

ENHANCING ENFORCEABILITY OF EXCULPATORY CLAUSES IN EDUCATION ABROAD PROGRAMMING THROUGH EXAMINATION OF THREE PILLARS

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Abstract

This article provides an overview of the current legal landscape related to considerations of duty of care and the special relationships that may accrue when an institution of higher education engages students in education abroad programming. In consideration of the continuing bend of the courts toward expanding the scope of liability an institution may find itself exposed to, while also questioning the enforceability of the waivers executed by its students, this article proposes adoption of three pillars in both the waiver and the processes attached thereto in order to provide further support should it later be produced under the spotlight of litigation.

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INTRODUCTION

*The safety of our students is our top priority.*¹

*The litigation appears to be premised on a belief that the university is the guarantor of the student's safety. Unfortunately, this is neither physically possible nor realistic.*²

Over the last fifteen years (with one exception during the 2008–09 year and excluding the extenuating circumstances of the 2019–20 academic year due to COVID-19), more students engaged in education abroad opportunities than in the previous year.³ For institutions of higher education, these programs can be incredibly broad, with experiences lasting from one week to one year. One program can involve a short trip abroad to a nearby country, while another can be a fully immersive experience in a different culture.⁴ Of those studying abroad,⁵ students in the STEM majors (science, technology, engineering, and math) are outpacing those in other degree programs.⁶ For institutions of higher education, education abroad programming continues to represent an essential component for ensuring competitiveness in their institutions as well as an opportunity for students and faculty alike to remove the traditional boundaries of the classroom in exchange for an entire world of learning possibilities.

Removing traditional educational boundaries comes with potential exposure to additional dangers for trip participants and, accordingly, questions regarding potential exposure to liability for institutions of higher education. Occasionally, institutions are reminded of the often unpredictable and uncontrollable nature of traveling overseas.⁷

1 University of Wisconsin-Madison (JCU) Settlement, *quoted* in Elizabeth Redden. *Settlement in Wrongful-Death Suit for Study Abroad Student*. INSIDER HIGHER EDUC. (February 27, 2019), <https://www.insidehighered.com/quicktakes/2019/02/27/settlement-wrongful-death-suit-study-abroad-student#:~:text=The%20family%20of%20a%20University,the%20settlement%20was%20reached%20Feb.&text=John%20Cabot%20University%20also%20declined%20comment>.

2 Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661, 666 (Minn. Ct. App. 1999).

3 INST. OF INT'L EDUC., *2020 Open Doors Report on International Education Exchange*, <https://opendoorsdata.org/data/us-study-abroad/u-s-study-abroad-for-academic-credit-trends/> (January 31, 2021).

4 As an example of the commitment given by institutions to education abroad, in the 2016 academic year alone, the University of North Carolina at Chapel Hill awarded over \$900,000 in financial aid to its students for international programs. *How Some Students Study Abroad on a Budget*, MUSTANG NEWS/MUSTANG MEDIA GRP. (Feb. 27, 2020), <https://mustangnews.net/how-some-students-study-abroad-on-a-budget/>.

5 For the purpose this article, *education abroad* and *study abroad* are used interchangeably.

6 Lekan Oguntoyinbo. *STEM Students Leading Charge to Study Abroad*, DIVERSE ISSUES IN HIGHER EDUC. (June 17, 2015), <http://diverseeducation.com/article/73887/>.

7 See Kerri O'Brien, *A Mother's Warning for Students Considering Study Abroad*, WFRXTV.COM (Apr. 5, 2018), <https://www.wfrxtv.com/news/local-news/a-mothers-warning-for-students-considering-study-abroad-programs/>; Kerri O'Brien, *After Tragedy, Moms Demand Transparency from Study Abroad Programs*, WRIC.COM (Aug. 24, 2018), <https://www.wric.com/news/taking-action/after-tragedy-moms-demand-transparency-from-study-abroad-programs/>; Brett Clarkson, *Group of 19 University of Florida Students Robbed at Gunpoint in South Africa*, SUN-SENTINEL.COM

The courts that have ruled in cases involving attempts by students, their parents, or their estates to hold an institution liable for an injury or death of a student have generally held that a university's duty of care to its students is similar to that of a business invitee,⁸ but conversely courts have generally upheld the principle that the university itself is not generally the "insurer of the safety of its students" absent further action and affirmation.⁹ However, as one can imagine, the spectrum of liability widens, depending on the specific circumstances of the case and the individual state laws that may be applicable. All such decisions as to whether a legal duty of care exists are examined by the courts as a matter of law, based on the circumstances presented by the parties.

Similar to the analysis courts have engaged in regarding on-campus or off-campus events and as further discussed herein, courts have addressed questions of the existence or scope of an institution's duty to protect a student from harm within the context of study abroad programming. However, in recent years, several courts have developed more fully the *special relationship* doctrine toward decisions that affirm institutional liability.

As the plaintiffs' bar has continued to thrust special relationship claims into each filing, institutions have attempted to shield themselves from tort liability

(May 15, 2019), <https://www.sun-sentinel.com/news/florida/fl-ne-university-of-florida-robbed-south-africa-20190515-bo3y432xajgbi5ywqiwfmbmpy-story.html>; Ariana Garcia & Mary Huber, Texas Tech Student Dies After Fall on UT Study Abroad Trip in Russia, STATESMAN.COM (Sept. 22, 2018), <https://www.statesman.com/NEWS/20180617/Texas-Tech-student-dies-after-fall-on-UT-study-abroad-trip-in-Russia>.

8 RESTATEMENT OF TORTS § 341 (AM. L. INST. 1934) Activities Dangerous to Licensees, "A possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensees know or from facts known to them should know of the possessor's activities and of the risk involved therein." Also consider, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §3 (AM. L. INST. 2010), "A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the persons' conduct lacks reasonable care are the foreseeable likelihood that the persons' conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." See generally *Regents of Univ. of Cal. v. Super. Ct.*, 29 Cal. App. 5th 890 (2d Dist. 2018). On remand, the court engages in a brief analysis beginning with the general duty of a university to its students before addressing other issues such as a special relationship and public policy.

9 *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir.1979). See also *Johnson v. State*, 894 P.2d 1366, 1369 (Ct. App. Wash. 1995), "... no special duty arises merely from Johnson's status as a student" but finding that student was entitled to invitee status since she lived in a university dormitory. See *Shimer v. Bowling Green State University*, 96 Ohio Misc. 2d 12, 16 (Ohio Ct. Cl. 1999), "The duty of care owed to plaintiff as a student of a state university is that of an invitee. ... Therefore, defendant owed plaintiff a duty to exercise ordinary and reasonable care to protect her from unreasonable risks of physical harm of which the university knew or had reason to know. ... However, where an invitee voluntarily exposes herself to a hazard, the owner or occupier of the premises will not be the insurer of her safety, since an invitee is required to exercise some degree of care for her own safety," citing *Thompson v. Kent State Univ.*, 36 Ohio Misc. 2d 16 (Ohio Ct. Cl. 1987)). See also *A.M. v. Miami Univ.*, 88 N.E.3d 1013 (10th Dist. Ohio 2017). See generally William P. Hoye J.D., *The Legal Liability Risks Associated with International Study Abroad Programs*, 131 Educ. Law Rep. (West) 7 (Feb. 4, 1999); Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309 (2006); Kathleen M. Burch, *Going Global: Managing Liability in International Externship Programs—A Case Study*, 36 J.C. & U.L. 455 (2010).

claims by injured students by requiring students to sign waivers. The use of waivers within the study abroad context has been a topic of constant consideration across international student operations and the legal offices that provided advice to these clients. However, since institutional waivers and their enforceability are usually a matter addressed through the application of state law and are thus subject to the varying scrutiny of individual state courts, the seemingly impenetrable shield from liability is showing signs of weakening. As evidenced by several recent decisions, courts are looking to factors surrounding the execution of the waiver rather than just the language of the waiver itself. In response, this article proposes that institutions reimagine the institutional waiver as a process leading to the assumption of risk by the student rather than just a piece of paper to hold high in the event of injury or death—a process that involves the exchange of information, thoughtful discussion of risks and the environment, as well as pre-departure orientation. This process, at a minimum, should be developed to satisfy three pillars of enforceability in that the student's consent to the conditions provided therein must be made knowingly, voluntarily, and with valuable consideration.

This article will first summarize the institution's duty to students as found in tort law. It will then move to a discussion of the special relationship doctrine that is gaining strength with respect to institutional liability in general, with potential application to liability for injuries related to study abroad programs.¹⁰ The article then turns to an analysis of jurisprudence related to the concept of duty and special relationships in cases involving study abroad.¹¹ Next, it discusses the use of waivers of liability within the context of both domestic and study abroad programming. This article will then engage in a more focused discussion of each pillar of enforceability and what institutional measures may be available to further establish the stability of each pillar relative to an individual study abroad program. Finally, the article proposes the adoption of assumption of risk affirmations as a core component accompanying any exculpatory language as well as encouraging discussions of potential dangers to students as a core component of pre-departure orientation programming.

10 This article focuses only on education abroad programming in the context of those programs that are *institutionally owned/operated programs*. See generally W.P. Hoye & G.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); also presented at the National Association of College & University Attorneys Symposium on International Programs, 2000, Hoye and Rhodes categorized programs into four types: institutionally owned/operated programs; contractual program (where the institution contracts with a third party to provide the program); permissive programs (the institution knows about the program but there is no formal relationship in place—for example, ads on a bulletin board in the education abroad office); and unsponsored, unapproved. For an examination of a possible fifth type of program, the student-organized trip, see also *Boisson v. Arizona Board of Regents*, 236 Ariz. 619; 315 Educ. Law Rep. (West) 511 (Ariz. Ct. App. 2015).

