students and tourists should be treated the same.

Because the law school has superior knowledge regarding its students and can prevent the student from participating in the international externship program,³³⁰ the law school may arguably owe a duty of care to the placement site. The duty is only triggered if the law school has knowledge that the student is dangerous. Because not all law schools provide the same types of services for their students,³³¹ a law school may not have the type of knowledge that will trigger the duty. Although a law school cannot knowingly ignore information,³³² it does not have a duty to investigate the student beyond the information that the law school already knows or should know. The faculty member responsible for accepting students into the program should seek information from the associate dean

ABA CRITERIA, *supra* note 15, at 26

325. *See Bloss*, 590 N.W.2d at 661.

326. *See Stockinger v. Feather River Cmty. Coll.*, 4 Cal. Rptr. 3d 385, 397–98 (Cal. Ct. App. 2003).

327. ABA STANDARDS, *supra* note 8, at 27 (“A field placement program shall include . . . a clear statement of the goals and methods, and a demonstrated relationship between those goals and methods to the program in operation”); *see also id.* at 28 (“A law school that has a field placement program shall develop, publish and communicate to students and field instructors a statement that describes the educational objectives of the program.”).

328. *See Bloss*, 590 N.W.2d at 661; *see also* discussion *supra* Part II.C.3; ABA CRITERIA, *supra* note 15, at § VI.C.; ABA STANDARDS, *supra* note 8, at 307.

329. *See generally Beach v. Univ. v. Utah*, 726 P.2d 413, 418 (Utah 1986).

330. *See* ABA CRITERIA, *supra* note 15, at § IV.

331. Usually an independent, stand alone law school does not provide the same types of services to its students as a university-affiliated law school.

332. *See Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002).

for academic affairs, the dean of students, and the registrar regarding whether the student is in good standing, whether there are any disciplinary charges pending, and whether there is any other information in the student's file that indicates the student is dangerous.³³³ If the law school accepts students from other schools into its international externship program, the law school should request that the same type of information be provided by the visiting student's home institution.³³⁴ The law school has a duty to exercise reasonable care to not place a student that the school knows is dangerous at the placement site. At a minimum, reasonable care requires checking the student's file.

3. Foreseeability

A law school is not responsible for all injuries which arise within the context of the international externship program. The law school has a duty of care to protect students from the reasonably foreseeable risk of injury. In determining foreseeability, focus should be on knowledge and control. Knowledge in the context of foreseeability is not just what the law school knows, but also what a reasonable faculty member, administrator, or law school should have known.³³⁵ In order for a law school to have control, the law school must have the ability to take action that will manage the unreasonable risk. A risk may be unreasonable if the student's exposure to the risk does not further curricular goals. A law school can manage risk by (1) informing students about the risk and how to appropriately address the risk, (2) reducing the amount of harm which can be caused by the risk, or (3) eliminating the risk.³³⁶ Because most of the risks that will arise in the context of an international externship program will occur in the foreign

333. While FERPA limitations will place some constraints on the sharing of this sort of educational information, there is a strong argument to be made that faculty members need to know this information in this context. *See* 34 C.F.R. §99.31 (2004) ("An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure . . . is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.").

334. *See* ABA CRITERIA, *supra* note 15, at § IV(C). As noted above, however, getting this sort of information will create present significant challenges under FERPA, and may be difficult to obtain from other schools.

335. *See, e.g.,* BICKEL & LAKE, *supra* note 19, at 218, noting that:

Colleges and universities that spend their time resisting student litigation on the grounds that their students are beyond their control, spend money on lawyers and lawsuits that could have been better spent remedying danger and disorder and preventing student injury. A college or university is better advised to avoid liability by demonstrating that it exercised reasonable care under the circumstances than to assert that it had no duty to a student regarding her safety on campus.

336. *See* Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999).

country, the law school may not always have knowledge of the risk and may be surprised by new and challenging situations.

