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CAMPUS RESPONSIBILITY FOR ALCOHOL-RELATED INJURIES: A LAW AND POLICY ANALYSIS

A Dissertation

Submitted to the Graduate Faculty of the Louisiana State University and Agricultural and Mechanical College in partial fulfillment of the requirements for the degree of Doctor of Philosophy

in

The Department of Educational Leadership and Research

by

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May, 2001
ACKNOWLEDGMENTS

The completion of any graduate studies program means that there have been numerous people supporting that student. To those many people, I owe a great deal of gratitude. Without their assistance, my graduate studies at Louisiana State University would not have been completed. Although it is impossible for me to acknowledge all who have shown me support, there are a special few I wish to mention here.

First and foremost I thank my wife Chris and my children, Max, Megan and Samuel. They encouraged me with their love and support, and, in many ways sacrificed more than I did to see this dissertation completed. Without them, I would not have been successful in achieving this dream. Additionally, my extended family of in-laws did more than their share of helping by entertaining my children and providing me the time to successfully complete my quest.

Dr. Richard Fossey, Chairman of my doctoral committee, has been not only a mentor, but also a friend. He inspires me with his intellect and never ceases to amaze me with the generous donation of his time and energy. I am also grateful to the other members of my committee, Professors Terry Geske, Becky Ropers-Huilman, Brij Mohan and Wayne Parent. I am also indebted to Dr. William Davis who served on my committee until his retirement. Their scrutiny and scholarly contributions added a great deal to the quality of this document. Also, Sheree Harper, Fifth Circuit librarian provided invaluable assistance in my legal research efforts. Finally, I would like to thank Betty Sampay for all of her technical assistance with my dissertation.
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ABSTRACT

The purpose of this study was to explore the evolution of the legal concept of legal liability of higher education institutions for alcohol-related injuries using a theoretical framework provided by tort law. The analysis was designed to provide a greater understanding of how and why the law concerning this concept has evolved. In addition to a legal analysis, interviews were conducted with student affairs administrators at institutions participating in the Robert Wood Johnson Foundation “A Matter of Degree: Reducing High-Risk Drinking Among College Students” program. Particular attention was given to the influences identified by the student affairs administrators as catalysts for change. The study also explored the history of legal liability for alcohol-related injuries and how the concept of legal liability for alcohol-related injuries had evolved over time.

Findings of the study showed that: a) potential for tort liability is an influence in alcohol use policy formulation, but residential life needs and the university president were greater influences; b) the creation of a positive learning environment and a safe campus were the primary goals of the creators of the campus alcohol use policies researched; c) the Greek system was a concern of all student affairs administrators and the approach to management of the various Greek systems varied among institutions; and d) the evolution of tort liability for alcohol-related injuries appears to be continuing away from the bystander era represented by *Bradshaw v. Rawlings*, (1979) and toward a duty of reasonable care established by *Furek v. University of Delaware*, (1991) and *Knoll v. Board of Regents of the University of Nebraska*, (1999). The relevant cases
analyzed indicate a need for well thought out alcohol use policies that provide a safe campus, but do not extend a university beyond its ability to reasonably implement the adopted policies.
CHAPTER I  
INTRODUCTION  
Background  

During the last three decades, colleges and universities have increasingly become involved in litigation, often as the target of a suit alleging some violation of a policy or regulation. Much of this litigation has resulted from the changing legal relationships between the students and their universities. 

Prior to the 1960's, colleges and universities operated under the legal theory of *in loco parentis*. Courts considered colleges to be acting in the place of parents regarding students with the right to exercise parental control and authority over students' lives. This view is expressed in *Gott v. Berea College* (1913); however, the doctrine had existed virtually since the beginning of the residential college and university. 

Since the early 1960's however, the theory of *in loco parentis* as a legal doctrine that insulated colleges and universities from liability has deteriorated greatly, and many authorities such as Kaplin (1979) consider it dead. Perhaps the most important case in bringing about the demise of this doctrine was *Dixon v. Alabama State Board of Education* (1961), in which the Fifth Circuit ruled that college students were entitled to at least minimal due process rights when faced with disciplinary action by a higher education institution. 

Various court decisions, the reduction of the age of majority, large increases in post-secondary enrollment, a broader student population in terms of ages and backgrounds, and a number of other factors have combined to create a new relationship between students and their colleges and universities. Likens (1979) suggests most
institutions recognize their students not as children requiring adult supervision, but more like customers or consumers of educational products within higher education.

One area in which the changed relationship between the college and the student can be clearly seen is that of institutional liability for injuries that result from students’ consumption of alcohol. In past cases, courts were generally unwilling to hold colleges liable for these injuries, absent some overt behavior showing clear negligence. This research will examine whether jurisprudence has changed in this regard, and the factors that may be responsible if a change has occurred.