11 For the purposes of this article, and unless otherwise mentioned within the context of the specific cases mentioned herein, issues regarding the extraterritorial application of U.S. and/or state law will not be discussed. While certainly an important consideration when seeking to determine whether a legal duty provided for by federal or state law and regulation applies, the enforcement of the exculpatory clauses in assumption of risk forms is primarily an issue of state law. Also not discussed herein, even if perhaps briefly addressed, is the application of state immunity and indemnity protections often available to state institutions and other public entities and employees in the course and scope of their employment such as was the case in *Griffen v. State*, 767 N.W.2d 633 (Iowa 2009).

I. The Institution's Duty to Its Students

Whether an institution owes a legal duty of care to its students within the context of a negligence cause of action is a matter of law to be determined by the courts.¹² Conversely, in the event a legal duty of care is established, foreseeability of the harm alleged and/or breach of the standard of care are questions of fact left to the discretion of the jury.¹³ For the plaintiff to prevail in a negligence action, the plaintiff must prove (1) the existence of the duty, (2) a breach of the same, and (3) an injury proximately related from such breach (i.e., causal connection).¹⁴ This analysis is used most often when the cause of action is perceived to be direct (i.e., a student is injured due an institution's action or inaction, or program under the institution's direct control). However, in cases where there is not a clear direct relationship between the cause of action claimed by the student and the perceived duty from the institution, such a presumption does not completely exonerate the institution from a legal obligation to the student for injury resulting from the acts of third parties.¹⁵ The *Restatement (Second) of Torts* section 315 provides that there is generally no duty to be responsible for the conduct of third parties, *unless* a special relationship exists between the institution and the third party that requires the institution to control the third party's conduct (or, in some cases, if there exists a special relationship between the institution and the student, which presumes that the institution will protect or otherwise be responsible for the student's safety).¹⁶ Absent such a relationship, the institution would not otherwise be responsible for the injury to a student at the hand of a third party.¹⁷

In *Bradshaw*, a student attended a class picnic held at an off-campus location. A faculty member who served as the sophomore faculty advisor at Delaware Valley

12 *University of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987) (en banc), determining within the context of Denver's state law "whether a particular defendant owes a legal duty to a particular plaintiff is a question of law" (citing *Imperial Distribution Services, Inc., v. Forrest*, 741 P.2d 1251, 1253-54 (Colo. 1987), finding that the university did not owe a duty of care to students related to an injury at an off-campus fraternity house); see also *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1366 (3d Cir. 1993), applying Pennsylvania law within the federal court context to determine whether the defendant college owed a duty to the defendant lacrosse player who died during a practice session.

13 *Regents of Univ. of Cal. v. Super. Ct.*, 29 Cal. App. 5th 890, 912 (2d Dist. 2018).

14 *A.M.*, 88 N.E.3d at 1022. See also *Dzung Duy Nguyen v. Massachusetts Institute of Technology*, 479 Mass. 436, 448 (2018), recognizing that a special relationship may lead to a "duty to prevent suicide," while also citing existing Massachusetts case law for the general principle that, "we do not owe others a duty to take action to rescue or protect them from conditions we have not created." The case also contains an analysis of the "modern university-student relationship" beginning with the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 40(a)(2012), and continuing with excerpts from across federal circuits and state courts.

15 For example, in *Munn et al. v. The Hotchkiss School*, 24 F. Supp. 3d 155, 170 (D. Conn. 2014), the court found that Hotchkiss's mere presence as a secondary school through the invocation of the "custodial" duty was enough to invoke a special relationship between Hotchkiss and Munn.

16 *Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979).

17 In *Bradshaw*, the plaintiff attempted to prove this custodial relationship by arguing that the university's policy prohibiting alcohol on campus or at campus events created such a duty for third-party actions. The court responded that it was unlikely that a court would find that by even having such a policy, "the college had voluntarily taken custody of Bradshaw so as to deprive him or his normal power of self-protection or to subject him to association with persons likely to cause him harm." *Id.* at 141.

College knew about the picnic but was not present. Alcohol was served at the picnic, having been procured by one of the underage attendees. Bradshaw leaves in a car driven by another student who is intoxicated. The car is involved in an accident, Bradshaw is injured, and sues the college. The court in *Bradshaw* ended where it began, "... the modern American college is not an insurer of the safety of its students."¹⁸

In a more recent case within the study abroad context, *Doe v. Rhode Island School of Design*, the court considered five factors before determining that a duty existed between a student who was sexually assaulted in housing procured by the institution during a study abroad trip to Ireland:

(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden of the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach.¹⁹

Growing in tenor and tenacity, courts have been continually challenged by the plaintiffs' bar to ignore *Bradshaw's* and *Bradshaw*-esque abandonment of the previous doctrine of *in loco parentis* and adopt the more subjective interpretation turning upon the specific circumstances of each relationship at each institution in each program.²⁰ In this article, there are several examples where the arguments between plaintiff and defendant seek to continually redefine the legal distance between obligation by the university and autonomy of the student. Whether courts will continue to lean back toward *in loco parentis* or some replacement is yet to be determined. Notwithstanding, institutions of higher education should take notice that their duties may not be limited to words in statutes and regulations but may now be established through e-mails and web pages.

II. The Special Relationship Doctrine

As a general concept, it has been argued that an institution of higher education may owe a reasonable duty of care with regard to its study abroad programming if the activity exposes the student to harm that is reasonably foreseeable (e.g., taking soil samples from a vineyard vs. rappelling into the mouth of an active volcano to collect rock samples), to the extent that such duty is not already mitigated through an informed assumption of risk or the engagement in an activity involves an

18 *Id.* at 138.

19 432 F.Supp.3d 35, 41 (D.R.I. 2019). The particulars of this case are discussed later in this article.

20 See generally Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485 (2003). This article provides a survey of higher education tort liability through the lens of several paradigms: the purely educational, the college as insurer, the bystander, the college as custodian, the business invitee, and the facilitator university. See also Louis A. Lehr, Jr., *The In Loco Parentis Standard*, 1 PREMISES LIABILITY 3d § 3H:2 (Louis A. Lehr, Jr., Ed., 2020) for a brief summary of the doctrine.

open and obviously visible (or inherent) risk or danger.²¹ In the presence of such a general duty of care, the institution may therein be expected to take actions to mitigate against such reasonably foreseeable harm if possible or, if such measures are unavailable or too burdensome, to provide notice to the students so that the students can make their own choices in moving forward.²² However, once the institution assumes the duty (i.e., through affirmation, information, or contract), it may be considered to have established a special relationship with the student beyond that which is normally present either in common law or through policy or procedure. Once the special relationship is assumed, further liability may thereafter attach. All this notwithstanding, in the absence of a special relationship in the education abroad context, the institution should not otherwise be automatically liable to its students and other participants in its education abroad programming.²³

Going back to *Bradshaw*, the court initially recognized that a special relationship existed at one time between a university and its students.²⁴ However the court walked through the evolution of this relationship by reasoning that when students were given more formal freedoms (the right to vote is an example provided in the ruling), the student's emerging role as a legally entitled individual also represented a change in the previous assumption that such relationship between the university and student was automatically established upon enrollment.²⁵ To this effect, the court in *Bradshaw* found the absence of a "custodial relationship" in consideration of current Pennsylvania law.²⁶ Without the proverbial legal strings to bind the university to the student, the special relationship shared between them post-*Bradshaw* would require more than just mere enrollment and attendance. In several decisions since *Bradshaw*, the courts have turned to state law, previous cases, or sections of the *Restatements* (as referenced further herein) in determining as a matter of law whether a special duty exists between the institution and student involved in one of its education abroad programs; usually any determination regarding the breach of such duty is a matter of fact.²⁷

21 Johnson, *Americans Abroad*, *supra* note 9, at 339

22 *Id.* at 344. See also William Hoyer & Natalie A. Mello, *Study Abroad: Legal and Operational Guidance Contained Within the Standards of Good Practice for Education Abroad*, Paper presented at the 2015 Annual Conference of the National Association of College and University Attorneys, Washington D.C., June 30, 2015. See also Burch, *supra* note 9, at 462-66.

23 This section does not directly address the potential custodial relationship incurred by an institution for a minor student enrolled in an education abroad program in its analysis of the cases presented and associated restatements. However, this section does conclude with an analysis addressing the intersection of differing responsibilities placed upon institutions with regard to minors participating amongst the majority adult population of students engaged in education abroad in light of *Munn*.

24 *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir.1979).

25 *Id.* The court also interweaved the decision of the court in *Healy v. James*, 408 U.S. 169 (1972) in determining that society itself "considers the modern college student an adult." *Bradshaw*, 612 F.2d at 140.

26 *Bradshaw*, 612 F.2d at 140-41.

27 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353, 363 (2011). See also *Cope v. Utah Valley State Coll.*, 290 P.3d 314, 325 (Utah Ct. App. 2012). However, at least one court made the determination that the existence of a special duty was a matter for the jury to decide. In the wake of the Ninth Circuit's

III. The Institution's Duty in Education Abroad

A. Relationships, obligations, and assumptions as addressed by the courts

In the context of education abroad programming, the story of Adrienne Bloss offers an early post-*Bradshaw* glimpse of the relationship shared between a university and student when abroad.²⁸ Ms. Bloss was sexually assaulted by a cab driver after leaving her host family's house to travel to another student's home in Cuernavaca, Mexico, during a study abroad experience.²⁹ The question at issue was whether the university was negligent for its failure to secure housing closer to the campus, failure to provide transportation, and failure to warn the students of the dangers of the city—all allegations claimed by the plaintiff that could have prevented the attack.³⁰ The court again looked to state law to determine the scope of immunities provided to the university in an examination of its ultimate liability toward the claims put forth by Bloss. In determining that the university retained its immunity with regard to discretionary programmatic decisions (that included considerations for housing, transportation, and notice), the court issued a *Bradshaw*-esque determination before further defining the boundaries of its duty during the course of its study abroad programs:

The litigation appears to be premised on a belief that the University is the guarantor of the student's safety. Unfortunately, this is neither physically possible nor realistic.³¹

Much of the finding in *Bloss* related to the court's deference to what it considered to be the *discretionary* powers of the university in creating the study abroad program. As long as the program was related to the academic pursuits of the institution, then the court would provide to it the same deference in defining its boundaries as provided to other academic pursuits.³²

As previously mentioned, perhaps no case is more often cited in education abroad literature than that of *Fay v. Thiel College*.³³ *Fay* involves an equally disturbing set of circumstances in which a student became ill on a study abroad

decision in *Bird v. Lewis & Clark College*, 303 F.3d 1015 (9th Cir. 2002), the Eastern District of Washington found, in *Jacky v. Webster University*, 2:02-cv-00197-EFS (E.D. Wash. 2004), that while "the parties cited to no case in the Washington state courts or the Ninth Circuit holding that a university that offers its students the opportunity to participate in an education abroad program, without more, has a special relationship with those students and therefore, a duty to them. Nor did the Court find one," the Court used *Bird* and the reasoning of the Ninth Circuit to ultimately decide in *Jacky* that "the Court holds that the issue of whether there was probably a special relationship between Ms. Jacky and Webster University creating a duty on the part of Webster University is one best decided by a jury." *Id.* On this point, the court denied the partial motion for summary judgment. However, the question put forth ultimately was never answered as the parties entered into a settlement sixteen days after the denial was filed.