The law school cannot just ignore risks which it knows or should know about. At a minimum, the law school must provide the innocent students with the knowledge that they need in order to take action to protect themselves.³³⁷ In identifying and informing students about the risks of the international externship program, law schools will be held to industry standards. Although no court has so held, the industry standard here is likely that standard which is provided by the ABA and requires that a faculty member must supervise the program,³³⁸ must train, evaluate, and communicate with the supervising attorney at the placement site,³³⁹ and periodically conduct “on-site visits or their equivalent.”³⁴⁰ Implicit in the supervision requirement is communication with the student while the student is at the placement site.³⁴¹ Although the primary purpose of the site visit and communication with the supervising attorney will be to insure the educational component of the externship program,³⁴² a law school faculty member cannot ignore obvious indicators that there is a foreseeable risk of harm to the student.³⁴³ If from the faculty member’s contact with the placement site, the faculty member can or should be able to identify reasonably foreseeable risks to the student, then the law school must act to address the risk such that the likelihood of harm to the student is minimized. Industry standards, which require site visits and contact with both the supervising attorney and the student, provide the law school with sufficient opportunity to identify risks of foreseeable harm to the student. Failure to follow industry standard will likely be deemed to be a breach of the law school’s duty of care.³⁴⁴ Moreover, failure to minimize unreasonable risk which was or should have been identified when the law school followed industry standards will also likely be deemed to be a breach of the law school’s duty of care.

If the foreseeable risk of harm to the student is unreasonable, the law school should decline to either place the student at the site or if the student is already at the site, remove the student from the site. The design of the law school’s program should be flexible enough to allow the faculty member the discretion to make these types of decisions on an on-going basis.

The risk of unreasonable harm must be assessed at both the level of

337. RESTATEMENT (THIRD) OF TORTS § 42 cmt.f (Tentative Draft No. 5, 2005).

338. See ABA STANDARDS, *supra* note 8, at 26.

339. *Id.* at 27.

340. *Id.*

341. *Id.*

342. See Butler, *supra* note 21.

343. See Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 622 (W.D. Va. 2002).

344. See Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th Cir. 1941).

whether the office is safe and whether the country is safe. The risk must also be continually assessed, including at the time the program is designed, at the time a student is placed at a particular site, and while the student is working at the placement site. There may be instances where the site is a safe office working environment, but residing in the country poses an unreasonable risk for a U.S. student. On the other hand, the country may be safe, but the site may pose an unreasonable risk. A country's safety can be assessed through various mechanisms. The law school should provide the student with the U.S. State Department Consular Information Sheets for the country in which the placement site is located.³⁴⁵ Students should also be informed of any U.S. State Department Travel Warnings.³⁴⁶ If during the student's externship, the U.S. State Department declares the country of the placement an "Area of Instability" or issues a travel warning, the student should be informed and should be given the option to terminate the externship at that location,³⁴⁷ and if possible, to be placed at a different site for completion of the program. The law school should also determine if the U.S. Peace Corps has or had a program in the particular country.³⁴⁸ If the U.S. Peace Corps will not place volunteers in a particular country or area of a country for safety reasons then a prudent law school should not place law students in volunteer positions in that country.³⁴⁹

The law school exercises the ultimate control in that it chooses the country, approves the site, and is involved in placing the student at the site.³⁵⁰ A law school acting as a facilitator and following industry standards will exercise more control in an international externship program, than it may exercise in a domestic externship program. The law school is, however, not required to control all aspects of the program. Although the law school should take a proactive approach in choosing the country and pre-screening placement sites, the law school can design the program such that the student can apply to more than one of the pre-approved placement sites.³⁵¹ Likewise, if more than one student applies to the same placement site, the site can be given the opportunity to choose who will receive the offer.³⁵² The goal of the law school as facilitator is not to micro-manage

345. ABA CRITERIA, *supra* note 15, at § VI.C.1.

346. *Id.* at § VI(C)(2).

347. *Id.* at § VI(C)(1)(b), -(2)(b).

348. *See* UNITED STATES PEACE CORPS, <http://uspeacecorps.gov> (last visited on Feb. 3, 2009).

349. Atlanta's John Marshall Law School will not place students on islands where the U.S. Peace Corps will not place female volunteers.