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

29 *Id.* at 662–63.

30 *Id.* at 663.

31 *Id.* at 666.

32 *Id.*

33 55 Pa. D & C4th 353 (2011). See also Redden, *supra* note 1.

trip to Peru.³⁴ Upon admittance to the clinic, the faculty supervisors for the trip and other students moved on, leaving Fay under the supervision of a Lutheran missionary who was not an employee of (nor had any formal relationship to) Thiel College.³⁵ Soon after admittance, the doctors informed the student that surgery was “absolutely necessary.”³⁶ Once under local anesthesia, the doctor and the anesthesiologist sexually assaulted Fay.³⁷

In seeking a motion for summary judgment, the defendant institution sought to use a pre-trip waiver of liability form as a defense against Fay’s claims for her injuries.³⁸ The court rejected the validity of the waiver and its exculpatory clause for not meeting the standard of Pennsylvania law as a valid clause and concluded that the form ultimately was invalid as a contract of adhesion.³⁹ With the release essentially thrown out, the court then proceeded to the defendant college’s claim that it held no special relationship with Fay and thus was only held to a “reasonable standard of care” which it satisfied in delivering her to and leaving her at the clinic.⁴⁰ Ms. Fay claimed that such a special relationship existed because of the consent form that was signed at the same time as the waiver with specific reliance on the language: “In the event of sickness or injury of my / our / daughter / son / ward / spouse / myself, [name hiel College to secure whatever treatment is necessary, including the administration of an anesthetic and surgery.”⁴¹

Holding that the consent form itself could not be considered a de facto waiver form, since it lacked any references to such purpose, and thus the defendant institution could not find shelter from its negligence under such theory, the court determined that the form in and of itself consummated the special relationship between the student and the college. This meant that in consenting to allow the college to “secure whatever treatment is necessary,” that language created an expectation from the student’s perspective and an enhanced duty of care for the faculty supervisor in the event of an injury.⁴² In reaching this conclusion, the court provided significant weight to section 323 of the *Restatement (Second) of Torts*, in that through the form, the college specifically undertook a special duty to care for the student in the event of an injury and failed in this obligation.⁴³ In applying the restatement to the specific circumstances of the case, the court reasoned that the plaintiff possessed the burden of proving that the failure of the college to perform its duty increased the risk of harm to the student, and such negligence was a

34 *Fay*, 55 Pa. D & C4th at 355.

35 *Id.* at 356.

36 *Id.*

37 *Id.*

38 *Id.* at 358.

39 *Id.* at 361.

40 *Id.*

41 *Id.* at 368.

42 *Id.* at 363.

43 *Id.* at 365.

“substantial factor” in the actual harm suffered by Fay.⁴⁴ This would ultimately be a genuine issue of material fact to be presented to a jury; the court ultimately denied the motion for summary judgment.⁴⁵

Several cases cited by other scholars⁴⁶ show similar efforts by the courts to consider the creation/assumption of special duties and relationships by colleges and universities for student participants in education abroad programs. For example, in the 1998 case of *McNeil v. Wagner College*,⁴⁷ the appellate division of the New York Supreme Court denied relief to a student who suffered nerve damage while undergoing surgery at an Austrian hospital for injuries sustained while on a study abroad program through the college.⁴⁸ The student claimed that when the administrator of the program acted as an interpreter at the Austrian hospital, the administrator immediately assumed a duty of care for the student’s well-being.⁴⁹ The court disagreed, citing New York’s continued rejection of the *in loco parentis* doctrine as applied to higher education and noted that the student failed to show any duty assumed by the administrator in agreeing to serve as the interpreter.⁵⁰ In contrast to *Fay*, *McNeil* represents an examination of an assumed duty of a college through an action of its employee in the absence of such obligation memorialized in a pre-trip waiver or consent forms, ultimately finding that the assumption of one task did not automatically mean the assumption of a special duty of care.

A possible outlier to either conceptual framework of whether such action is contemplated in writing between a student and university is *Ju v. Washington*,⁵¹ where a faculty advisor on a study abroad trip to Cuba took action to preserve the immediate health of a student by sending her home from the experience, wherein the student then sued for breach of contract stating that she was sent home “against her free will.”⁵² In light of the perceived immediate danger to the student’s health by the program coordinator, as well as local doctors, the court declined to find the university in breach of contract for sending her home, without reference in the court’s analysis of any pre-trip waivers or agreements that provided the university with such right. Nevertheless, the case demonstrates that while the assumption of a special duty may be related directly to the action taken or a specific provision of a document agreed to by both parties, some courts may be willing to extend the

44 *Id.* at 366.

45 *Id.*

46 *See supra* notes 9 and 10.

47 246 A.D.2d 516; 667 N.Y.S.2d 397 (N.Y. App. Div. 1998). *See also* Burch, *supra* note 9, at 483.

48 *McNeil*, 246 A.D.2d at 516.

49 *Id.* The student’s theory of recovery was that during the interpretation, the administrator withheld information regarding a doctor’s recommendation for immediate surgery and that such negligence was a proximate cause of the student’s nerve damage. *Id.*

50 The court’s reasoning went further in that, even if there was a relationship, the student failed to prove the allegations that the administrator withheld information regarding the doctor’s recommendation. *McNeil*, 246 A.D.2d at 517.

51 156 Wash. App. 107 (2010).

52 *Id.*

discretion of the institution in the context of education abroad programs where the safety of the student is a primary concern without addressing whether the institution assumed a special duty or had the obligation to take such action.⁵³

Outside the context of education abroad, several cases are instructive for further examining the boundaries of creation of a special relationship based on the factual patterns of institutional activities and actions occurring on and off campus. For example, an institution of higher education can be held liable for the dangerous conditions of a mandatory internship if the institution was in a position to have direct knowledge about such conditions and failed to provide a warning to the student prior to the start of the experience.⁵⁴ However, there may not be a special duty owed by an institution to a student who was injured in a zip line incident at a “wilderness leadership training course” that he enrolled in through the university, but was administered by an independent third-party provider, especially since the university had no similar ties to or control over the program or its supervision.⁵⁵ Further, in support of theories supporting the creation of special relationships in education abroad programming, an institution may incur liability by creating a special relationship, if the overseas experience is in direct furtherance of a programmatic requirement (presumably more than just merely satisfying credit hours), and the institution holds sole discretion of site selection. Such liability may be mitigated, if the site is controlled and operated by a third-party provider through which the institution has contracted to perform certain educational services. However, even where the site is operated by

53 See generally Brittney Kern, *Balancing Prevention and Liability: The Use of Waiver to Limit University Liability for Student Suicide*, 2015 B.Y.U. EDUC. & L.J. 227 (2015). Further complicating the issue is the continued emergence of mental health issues on campus and the inevitability that such health crises would continue to occur in the education abroad context. In Kern’s examination of mental health issues relative to the special relationships that may be created or asserted between a university and student contemplating or attempting suicide, she provided an examination of several cases that involved *suicide waivers* as well as whether the university was put on notice of a student’s mental instability and should have a duty to act. Kern’s work is instructive in the event that a similar issue would arise during the course of an education abroad program, in which both the pre-trip waivers and any actions undertaken by the faculty advisor may be later argued to have created a special relationship requiring further care and attention to a student with mental health issues or a student who may be contemplating or attempting to complete suicide. See generally *Connor v. Wright State Univ.*, 2013 Ohio 5701 (10th Dist. 2013). Responding to a call, campus police officers contacted medics who transported a student to a hospital after the department received a call that the student overdosed on prescription medication. *Id.* at ¶ 2. A short while later, the campus police officers received another call about the student’s attempts to harm himself, and after a brief conversation, the officers did not believe the student represented a harm to himself or others. *Id.* at ¶ 4. A short while after that, the student completed suicide. The court relied upon the four-part test provided for in Ohio Revised Code section 2743.02(A)(3)(b), and while it ultimately found that such test could not be completely satisfied, it is of significance that the court found that a special relationship could arise from the police officers’ statement to the student that, “if he needed someone to talk to that he could call the police department and [they] would be more than happy to help him out.” *Id.* at ¶ 16.

54 *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000). The court determined that because the placement office had the final determination as to where students were placed, “students ... could reasonably expect that the school’s placement office would make some effort to avoid placing [students] with an employer likely to harm them.” *Id.* at 90 (citing *Silvers v. Associated Tech. Inst., Inc.*, No. 93-4253, 1994 WL 879600 (Mass. Super. Ct. Oct. 12, 1994)).

55 *Van Maanen v. Youth with a Mission-Bishop, et al.*, 852 F. Supp. 2d 1232 (E.D. Cal. 2012).

a third party, liability may still attach as in the case of *Doe v. Rhode Island School of Design*.⁵⁶

The Rhode Island School of Design (RISD) sponsored an education abroad experience in Ireland and used a local third party, Burren College, to provide on-ground logistics, including housing. Upon Burren College's recommendation, RISD quartered its students in three houses close to the college. Doe was unable to lock her bedroom. On the very first night of the education abroad experience, she was raped by another program participant who was immediately dismissed from the program thereafter. Doe alleged negligence against RISD for "failing to provide her with reasonable safe housing accommodations."⁵⁷ Despite RISD's objections to the same, the court determined that a special relationship did exist, that RISD owed a duty to exercise reasonable care in providing secure housing, and thus it failed in its duty. Furthermore, the court determined that it was "reasonably foreseeable that one of RISD's students could be the victim of an attack if reasonable safe housing accommodations were not provided"⁵⁸ and looked to the *Restatement (Second) of Torts* section 314A for support. According to the court, while RISD did not have direct knowledge of the assaulting student's violent nature, it did have constructive knowledge that an assault, in general, could occur, stating,

As the record makes clear, prior to the start of this program, RISD, was aware that sexual assaults or misconduct could occur during its international study abroad programs. In fact, RISD, like so many universities, has had to deal with this reality, including with respect to an allegation of sexual misconduct during a study abroad program two years prior to the Ireland Program.⁵⁹

Ultimately, the bulk of the decisions cited regarding institutional liability through special relationships in education abroad programming and other contexts are largely determinative on state law considerations, previous court decisions, as well as various provisions of the Restatements. While state law standards for assigning a special relationship to one of its state institutions vary, the courts' consistent consideration of the restatement as a keyhole through which the state-related issues and interpretations could be viewed leaves open the possibility that the individual state cases considered together could provide additional inroads supporting the further expansion of the application of the special relationship. Restatements are often relied on by courts to further establish issues of liability and duty of care in cases of first impression, especially when such liability is predicated upon the actions of a third party or a condition seemingly outside the control of one of the primary actors (i.e., the institution and the student).⁶⁰

56 432 F. Supp. 3d 35 (D.R.I. 2019).

57 *Id.* at 40

58 *Id.* at 45.

59 *Id.*

60 See *Creppel v. Geco-Prakla, Inc.*, 1994 WL 50241, Civ. A. No. 93-1994 (E.D. La. February 11, 1994), unreported, "A persuasive authority on the general law of torts is The Restatement (Second) of Torts." See also David A. Logan, *When the Restatement Is Not a Restatement, The Curious Case of the "Flagrant Trespasser,"* 37 WM. MITCHELL L. REV. 1448 (2011). According to Logan, "There were more than

B. Continued focus turned to the Restatements

In the context of education abroad programming, the three restatements cited by the courts in *Bradshaw*,⁶¹ *Fay*,⁶² and *Boisson*⁶³ provide further insight into analyzing the existence of a special relationship between the student and the administering institution. First, is the activity one that is directly related to the education program in which the student is enrolled? In *Boisson*,⁶⁴ one of the first considerations applied by the Court of Appeals of Arizona to a case involving liability for the death of a student in a student-organized study abroad experience to Mount Everest was a concept introduced in the *Restatement (Third) of Torts* section 40(a). This restatement provides generally that, in the presence of a special relationship, one party owes another a reasonable duty of care with regard to the risks that may “arise within the scope of the relationship.”⁶⁵ *Restatement (Third) of Torts* section 40(b)(5) provides, among the several categories of special relationships, “a school and its students.” According to the reporter’s notes of the restatement, there is a “substantial acceptance” of this relationship by courts, but (as cited in *Boisson*) such relationship is often applied in the limited context for “risks that occur while the student is at school or otherwise engaged in school activities.”⁶⁶ The court ultimately concluded that the trip to Mount Everest was not an, *off-campus* university-sponsored trip as the plaintiffs asserted (even if the university on-site staff did have knowledge of it) and that the university did not owe a duty of care to the student. Notwithstanding the decision, the restatement itself is important as the first waypoint in considering whether the activity itself is directly related to an institutional activity or program before moving on to whether the actions of an individual faculty or staff member may create a special relationship or a special duty of care on behalf of the institution.⁶⁷

160,000 judicial citations to restatements by 2004, with the largest single number, by a considerable margin, involving torts” *Id.* at 1449. “During this time, there were more than 67,000 citations to the torts restatements, with the contracts restatements a distant second with slightly less than 29,000 citations.” *Id.* at n.3. The court in *Munn et al. v. The Hotchkiss School*, 24 F. Supp. 3d 155 (D. Conn. 2014), *appealed*, 795 F.3d 324 (2d Cir. 2015) cited several restatements in its reasoning on foreseeability, risk, duty, and harm.

61 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

62 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353 (2011).

63 *Boisson v. Ariz. Bd. of Regents*, 236 Ariz. 619; 315 Educ. Law Rep. (West) 511 (Ariz. Ct. App. 2015).

64 *Id.*

65 RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 (a)(AM. L. INST. 2012).

66 RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §40, Reporters’ Note, § 1 (AM. L. INST. (2012). *Boisson*, 236 Ariz. at 623. This *Boisson* decision is cited by the Connecticut Supreme Court in *Munn* (326 Conn. 540, 552, Conn. 2017) with regard to duty of care, “The duty is tied to the expected activities within the relationship. Therefore, in the student-school relationship, the duty of care is bounded by geography and time, encompassing risks such as those that occur while the student is at school or otherwise under the school’s control.” Of note, “engaged in school activities” was revised to state “under the school’s control” by the Connecticut Supreme Court in *Munn* (citing RESTATEMENT (THIRD) OF TORTS § 40, cmt. 1).

67 It could be argued that the court in *Boisson* actually made a leap in interpretation by assuming that the term *schools* in section 40 of the Restatement (Third) applies to postsecondary education. As inferred in the reporters’ note, the term may be limited to secondary schools through its references to the “custodial relationship,” which is not a comparison usually made to the relationship between

Second, after establishing the activity is a university activity or program, the court in *Fay* cited *Restatement (Second) of Torts* section 323 for its proposition that

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 the liability to the other for physical harm resulting from this 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.⁶⁸

Essentially, if a person says he or she will take an action, another relies upon that action, and there is either an increase in probability of harm and the other person is actually harmed, then the duty of care has been breached and liability may accrue. In the context of *Fay*, this assumption took the form of a single statement in a pre-trip document consenting to allow the college representative to take action in the event the student needed medical treatment.⁶⁹ While providing the student with the boundaries of acceptable behavior and the terms of the educational program, these documents may also contain assumed duties undertaken by the institutional representative—both directly and indirectly—upon which the student may rely during the course of the education abroad opportunity, and thereby imposing on the institution an unintended special relationship and increased duty of care.

C. A minor exception?

It is important to note, however, that the imposition of a special relationship and the duties associated therein by a court may not follow this same reasoning in the event the participant in the education abroad program is a minor. For example, in the case of *Munn et al. v. The Hotchkiss School*, Munn was a fifteen-year-old student at the Hotchkiss School who was on an education abroad experience in China when Munn received a tick bite during her visit to Mount Panshan. As an eventual and tragic consequence of this one bite, Munn was left with severe brain damage in which “she had limited control over her facial muscles, so that she drools, has difficulty eating and swallowing, and exhibits socially inappropriate expressions.”⁷⁰ While the district court noted that Munn “is in other ways normal” despite certain cognitive impairments, the court also noted testimony where she contemplated suicide and her hidden rage when people think she suffers from mental retardation while all the while she remains acutely conscious and self-aware of her condition.⁷¹ As further explained herein, the courts rendered (and

students and a postsecondary institution. Even the court itself noted, “The parties have cited, and the court has found, no Arizona case addressing whether a college or university owes its students a duty of reasonable care for off-campus activities. . . . No Arizona case has recognized a duty by a university or a college in any context comparable to this case.” *Boisson*, 236 Ariz. at 623.

68 *Fay*, 55 Pa. D & C4th at 365 (citing RESTATEMENT (SECOND) OF TORTS § 323 (AM. L. INST. 1965).

69 *Id.* at 368.

70 *Munn et al. v. The Hotchkiss School*, 24 F. Supp. 3d 155, 166 (D. Conn. 2014).

71 *Id.*

upheld) a decision against the Hotchkiss School in the amount of a little north of \$41 million—finding that Munn’s injuries were “reasonably foreseeable” and that the school failed in its duty to warn Munn and her parents of the dangers associated with the trip. What if Munn was a minor high school student participating in a university study abroad experience through a pathway program to earn college credits?⁷² Referred to most commonly as dual enrollment, several institutions in nearly every state participate in a program that encourages high school students to gain college credits through established partnerships either at the state level or those school-to-institution agreements.⁷³ While the students involved in *Bradshaw*⁷⁴ were clearly college students and the student at the center of *Munn* was clearly a secondary school student, a court may not see the dually enrolled student as belonging clearly to either category, thus leaving open the possibility of engaging *in loco parentis* as the legal standard of care even while the student participates in a study abroad opportunity at an institution of higher education. Much like the adoption of the First Amendment framework for free speech analysis from the secondary contexts of *Hazelwood School District v. Kuhlmeier*⁷⁵ to institutions of higher education,⁷⁶ it is not outside the boundaries of legal jurisprudence for courts to begin to parse participation in study abroad experiences by age in applying the duty and liability of the institution in the event of a claim: one standard of duty for students above the age of majority and a more custodial standard for those below. With the emergence of gap year study abroad programs, the line in the sand previously established between secondary and postsecondary schools regarding the role and duty of the institution in the safety of its students grows even more gray.