350. ABA CRITERIA, *supra* note 15, at § IV(A).

351. Students applying to the Micronesian Externship Program are allowed to choose from a list of 22 approved placement sites. *See* Micronesian Externship Program Application, <http://www.johnmarshall.edu/academics/Micronesian01.php> (last visited on Feb. 6, 2009).

352. Placement sites participating in the Micronesian Externship Program receive

the student's international externship experience, but to provide the student with options which fulfill the educational goals of program and where risk can be managed at an acceptable level.

4. Special Problems

Although there are risks inherent in any international program, international externship programs create fewer risks for educational institutions than do study abroad programs. In an international externship program, unlike a study abroad program, the law school does not hold classes and does not provide housing.³⁵³ Therefore, the types of risks which open a law school to the imposition of a duty under the "special relationship" doctrine such as business-invitee, premises owner, or landlord tenant theories should not be applicable to an externship program.

a. Travel

Externship programs typically do not arrange travel for the student. The student should be counseled to arrange their own transportation using reputable carriers. The travel arrangements and the student's safety during travel is the student's own responsibility. Nonetheless, to the extent that the faculty member is aware of particular travel risks, the student should be informed of these risks.

In the Micronesian Externship Program, the Pacific islands where the students are placed receive limited flights, many of which arrive in the early hours of the morning. In order to address the risk that a jet-lagged student may have difficulty arriving safely at their housing on an unfamiliar island in the middle of the night after twenty-four hours of travel, the Program's Externship Agreement requires that the placement site "make arrangements for a responsible person from the [placement site] to meet the student at the airport and transfer the student to the student's housing."³⁵⁴ On several occasions, the entire placement office staff has met the student at the airport.

b. Housing

Unlike study abroad programs, law schools do not generally provide housing for students participating in an externship program. But housing is necessary in order for the student to participate in the externship program. Both the law school and the student are usually unfamiliar with the best and safest housing alternatives for the student. Although students can

the application materials of all students who applied for that site. The placement site makes the final decision as to which student will receive the offer. *Id.*

353. See ABA CRITERIA, *supra* note 15, at §§ IV and V.

354. ATLANTA'S JOHN MARSHALL LAW SCHOOL EXTERNSHIP AGREEMENT (on file with author).

sometimes locate housing using internet resources, because of the student's lack of knowledge, there is still a risk that the student will not identify safe and appropriate housing.

Housing is a risk which can be transferred to the placement site. As a term of its Externship Agreement, Atlanta's John Marshall Law School requires that the placement site "assist the student in identifying and securing safe, appropriate housing."³⁵⁵

c. Medical Treatment

Unlike a study abroad program, in an externship program, a faculty member does not accompany the student to the foreign country.³⁵⁶ The student, however, is still exposed to the same types of risks of medical malpractice and other injuries as the students in *McNeil v. Wagner College*³⁵⁷ and *Fay v. Thiel College*³⁵⁸ were exposed to. The law school has no ability to control the quality or availability of medical care in the foreign country.

When designing the externship program, especially if placement sites are located in developing countries, the law school should research the medical care available and provide this information to students, or offer students health insurance for purchase through a reputable third party. Students should be informed of the practice of local or "indigenous" medicine and the dangers, if any, of participating in such healthcare practices.³⁵⁹ Students with special healthcare needs should be informed to bring their own medication with them, as they might not be able to fill prescriptions in

355. *Id.* Appropriate housing is defined in the Externship Agreement as "a furnished studio apartment or its equivalent in a secure area of the island." *Id.* Safe housing "means the housing has functioning windows and doors with locks and is not located in a known high crime area." *Id.* The student is responsible for paying for the housing. *Id.*

356. Compare ABA CRITERIA, *supra* note 15, at § II (requiring that at least one tenure track faculty member be present on-site "for the entire duration of the program"); with ABA STANDARDS, *supra* note 8, at 305(e)(5) (requires "periodic on-site visits or their equivalent by a faculty member").