Offered by both large education abroad providers as well as individual institutions, these programs take advantage of the growing trend where newly minted high school graduates take a *year off* before formally enrolling in an institution of higher education.⁷⁷ Students can then apply this gap year study abroad experience as course credit at their future institutions of higher education. Many of these providers are partners with institutions of higher education, and now some institutions of higher education are offering their own gap year enrollment options. As the population of students engaged in dual enrollment and/or gap year study abroad activities increases, it is not outside the realm of possibility for a

72 For example, in Ohio the dual enrollment opportunity offered to high school students is called “College Credit Plus.” During the 2015–16 school year, over 54,000 students participated in the program by enrolling in twenty-three community colleges, thirteen universities, and thirty-five private higher education institutions. https://www.ohiohighered.org/content/college_credit_plus_info_students_families. See also, https://www.ohiohighered.org/sites/ohiohighered.org/files/uploads/CCP/CCP_overview_2016_11032016.pdf.

73 Find a state-by-state analysis by the Education Commission of the States at <http://ecs.force.com/mbdata/mbprofallIRT?Rep=DE15A>.

74 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

75 484 U.S. 260 (1988).

76 See *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), applying *Hazelwood* in the context of a subsidized student newspaper and citing *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). See also *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012).

77 Discussion of the gap year phenomena, as well as several programmatic options, is found at <https://www.studyabroad.com/gap-year-worldwide>.

claim to arise that asks the court to parse the obligations of the institution to minor participants separate and apart from those who have reached the age of majority. Some institutions of higher education may be able to avoid such a possibility, if there are examples of policies in place either prohibiting dual enrollment students from participating in study abroad or preventing participation by minor students altogether.⁷⁸ However, the remaining institutions that have not addressed this issue may be left to wait until the spotlight shone upon *Munn* turns its focus toward higher education.

IV. The Rise (and Fall?) of the Institutional Waiver

Even in the event of a duty or special relationship, institutional waivers requiring the student to *release, indemnify, and hold harmless* the institution are often portrayed as a mainstay component in the practice of education abroad.⁷⁹ However, in a study conducted and reported by United Educators, “institutions could produce a signed pre-travel waiver in only fifteen percent of the study’s claims.”⁸⁰ Whether through failure to implement the waiver as part of the program’s application process or a failure after the fact to maintain the document in accordance with institutional retention schedules, the absence of the waiver can substantially limit an institution’s defense in mitigating liability. Yet, even its production during discovery is not a guarantee against liability.

For example, the waiver produced in *Fay*⁸¹ failed to absolve the college of its duty to remain with the student in the event of a medical emergency *because* of the language in the waiver, and the *Munn*⁸² case was decided based upon what was *not* in the waiver. This preclusion of the waiver became a crucial decision that removed a significant barrier toward a determination of liability against the school.⁸³ The pretrial ruling precluded the introduction of the pre-trip release on

78 For example, the University of Cincinnati by policy prohibits the participation of College Credit Plus (dual enrollment) students altogether in study abroad, while also limiting participation by minors enrolled in regular coursework. See <https://www.uc.edu/campus-life/study-abroad/apply/minors.html> (last visited January 31, 2021).

79 See Hoye, *supra* note 22. See also Eric LeBlanc, *Limiting Risk and Responsibility in Study Abroad: Are Waivers Good Enough?*, 6 Coll. Q. 1 (2003), <http://collegequarterly.ca/2003-vol06-num01-fall/leblanc.html>. This article demonstrates an early adoption of the standard waiver as a component of mitigating study abroad liability through the perspective of Canadian institutions of higher education.

80 United Educators, *At Risk Abroad: Lessons from Higher Ed Claims* 10 (February 2016), edurisksolutions.org.

81 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353, 363 (2011).

82 *Munn et al. v. The Hotchkiss Sch.*, 795 F.3d 324 (2nd Cir. 2015).

83 In its discussion, the court examined several factors from previous case law before focusing on the issue as to whether the waiver represented a contract of adhesion. While a common argument when examining releases, the court’s rationale in *Munn* (933 F. Supp.2d 343, D. Conn. 2013) made comparison to the 2005 case, *Hanks v. Powder Ridge Restaurant Corp.*, 276 Conn. 314, 322 (Conn. 2005). The court compared the release executed in *Hanks* (where skiers were presented with the release while already on the slope) with the release executed in *Munn* at 345-346 (offered three months before the trip was to commence),

the basis that the release lacked the unambiguous waiver in regard to negligence committed by the Hotchkiss School (“Thus, the release speaks with clarity about the “negligence of everyone but the Hotchkiss School”),⁸⁴ and even if the release had contained such language, the court considered it void as a matter of public policy since “Hotchkiss school’s employees were in the exclusive position to evaluate the risks Cara encountered on her trip and to ensure that Cara had the resources to protect herself against those risks.”⁸⁵ The district court ultimately found that the school was negligent in its duty to notify Munn and the other students of the dangerous health conditions present at Mount Panshan and also found that the presence of these dangers was not only foreseeable but was inferred by the existence of Centers for Disease Control advisories in place before the trip began.⁸⁶ With a reduction in prior economic damages for amounts covered by insurance, the jury awarded damages in the amount of \$41,465,905.39.⁸⁷ Several higher education associations immediately took notice and then action.⁸⁸ The Hotchkiss

before coming to the conclusion: “But like the patrons in *Hanks*, Cara and her parents had no meaningful exit option.” In its determination, the court ignored the fact that the course was not a required part of the curriculum, but rather a completely optional trip provided for “enrichment,” not satisfying any criteria that must be completed prior to commencement. Munn was not compelled to go on the trip and possessed the option to decline both the release and the trip itself. Instead, the court hinged its decision on the custodial relationship between the school and the student: the school had some “control” over Munn’s exposure to the risks that a trip to China posed.

84 *Munn et al. v. The Hotchkiss Sch.*, 933 F. Supp. 2d 343, 346 (D. Conn 2013).

85 *Id.* at 348.

86 *Munn et al. v. The Hotchkiss Sch.*, 24 F. Supp. 3d 155, 177 (D. Conn. 2014). The court recognized that the advisory provided by Plaintiff Munn was issued after the incident occurred and the court then only theorizes through footnotes, “The jury could easily and reasonably have inferred that the August 2007 webpage contained the same basic information as the late spring 2007 page.” The advisory in question did state that precautions such as insect repellent and “long sleeved shirts” should be taken as a precaution.

87 *Id.* at 214. It should be noted that the school, through the motion, introduced several claims including assumption of risk, contributory negligence by the parents (“negligent supervision”), and public policy, whereby the school argued that if this case were permitted to stand it would open up litigation against schools across the country for any extracurricular activity.

88 E.g., Kaitlin Mulhere, *Higher Ed Groups Caution Court Decision Could Discourage Study Abroad*, INSIDE HIGHER EDUC. (October 24, 2014), <https://www.insidehighered.com>. Accord Julianna Renzi, *Column: Travel Risk Is Not School’s Responsibility*, DAILY WILDCAT (November 11, 2014), <http://www.wildcat.arizona.edu/article/2014/11/column-travel-risk-is-not-schools-responsibility>; Hon. Thomas A. Dickerson, *Dangerous Student Tours: The Chinese Tick Case*, GLOBAL TRAVEL INDUS. NEWS (August 28, 2014), <http://www.eturbonews.com/49598/dangerous-student-tours-chinese-tick-case>; Liz Klimas, *Student Wins \$41.7 Million Settlement for Disease She Contracted on School Trip*, THE BLAZE (Mar. 29, 2013), <http://www.theblaze.com/stories/2013/03/29/student-wins-41-7-million-settlement-for-disease-she-contracted-on-school-trip/>. Representative of this case’s relevance to the higher education landscape, over forty organizations had submitted or otherwise joined as amicus curiae to the Second Circuit case including NASPA: Student Affairs Administrators in Higher Education, NAFSA: Association of International Educators, Forum on Education Abroad, Institute for International Education, and the American Council on Education. Relative to the Connecticut Supreme Court case, twenty-three organizations signed on to another amicus curiae brief submitted to the court.

School soon after appealed the decision to the Second Circuit.⁸⁹ The Second Circuit rejected the argument put forth by the Hotchkiss School and upheld the decision that the student's injuries were foreseeable. In addressing the public policy with regard to the school's duty of care brought by the Hotchkiss School on appeal, the circuit court certified two questions to be thereafter considered by the Connecticut Supreme Court: (1) Does Connecticut public policy support imposing a duty on a school to warn or protect against the risk of a serious insect-borne disease when it organizes a trip abroad? (2) If so, does an award of approximately \$41.5 million in favor of the plaintiffs, \$31.5 million of which are noneconomic damages, warrant remittitur?⁹⁰ The Connecticut Supreme Court answered in the affirmative on the first question and upheld the original \$41.5 million award (which included \$31.5 million in no-economic damages). Accordingly, upon its return, the Second Circuit affirmed the decision of the district court in a summary order published on February 6, 2018.⁹¹ In responding to the public policy concerns, the Connecticut Supreme Court offered the following:

The public policy of Connecticut does not preclude imposing a duty on a school to warn about or to protect against the risk of a serious insect-borne disease when organizing a trip abroad, as it is widely recognized that schools generally are obligated to exercise reasonable care to protect students in their charge from foreseeable harms ... the normal expectations of participants in a school sponsored educational trip abroad involving minor children supported the imposition of a duty on the defense to warn about and to protect against serious insect-borne diseases in the areas to be visited on the trip.⁹²

Conversely, in *Thackurdeen v. Duke University*,⁹³ the waiver was upheld based upon the plain language of its content in consideration of the circumstances under which it was intended to apply. Ravi Thackurdeen was a student enrolled in an education abroad program to Costa Rica administered by Duke and the Organization for Tropical Studies (OTS). During a trip to a local beach, Thackurdeen was pulled far away from shore by a rip current and subsequently drowned. His family sued Duke for negligence, amongst other claims, claiming that Duke and OTS had a duty to exercise reasonable care with regard to Thackurdeen and that the duty was breached by taking him to a beach known for having strong rip currents. Within the pleadings, Thackurdeen's claim (brought by his parents) listed twelve specific duties that had been breached.⁹⁴ Duke and OTS moved to dismiss Thackurdeen's claim based upon the contractual waivers and releases presented by Duke and OTS, and signed by Thackurdeen and his father prior to the trip.⁹⁵

89 Munn et al., v. The Hotchkiss Sch., 795 F.3d 324 (2d Cir. 2015).

90 *Id.* at 335.

91 Munn et al. v. The Hotchkiss Sch., 724 Fed.Appx. 25 (2d Cir. February 6, 2018).

92 Munn et al., v. The Hotchkiss Sch., 326 Conn.540 (Conn. 2017), *Syllabus*.

93 1:16CV1108, 2018 WL 1478131 (M.D.N.C. March 23, 2018)

94 *Id.* at *9.

95 *Id.* at *6.

Statement of Authorization and Consent: We understand that participation in the

The Thackurdeens countered that the claim was not barred by the waivers because (1) Duke and OTS's actions represented gross negligence, which cannot be waived under North Carolina law; (2) even if the waiver was effective, the trip to the breach was outside the scope of the waiver; and (3) even if it could be waived, it was against public policy to do so and therefore is unenforceable.⁹⁶

Relative to the first two claims, the court found that Duke and OTS's actions did not meet the standard for gross negligence and that the plain language of the waiver included the entire trip from start to finish (and not just certain individual activities in between). However, the adjudication of the final claim hinged upon the court's acceptance of Thackurdeen's argument that because higher education is a highly regulated activity, public policy would not favor the enforcement of the waiver because of the substantial safety interest the public has in sending their children off to college.⁹⁷ The court did not accept this argument. Instead, rather than focus on the practice of higher education, the court focused on the activity itself—swimming in the ocean.

program is voluntary and that any program of travel involves some element of risk. We agree that in partial consideration of Duke University sponsoring this activity and permitting the student to participate, we will not attempt to hold Duke University, its trustees, officers, agents and employees liable in damages for any injury or loss to person or property the student might sustain while so participating; and we hereby release Duke University, its trustees, officers, agents and employees from any liability whatsoever for any personal injury ... arising from participation in the program. ... Release, Assumption of Risk, Waiver of Liability, and Hold Harmless Agreement: In return for the Organization for Tropical Studies and Duke University allowing me to participate in this activity and having read and understood this Participation Agreement, I hereby state that I agree to the following: A. I hereby RELEASE, WAIVE, DISCHARGE, AND COVENANT NOT TO SUE the Organization for Tropical Studies, Duke University, its trustees, officers, employees, or agents (hereinafter referred to as RELEASEES) ... for any liability, claim and/or cause of action arising out of or related to any loss, damage, or injury, including death, that may be sustained by me ... that occurs as a result of my traveling to and from, and participation in this activity. B. I agree to INDEMNIFY AND HOLD HARMLESS the RELEASEES whether injury or damage is caused by my negligence, the negligence of the RELEASEES, or the negligence of any third party from any loss, liability, damages or costs, including court costs and attorneys' fees, that RELEASEES may incur due to may traveling to and from, and participation in this activity. C. It is my express intent that this RELEASE and HOLD HARMLESS AGREEMENT shall bind the members of my family ... if I am alive, and my heirs, assigns and personal representative, if I am deceased, and shall be deemed as a RELEASE, WAIVER, DISCHARGE, and COVENANT NOT TO SUE the above-named RELEASEES. F. I understand that by participating in this activity I will ASSUME THE RISK of injury and damage from risks and damages that are inherent in any activity.

96 *Id.*

97 *See generally* Robert J. Aalberts et al., *Studying Is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 J.C. & U.L. 189 (2015), which provides for an interesting discussion of the involvement of the federal government and state legislatures in public policy discussions involving study abroad programming and its purposes as well as a proposition for a federal standard for study abroad liability.

Here, Ravi and his father signed two waivers. The language of the waivers is clear and includes a release from any liability arising out of the injury or death of a participant while on the Global Health Program. The beach trip where this tragic event took place was an activity sponsored by the Global Health Program and Ravi's death occurred while he was swimming in the ocean during the beach outing. There is nothing to support a finding that swimming in the ocean is the type of highly regulated activity that triggers the substantial public interest exception to the enforceability of the waivers Ravi and his father signed.⁹⁸

While these cases and others mentioned herein are not dispositive toward a determination as to the current enforceability of waivers within the education abroad context, they certainly provide three key perspective for reviewing both the enforceability and exposure of current and future waiver, release, and assumption of risk documents for education abroad programs: (1) Does the document cover the entire scope of the program (time, place, activities). (2) Does the document specifically state the indemnified institutional parties. (3) Is the document enforceable in consideration of the laws and decisions within the institution's jurisdiction? Furthermore, enforceability should be viewed not only from the lens of the adult student as the participant but through that of the parents who may be asked to sign on behalf of their minor child.

V. Three Pillars as a Foundation for Enforceability

In consideration of the duties and special relationships that may be formed, and the varied and evolving nature of the educational abroad experiences available to students, waivers and releases have to be more than just a piece of paper. Moving forward, waivers and releases should be adopted as a component of a systematic orientation program adopted by the institution that includes a reasonable opportunity for each student to be notified of the reasonably foreseeable risks involved in the experience and allows the student the opportunity to make an informed decision whether or not to assume those risks (and sign the release). The three pillars supporting the release of claims demands that such release be made knowingly, voluntarily, and with valuable consideration between the parties. The institutional waiver should be able to stand upon the foundation provided by these three pillars. Instead of being reduced to a perfunctory component inwardly protecting the institution, waivers and releases should be viewed as the culmination of a process through which the participant is aware of the risks, understands the risks, has voluntarily agreed to assume the risks, and has voluntarily agreed to release the institution from the consequences of the program in consideration for the opportunity to participate in the program itself. For its part, the institution should engage the student in an examination of the reasonably foreseeable risks throughout the course of the education abroad experience and provide the student with the resources through which the student can knowingly and voluntarily assume the risk, while also taking personal steps to mitigate the dangers inherent therein.

⁹⁸ *Thackurdeen*, 2018 WL 1478131 at *11. Contrast *Downes v. Oglethorpe University, Inc.*, 342 Ga. App. 250 (2017), finding that where a student drowned while on an education abroad trip, "the student assumed the specific risk of drowning posed by entering a body of water so inherently dangerous as the ocean."

A. *Knowingly*

Consistent throughout the few cases that exist regarding the applicability of waivers within higher education is that the “contract or exculpatory clause must be clear and explicit.”⁹⁹ A clear and explicit release can provide the foundation for the defense that the student executed the document aware of the consequences of such a release and assumed the risks associated therein. However, that same clear and explicit release of claims may not provide a sufficient foundation in the event that the student was not aware of the consequences of the activity itself and therefore did not knowingly assume any such risk.¹⁰⁰ To strengthen the argument that a release is made knowingly by the student and that the student is knowingly assuming the risks associated with the activity, institutions must engage in a comprehensive review of the risks associated with the activity prior to its commencement. This review should ensure that the reasonably foreseeable risks are explained to the student so that the student has the knowledge to then assume those risks as a component of the release itself. *Solomon v. John Cabot University*,

99 *Roe v. Saint Louis Univ.*, No. 4:08CV1474 HEA, 2012 WL 6757558 (E.D. Mo. 2012). In finding for the defendant with regard to a back injury suffered by a female athlete, the court examined the following language, “I agree to release and hold harmless Saint Louis University, its employees, agents, representatives, coaches, physicians, athletic trainers, student-athletic trainers, and volunteers (collectively “Releasees”), from any and all liability, actions, cause of action, debts.... I FURTHER UNDERSTAND AND AGREE THAT THIS RELEASE COVERS ANY LIABILITY, CLAIM AND ACTION CAUSED ENTIRELY OR IN PART BY ANY ACT, FAILURE TO ACT, MISTAKE, FAILURE TO SUPERVISE, OR NEGLIGENCE ON THE PART OF ANY OF THE RELEASEES.” before determining that, “there is no question that the language above is clear and explicit.” In the same decision, the court also revived the previous precedent of the Eighth Circuit that “the college is not an insurer of the safety of its students” absent a special relationship, citing *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003).

100 *See Turnbough v. Ladner*, 754 So. 2d 467 (S.C. Miss. 1999), *reh’g denied*, April 20, 2000. Despite signing a release before engaging in the activity, the court determined that even though a student who suffered injuries while engaged in a diving course executed a release, the student “did not knowingly waive his right to seek recover for injuries caused by [the diving instructor’s] failure to follow basic safety guidelines that should be common knowledge to any instructor of novice students.” (*Id.* at 470). The court further opined that if it was the intent of the diving school to protect itself from the negligence of its own instructors, it should have provided such language in “specific and unmistakable terms” in the release itself. *Id.* at 470. *Contra Morgan v. Kent State University*, 54 N.E.3d 1284 (10th Dist. Ohio 2016), where a student suffered an injury after being punched in the face by the instructor during a novice karate lesson. The court determined: “As danger is inherent in karate, it is common knowledge that such danger exists, and appellant’s injury occurred during the course of participating in the inherently dangerous activity, we find that the doctrine of primary assumption of risk applies in this case” (*Id.* at 1292). *Contra Valdosta State University v. Davis*, 356 Ga.App. 397 (Ga. App. 2020), where the court overturned a previous denial of summary judgment, finding for the defendant where a student suffered injuries after falling from a lofted bed. The court applied the superior-or-equal knowledge rule stating that “a knowledgeable plaintiff cannot recover damages if by ordinary care [she] could have avoided the consequences of defendant’s negligence.” In short, the court determined that the dangers presented by a lofted bad are “open and obvious.” *Id.* at 399-400. *Contra Spears v. Association of Illinois Electric Cooperatives*, 986 N.E.2d 216 (4th Dist. Ill. App. 2013), in which the court determined that the question of unequal bargaining position raised by the plaintiff is a question of fact that could not be resolved as a matter of law by the court. *Contra Wheeler v. Owens Community College*, 2005-Ohio-181, (Ct. Cl. Ohio 2005), finding that a release signed by a student injured during a peace officer training course was “too general to be enforceable.” *Id.* at ¶ 27.