357. *McNeil v. Wagner Coll.*, 667 N.Y.S.2d 397 (N.Y. App. Div. 1998) (student suffered nerve damage in ankle from emergency surgery performed at hospital in Austria). See discussion *supra* Part I.C.1.a.

358. *Fay v. Thiel Coll.*, 55 Pa. D. & C. 4th 353 (Pa. Com. Pl. 2001) (after student's appendix was unnecessarily removed, doctors sexually assaulted student in rural Peruvian medical clinic). See discussion *supra* Part II.C.1.b.

359. Students participating in the Micronesian Externship Program are informed that the practice of "local" medicine is still prevalent on most islands, that most of the "local" medicine has not been subject to any scientific testing, and has not been FDA approved. Students are also informed that some of the "local" medicine is similar to homeopathic medicine and does appear to work. Students are warned that there is always a risk in using "local" medicine and are warned not to partake of "local" medicine from anyone they do not know. But, the choice of medical care, if and when needed, is left to the student.

the foreign country.³⁶⁰ All students should be provided with information regarding the Center for Disease Control and Prevention's and the World Health Organization's recommended vaccinations and health warnings.³⁶¹ All students should be required to obtain health insurance and evacuation insurance.³⁶²

d. Extra-curricular Activities

Educational institutions usually do not owe their students a duty of care when the student is engaged in recreational activities.³⁶³ Because many placement sites will be chosen not only for their educational value, but also for their geographical desire (students want to visit the country), the law school should provide basic information about safety guidelines for those recreational activities for which it is reasonably foreseeable that the student will participate. Although the law school has no duty to the student for injuries received from participation in extra-curricular activities, the law school as facilitator should take a proactive role and inform the student of the dangers from the activities that the law school knows that a student is likely to participate. As a general rule, if a tourist will travel to the location to participate in the activity, then the student will likely participate. If the law school knows that it is common for a local person to invite a traveler to participate in an activity which is not an advertised tourist activity, then the student will likely receive an invitation to participate in the activity. For example, the Micronesian islands are known for their pristine coral reefs, making them tourist destinations for scuba diving, snorkeling, and fishing.³⁶⁴ Students are informed of recent events of lost divers and other such accidents and are cautioned that if they decide to scuba dive they should only use PADI³⁶⁵ certified dive shops.

e. Acts by Employees of the Placement Site

As a curricular program, the externship program is governed by the law school's policies and by the federal civil rights laws.³⁶⁶ Thus, the law

360. Students in the Micronesian Program are also encouraged to bring any over the counter medication which they think they might need as these products are not always available on-island. Any such medication should be transported in its original, unopened packaging.

361. Center for Disease Control and Prevention, <http://www.cdc.gov> (last visited on Feb. 6, 2010).

362. See Hoye, *supra* note 13; see also MICRONESIAN EXTERNSHIP PROGRAM, *supra* note 14 (insurance information).

363. See discussion *supra* Part I.A.1.b.

364. See Federated States of Micronesia Visitor's Bureau, <http://www.visit-fsm.org> (last visited on (Feb. 6, 2010)).

365. PADI is the Professional Association of Diving Instructors. See PADI, www.padi.com/scuba/ (last visited on Feb. 6, 2010).

366. See discussion *supra* Part I.A.1.b.

school's non-discrimination policy, its harassment policy, and its disabilities policy apply to the program. The law school must communicate these policies to the placement site,³⁶⁷ provide the placement site with copies of the policy and copies of the applicable laws,³⁶⁸ and should obtain the placement sites agreement to abide by the policy. If the supervising attorney or placement site's decision-maker refuses to comply with the law school's policies, the law school should not include that site in its externship program.

f. Acts by the Student at the Placement Site

Because the externship is a curricular program, the student is bound by the law school's rules and regulations as published in its student handbook or other documents. The law school, thus, has control over the student's behavior. The law school should inform the student of the behavior that is governed by the law school's code of conduct and the consequences if the student violates that code.³⁶⁹

As discussed in more detail above, if the law school has knowledge that the student is dangerous, the law school may have a duty to inform the placement site of the danger and either refuse to allow the student to participate in the externship program or remove the student from the placement site.³⁷⁰