*Inc.*¹⁰¹ is an example of the importance of a well-documented and thorough pre-departure orientation program as a means of establishing the knowledge held by the parties of the risks associated with a study abroad program. Beau Solomon was a student at the University of Wisconsin-Madison (UW) who was murdered in Rome while attending a study abroad opportunity provided by John Cabot University (JCU), which had a contractual relationship with UW. Solomon first learned of the opportunity when attending a study abroad fair sponsored by UW. He signed up for the opportunity and later attended the mandatory orientation sessions for students conducted by a JCU representative (i.e., pre-departure). Upon arrival in Rome, Solomon attended another mandatory session (i.e., post-arrival). Several days later, Solomon's body was recovered from the Tiber River, and Italian authorities had an Italian citizen in custody. Solomon's estate sued JCU alleging that both during the fair and the subsequent orientation sessions that followed, JCU failed to provide notice to their son of "the known dangers in the area surrounding JCU campus, and he therefore traveled to Rome unaware of those dangers."¹⁰² JCU denied knowledge of previous individuals who died "under suspicious circumstances" but did acknowledge that it was aware of one student from the University of Iowa who had died near the Tiber River (while also confirming that JCU affirmatively alleged that the student's death was "ruled accidental and non-criminal by Italian authorities").¹⁰³ While the case itself did not ultimately rule on the negligence of the parties, as it was settled in 2019,¹⁰⁴ the tragic story of Beau Solomon highlights the importance of every pre-departure orientation as a means of establishing the knowledge of the parties while seeking to secure the validity of the assumption of risk by the student and provide a defense for failure to warn by the university.¹⁰⁵

Further punctuating the importance of information conveyed during pre-departure activities, as a means of establishing the boundaries of foreseeability within the study abroad program, is the case of *Downes v. Oglethorpe University*.¹⁰⁶ Two professors leading an education abroad experience engaged in several pre-trip meetings with students where various issues regarding their upcoming travel to Costa Rica were discussed. In one particular meeting, both instructors discussed swimming in the ocean with the students. Despite the warnings provided in those meetings, "the students continued to express that they were good swimmers."¹⁰⁷ Six days into the trip, the group drove to a nearby beach. Soon after arriving Downes ventured into deeper water with some of the other students but unfortunately drowned. The defendant university relied upon the assumption of risk theory

101 3:17-cv-00621-jdp, 2018 WL 2452775 (W.D. Wisc., May 31, 2018) (unreported).

102 *Id.* at *4.

103 *Solomon et al., v. John Cabot University, Inc. and ACE American Insurance Company*, 3:17-CV-00621, Defendant's Answer to First Amended Complaint, filed June 14, 2018, page 11.

104 *See* Redden, *supra* note 1.

105 The case also provides an example of the threshold arguments that must be satisfied by a plaintiff for a federal court to exercise its jurisdiction over a foreign study abroad programming provider.

106 342 Ga. App. 250, 802 S.E.2d 437 (2017).

107 *Id.*

as an affirmative defense in that (1) Downes had knowledge of the danger (i.e., swimming in the ocean had been directly discussed by the group); (2) Downes understood and appreciated the risk associated with such danger (i.e., drowning); and (3) Downes voluntarily exposed himself to those risks.¹⁰⁸ Downes's parents sued claiming that it was the institution's negligence that caused the student's death, both through failing to exercise "ordinary care" in its planning of the trip as well as its failure to train its professors in "supervising swimming students" and supplying safety equipment. The appellate court, perhaps echoing *Bradshaw*¹⁰⁹ and *Bloss*,¹¹⁰ denied the parents' claim and upheld the state court's grant of summary judgment, stating,

Appellants do not show, however, that Oglethorpe was under a statutory or common law duty to provide safety equipment to its students during an excursion to the beach, or that the ocean is analogous to a nonresidential swimming pool. Nor can we conclude that Oglethorpe became an insurer for the safety of its students by undertaking a study-abroad program, or that it was responsible for the peril encountered by Downes in that it transported him to the beach.¹¹¹

While the court appeared to provide more weight to the obvious risk posed by swimming in the ocean, the case is nonetheless instructive as to the importance of pre-trip meetings and communication of risk (even, *inherently dangerous* risks that should be apparent to a *competent adult*). Nonetheless, without even a cursory explanation of the reasonably foreseeable risks known by the institution and the effects of an exculpatory clause contained within the waiver, courts seem more willing to engage in a theoretical exploration of what is and is not reasonably foreseeable and what the individuals executing the waiver may or may not have known.¹¹² For example, would another institution be required to have provided more detailed information regarding the strong currents in the waters off Costa Rica, a detail in the discussion in *Downes*? Would another court provide less deference to an institution for the warnings provided in the orientation session to students in *Bloss*, or would the court agree with the court in *Bloss* that "to rebalance the extent of the warnings would represent judicial interference with executive policy-making and affect the program's design..."?¹¹³

108 *Downes*, 342 Ga. App. at 251.

109 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

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

111 *Downes*, 342 Ga. App. at 255.

112 *Munn et al. v. The Hotchkiss School*, 933 F. Supp. 2d 343, 347 (D. Conn. 2013), ruling regarding waiver upheld by *Munn v. The Hotchkiss School*, 724 F. App'x 25 (2d Cir. 2018). In interpreting the intent of the Hotchkiss School in creating the waiver and its intended scope, the court said "But the school's intent does not matter. What matters is whether lay people, in this case a fifteen year-old student and her parents who lack legal training, would have understood that by only holding the school responsible for its 'sole negligence,' they were in effect waiving the school for any responsibility for its comparative fault. The answer can only be no. An average person would reasonably believe that the school meant to remain responsible solely for any harm that its negligence caused."

113 *Bloss*, 590 N.W.2d at 666.

All information provided to the student throughout the study abroad program (from ads to postarrival orientation) should be dedicated toward ensuring that the scope of such knowledge has been provided, received, and understood by the student so that a shared understanding can be achieved. Only through a thoughtful and diligent conversation with the students regarding these issues can the theoretical exploration become a statement of fact that moves the inquiry further along to the next pillar.

B. Voluntarily

Even assuming that the parties have reached an understanding as to the risk accompanying the education abroad experience and the consequences of the exculpatory clause presented before the participant student, the process itself should be as transparent as possible with regard to the document's execution as a programmatic requirement. For example, the Waiver of Liability form as presented to the students in the case of *Fay* and the Pennsylvania court of common pleas decision to reject its enforceability as a means to quell the student's claims should be considered:

Both plaintiff and defendants agree that the waiver of liability form was presented to plaintiff on a take-it-or-leave-it basis, i.e., plaintiff either signed the form or she did not go on the Thiel-sponsored trip to Peru. The terms of the waiver of liability form were not bargained for by plaintiff and, in fact, plaintiff had no choice in its terms and provisions. Plaintiff simply executed the waiver of liability form, which she was powerless to alter, because she was told that she had to sign that form in order to go on the study abroad trip to Peru. Because rejecting the transaction entirely was plaintiff's only option other than accepting the contract with the exculpatory clause, this court finds that the subject waiver of liability form is a contract of adhesion.¹¹⁴

The decision in *Fay* should be contrasted with the D.C. Circuit Court in *Bradley v. National College Athletic Association* finding that, "... even if a contract is one of adhesion, it is enforceable unless it is deemed unconscionable upon judicial scrutiny."¹¹⁵ Taking the analysis further, the court in *Bradley* required the plaintiff to prove that even if the contract was one of adhesion, the plaintiff student still had to demonstrate that the contract was unconscionable. To this end, the court imposed a two-part standard: (1) that the student lacked a meaningful choice and (2) that the terms were unreasonable to the one party.¹¹⁶ This two-part standard represents

114 *Fay v. Thiel Coll.*, 55 Pa. D & C4th 353, 360–61 (2011).

115 464 F.Supp.3d 273 (D.D.C. 2020), finding in relevant part, "Here, even if the plaintiff had shown that the Acknowledgement of Risk form was procedurally unconscionable, which she has failed to do, the plaintiff has failed to make any argument, let alone a showing—and the Court cannot find any evidence in the record to suggest that she has—that the Acknowledgement of Risk form is substantively unconscionable or that this case involves an egregious situation. Accordingly, the Court concludes that the plaintiff has failed to demonstrate that the Acknowledgement of Risk form was adhesionsary and therefore unenforceable." This case involved a student who allegedly sustained a head injury during a NCAA-sanctioned field hockey game.

116 *Id.*

the traditional test used by many state courts to examine the enforceability of an agreement within the context of whether that agreement through its creation or its terms is unconscionable as determined by the court.¹¹⁷ The court in *Bradley* utilized the traditional two-part test before finding that the plaintiff had failed to present any procedural or substantive facts that would render the Acknowledgment of Risk form unenforceable.¹¹⁸

Unconscionability is not just an examination of bargaining power; it is also an examination of whether the bargain itself was truly entered into voluntarily. The scales between procedural and substantive unconscionability may not always be level, which in and of itself does not prevent enforceability. However, if one party is sufficiently disadvantaged during the contracting process, then it can be argued that the person's assent to the terms was not voluntary, and thus certain terms of the contract which are disadvantageous to that party should not be enforced. Within the context of education abroad and the exculpatory waiver, the argument for unconscionability is not so much about the bargaining power between the parties but whether the process was so one sided and the terms so unfair that the student did not voluntarily agree to its terms, and thus they should be found to be unenforceable. Or, is the student assumed to be knowledgeable enough to understand the agreement when the terms are commercially reasonable for the activity?¹¹⁹

Aside from the knowledge held by the student at the time of execution, did the student have the opportunity to make a meaningful choice not to enter into the contract at all? There is an obvious difference between documentation presented weeks—even months—before the trip's departure and a demand for signatures as the plane readies to pull away from the gate. While unconscionability rests upon the examination of the bargaining power of the parties, even a waiver that is assumed to be commercially reasonable in consideration of its place within the marketplace may still be scrutinized to determine if its execution was the result of a voluntary transaction.¹²⁰ Even if the student was presented with the waiver long before departure, were the circumstances under which the waiver was presented sufficient enough to lead to voluntary assent? Suppose the education

117 See Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1 (2012). This note outlines three approaches taken by courts to address the issue of unconscionability in contracting: (1) the traditional approach of providing equal weight and importance to the presence of both procedural and substantive unconscionability, (2) the sliding scale approach where both procedural and substantive considerations are taken in totality without requiring one to be satisfied with equal balance to the other, and (3) the single-prong approach employed by a minority of courts where the presence of either procedural or substantive unconscionability is sufficient to defeat enforceability of the agreement.

118 Of note, the court in *Bradley* briefly considered applicability of the "single-prong" approach, but ultimately determined that the plaintiff had also failed to present any facts that the bargain itself met the "egregious" standard already established by the D.C. courts. *Bradley*, 464 F.Supp.3d 273 at *294.

119 See Howard O. Hunter, § 19:41 *Procedural and Substantive Distinction*, in MODERN LAW OF CONTRACTS (March 2020). This note provides examples of three case studies examining various considerations of the "dichotomy between procedural and substantive unconscionability and the confusion that sometimes occurs in trying to determine whether unconscionability is the result of a problem in the bargaining process or in the underlying agreement."

120 See *Bradley*, 464 F.Supp.3d 273 at *295

abroad experience itself was required for graduation. Does the institution offer an alternative? Was this requirement present and known to the student upon enrollment in the program? While the absence of an alternative may not be dispositive to upholding an exculpatory clause executed between the adult student and the institution, the circumstances under which the language was presented, discussed, and executed may ultimately determine whether it was voluntary.

C. With Valuable Consideration

*As a condition of participation, For good and valuable consideration given herein, and several similar phrases are often found in the releases presented to students prior to their departure on an education abroad experience. One important aspect of whether a release is voluntary depends upon the relative bargaining position of each of the parties. However, going a bit further to the bargain itself between the parties, the third and perhaps most loadbearing of the pillars is that the agreement itself must have valuable consideration. As provided for by an Illinois court as an example, "Valuable consideration for a contract consists either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other."¹²¹ The court also limited the applicability of this bargain based upon the "pre-existing duty rule" when one party's consideration is essentially based on what it is already "legally obligated to do."¹²² The legal obligation is not limited to statute as it was in *White*, but may also accrue due to a previous agreement between the parties.¹²³*

Within the context of an institution of higher education, an important preliminary consideration is whether the release presented prior to the education abroad experience falls within the preexisting duty rule. Several courts have found that there may be a contractual relationship between an institution of higher education and its student upon the student's admission and enrollment courses.¹²⁴

121 *White v. Vill. of Homewood*, 256 Ill. App. 3d 354, 356 (Ill. App. 1993). In *White*, the plaintiff was injured during the administration of a physical agility test that was a prerequisite to joining the Homewood Fire Department (HFD). Prior to the plaintiff's test, she signed a "release of all liabilities." However, since HFD was required by statute to administer the test, the court found in favor of the plaintiff for want of consideration.

122 *Id.* at 357, ultimately finding, "consideration cannot flow from an act performed pursuant to a pre-existing legal duty. As a result, the exculpatory agreement is unenforceable as a matter of law."

123 3 WILLISTON ON CONTRACTS §7:36 (4th ed. 2019). PROMISE TO PERFORM OR PERFORMANCE OF PREEXISTING OBLIGATION OTHER THAN DEBT; CONTRACTUAL PREEXISTING DUTY RULE, 2000.

124 The purpose of this note is not to provide a debate as to whether a catalog or other documents represent a contract between the institution and the student; only that several courts have found such a contract exists. See *Brody v. University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 154 (2d Dist. 1998), supporting "A contractual relationship exists between a college or university and its students, and the terms of the contract are generally set forth in the school's catalogs, bulletins, and brochures" (citing *Frederick v. Nw. Univ. Dental Sch.*, 247 Ill. App. 3d 464, 471 (1st Dist. 1993)). See also *Andersen v. Regents of University of California*, 22 Cal. App. 3d 763, 769 (1st Dist. 1972), stating "That, by reason of plaintiff's enrollment as a student, there arose a contract between him and the university may not be questioned." See also *Niedermeyer v. Curators of University of Missouri*, 61 Mo. App. 654, 657 (Kansas City 1895), stating, "The paragraph in the catalogue of 1892 and 1893 was by its very terms, a public offer to admit persons as students to any of the classes of the law department of the University, on payment of the sum of \$50 for the first year and \$40 for

Even assuming such a relationship exists, is participation in an education abroad course valuable consideration? Since the education abroad course exists outside of the traditional boundaries of the classroom, and assuming the release is presented for the specific purpose of the course itself, is participation itself valuable consideration? Several courts have found that releases for individual programmatic courses outside the traditional classroom are valid, thus suggesting that perhaps it is.¹²⁵ However if the course itself is a prerequisite to graduation and the institution offers no other alternative, the release itself may require further consideration to mitigate exposure to a claim of adhesion or being rendered unenforceable as a matter of law.

VI. Application and Conclusion

By transitioning from the focus on waivers to assumption of risk as a standard practice within the education abroad context, institutions of higher education should ensure that the release itself stands upon the support provided by the three pillars: that the student enters into the release knowing the scope of risk and specific circumstances of the environment in which the release seeks to encompass, that the student enters into the release voluntarily, and that the student and institution have engaged in the exchange of consideration where both parties have benefitted but also sacrificed. The three pillars may not always stand with equal length and equal weight. Perhaps the consideration offered shoulders more of the burden than whether the acceptance itself is voluntary. For example, in consideration for gaining the unique experience of participating in a survey of Italian architecture throughout the Tuscany region, a student who has never traveled outside the United States may not fully know or appreciate the risks inherent in overseas travel—but through the implementation of the three pillars, the student will at least be able to make an informed decision. Regardless, the days of the general release are numbered. With information readily available and constantly updated on the day's events the world over, recent decisions, such as *Munn*, demonstrate that institutions should adapt the circumstances under which the waiver is presented, explained, and executed. While several pre-twenty-first-century court decisions

each successive year. The plaintiff's payment of \$50 and receipt of his matriculation card for the years 1892 and 1893, constituted an implied acceptance and also notice of such acceptance. The contractual relations created between the parties thus became complete and binding."

125 *Boyce v. West*, 71 Wash. App. 657 (Div. 3 1993), upholding the use of a release for an elective scuba diving course despite a challenge that the release was against public policy. See also *Lemoine v. Cornell University*, 2 A.D.3d 1017 (N.Y. 2003), declining to void a release signed by a student prior to a basic rock-climbing course on statutory grounds. See also *Thompson v. Otterbein College*, No. 95APE08-1009, 1996 WL 52901 at *4 (10th Dist. Ohio, February 6, 1996) (unreported), stating, "Contrary to appellant's assertions, this was not an adhesion contract. The situation might be different had appellee required all students to sign such a release for all physical education courses. There is no evidence that this was the case. As stated above, apparently appellant was not required to take the equestrian course. As such, appellant would not be in such an unequal bargaining position as to make a release unconscionable. She could have chosen not to sign the release and chosen instead to take another physical education course."

echoed the reasoning explained in *Bradshaw*¹²⁶ and *Bloss*,¹²⁷ twenty-first-century courts appear to be ready to broaden the institution's obligation to explain the reasonably foreseeable risks to the student prior to asking the student to execute an exculpatory clause regarding the same. While courts have not appeared yet to attach institutional liability for third-party actions, they do appear ready to do so in the event the third-party actions were reasonably foreseeable, such as most recently demonstrated in *RISD*,¹²⁸ and that such third parties were procured to perform a duty that the institution itself would normally perform or that represents a core component of the program. As education abroad programs begin to revive themselves in a post-COVID-19 world, institutions should take the opportunity provided by this most recent pause in operations to adapt their current orientation programs with these three pillars in mind.

The purpose of this article is not to invalidate the enforceability of releases and waivers already a part of the normal education abroad process as a best practice across institutions of higher education. The three pillars presented serve to provide institutions with recognizable waypoints to strengthen the current processes already in place. This article also encourages institutions, which have not already adopted a pre-departure orientation process, to do so. As found by United Educators, "a review of UE claims involving pre-departure risk orientations indicates the liability is decreased when institutions educate travelers on the dangers involved before the trip."¹²⁹ Partnered with assumption of risk language that precedes exculpatory clauses in the release form presented to participants well in advance, the pre-departure orientation is essential for informing the student of known and potential dangers inherent in the intended area of travel while affording them the opportunity to ask questions and consider their participation moving forward. This partnership between forms and process with regard to exculpatory clauses and the three pillars will continue to evolve as education abroad opportunities become more prevalent in undergraduate and graduate programs as well as the emergence of "gap year" programs where high school graduates take their entire first year of undergraduate coursework through a completely international sequence of education abroad programs and service opportunities sponsored by the institution of higher education.¹³⁰

126 *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir.1979).

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

128 *Doe v. R.I. Sch. of Design*, 432 F. Supp. 3d 35 (D.R.I. 2019).

129 *See supra* note 77, at 12.

130 With regard to those participants enrolled in gap year programming, institutions will not only have to be concerned with the circumstances through which a student executes the exculpatory clause; those programs may also have to ensure, subject to state law requirements, that the process also encompasses the involvement of parents or guardians who may be required to execute the release on the minor child's behalf in order for it to be enforceable. *See generally* *Thackurdeen v. Duke Univ.*, 1:16CV1108, 2018 WL 1478131 (M.D.N.C., March 23, 2018) (both the student and his father signed the waiver documents, and collectively both the student and his father were deemed to have waived recovery for negligence and wrongful death).