367. ABA STANDARDS, *supra* note 8, at 27.

368. Law school policies can be provided electronically.

369. Students participating in the Micronesian Externship Program sign an Agreement for Participation which provides as follows:

2. I will comply with the John Marshall Law School Code of Student Responsibility throughout the duration of my participation in the Program. I agree that the Program Director shall have the right to enforce appropriate standards of behavior and that I may be dismissed from the Program at any time for failure to comply with such standards. I understand that if I am dismissed from the Program, I shall receive a grade of "no credit" for the externship.

3. I understand that as an extern I hold a position of trust and am bound by the standards of attorney conduct for the jurisdiction where the placement site is located. I further understand that if my placement site is a government office I am bound by the ethical standards for government employees, including all polices relating to gifts and conflicts of interest. I understand that a violation of the standards of attorney conduct is a violation of the Law School's Code of Student Responsibility and is grounds for dismissal from the Program pursuant to paragraph 2.

MICRONESIAN EXTERNSHIP PROGRAM, *supra* note 14 (Program Agreement for 2009 Participation).

370. See discussion *supra* Part II.B.3.

*g. Cultural Competency*³⁷¹

Many of the risks which students may be exposed to may not be obvious, but may arise because of cultural differences. Although the law school may not be able to identify the specific harm, the risk that certain culturally inappropriate behavior may create a risk of harm to the student is reasonably foreseeable. A law school will only be able to assess the risks posed by cultural incompetence if the law school itself possesses cultural competence. A law school will possess cultural competence if a member of its faculty or staff who is associated with the externship program has cultural competence. A law school should not consider offering an international externship opportunity in a community for which it does not have cultural competence.³⁷²

Because the risk that a student with a lack of cultural competence may be harmed is foreseeable, the law school may have a duty to provide the student with information about and training in the culture of the placement site. This training should occur before the student leaves for the placement site. In the Micronesian Externship Program, before traveling to their placement site, students attend a one week (14 hour) class during which students are provided basic information and training about Micronesian customs and traditions, including how to avoid cultural offenses both in the office and in social settings. Students are also exposed to aspects of how culture and tradition have influenced and continue to influence the development of the law in their placement site jurisdiction.

V. CONCLUSION

The risk inherent in a student's participation in an international externship program is the type of risk which makes law school (and university life) worth living. If the institution acts as facilitator in the design and implementation of the international externship program, the it can manage the risk to the student, to the placement site, and to itself. An international externship program designed with managed risks creates opportunities for students, faculty, and a law school itself to participate in the globalization of legal education and the law.

Because international externship programs do not require classroom and library space or require the number of faculty and staff as do traditional study abroad programs, externship programs cost less. If designed well,

371. Cultural competency means more than just knowing something about the country and the cultural of its people. Acquiring cultural competency requires that one acknowledge, identify, and deconstruct their own cultural assumptions; be aware of the manner in which cultural assumptions are present in non-verbal communication; and learn cultural awareness.

372. See ABA CRITERIA, *supra* note 15, at § II.C.2. ("At least one member of the full-time faculty or on-site staff must . . . [b]e familiar with the country in which the program is offered.").

international externship programs can also expose the law school to less risk of liability. The key to diminishing the risk to the law school is to be certain that the faculty who design the program assess all reasonably foreseeable risk to the student or which could be caused by the student and take reasonable steps to reduce the risk. Because students participating in an international externship program are likely to have more direct contact with the local population, it is essential that the externship program is designed to impart knowledge of local customs and traditions and is designed to achieve cultural competency in the participating students before departing for the externship.

International externship programs require students to completely immerse themselves in the foreign country's professional and social culture. Unlike study abroad programs, externs are not tourists. Externs are performing legal work under the supervision of foreign attorneys—solving the real world problems of real world clients. International externship programs enrich the law school because they provide students the ability to move from domestic student to global practitioner of law. Students who participate in international externship programs are more likely to be able to competently practice law in a global economy upon graduation from law school.