In the fall of 1998, Frostburg State University began reviewing its alcohol policy based on a study conducted by the President’s Advisory Council on Substance Abuse conducted in April of 1997. The Frostburg study revealed 90 percent of the students at Frostburg consumed alcohol in some form and 76 percent of the underage students drank alcohol. The study also indicated that 59 percent of the students participated in binge drinking.\(^1\) In a soon to be published survey by Harvard University’s School of Public Health, it appears the proportion of students who frequently binge-drink as well as the proportion of those who do not drink are on the rise. Henry Wechsler, director of college alcohol studies at Harvard’s public health school noted that binge drinking remains a problem despite serious efforts by institutions to combat the problem. Binge drinking is defined as five or more drinks in a row at least once in a two week period for men and four or more drinks in a row for women. Additional problems cited by Wechsler in an article by Ben Gose (2000)

\(^1\)Http://www.frostburg.edu/botline/BL9.2.98/studentdrinking.html

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included the finding that frequent binge drinkers were four times as likely as those who
did not binge to get behind in school work, five times as likely to have sex without
protection and ten times more likely to damage property. Given these findings it is
likely that the practice of drinking by students will continue and accidents related to
alcohol use will continue to be a problem that must be addressed by college and
university administrators. The time appears ripe for a legal and policy study of the
problem of alcohol consumption on campus and the liability faced by higher education
institutions for injuries which result from the use of alcohol.

The story of twentieth century higher education alcohol policies involves the
gradual application of typical rules of civil liability to institutions of higher education
and the decline of insulating doctrines which traditionally protected institutions of
higher learning from scrutiny in the legal system. A series of recent alcohol related
student injuries reported by Leo Reisberg (1998) have brought public (and legal)
attention to questions about the legal rules governing university responsibility for
student injury. Recent campus riots over beer privileges, a string of alcohol related
deaths at prestigious colleges including Massachusetts Institute of Technology ("MIT")
and Louisiana State University ("LSU") have received widespread media attention. It is
a time of transformation and transition in higher education and higher education alcohol
law.

Social attitudes towards college aged drinking (particularly abusive, under-aged
drinking) have shifted in the last few years. As a result of the alcohol related death of a
freshman at MIT, the university endured a criminal investigation for its role in the
incident. There appears to be a sentiment on many campuses that a dangerous college
aged drinking culture has gotten out of hand and needs to be controlled. A major concern is that some college freshmen could be especially vulnerable to the college liquor culture. Strong social sentiment, coupled with trends in liquor liability law, suggest that courts may craft new rules for colleges that establish creative duties in alcohol related injury cases. This research will attempt to document and analyze the legal duties and implications associated with campus alcohol policies as they relate to alcohol related injuries.

Purpose of the Study

The purpose of this study is to identify and analyze the evolution of the concept of legal liability of higher education institutions for alcohol-related injuries using a theoretical framework provided by tort law including statutory duties and common law decisions. The analysis of the evolution of this legal concept is intended to provide an increased understanding of how and why the law concerning this concept has evolved. In addition to a legal analysis, interviews will be conducted of student affairs administrators at institutions participating in Robert Wood Johnson Foundation grant program to reduce college student drinking to determine the influences involved in the formation of the contemporary alcohol use policies at their institutions. The following questions will be addressed:

1. What factors influence the higher education institutions’ decision to create contemporary alcohol use policies?

2. What influences affected the provisions adopted as the contemporary alcohol use policies?
3. How has the evolution of campus liability for alcohol-related injuries changed over the past four decades?

4. What are the legal and practical implications for colleges and universities of the present status of campus liability for alcohol-related injuries?

Background of the Study

Drunkenness of American college students was a problem even in colonial days (Brubacher and Willis, 1976) and even today one of the highest courts has commented that beer drinking by college students is a common experience (Bradshaw v. Rawlings, 1979). Student drinking was commonly tolerated on most college campuses; however, several factors have changed that position in recent decades. One factor is the general toughening of societal attitudes toward drunken driving that has spurred considerable media attention. Another factor is the liability insurance concern facing the country. A third factor involves the efforts by federal and state lawmakers to pass legislation to discourage alcohol abuse.

In 1988 Congress passed amendments to the Drug-Free Workplace Act\(^2\) and additional amendments in 1989 to the Drug-Free Schools and Communities Act.\(^3\) This legislation obligates colleges and universities to take specific steps to discourage alcohol abuse by students and employees. State legislatures have also recognized the problem of alcohol abuse by college students and have passed laws that limit the availability of alcohol on or near college campuses.

\(^2\)41 U.S.C. Sec. 701.

\(^3\)20 U.S.C. Sec. 1145g.
The amendments to the Drug-Free Schools and Communities Act initiated the requirement for alcohol policies. The Drug-Free Schools and Communities Act now requires every college and university that receives federal funds to adopt and implement a drug and alcohol policy. 4 Basically, an institution’s obligation consists of:

(1) prohibiting the unlawful possession, use or distribution of illegal drugs or alcohol on college property or as part of a college activity;
(2) distributing annually to all students a document describing the health risks associated with using illicit drugs or abusing alcohol; available drug and alcohol counseling programs for students and employees; and noting local, state, and federal legal sanctions as well as the college's sanctions;
(3) establishing sanctions for drug and alcohol offenses up to and including expulsion and referral for prosecution (Smith and Fossey, 1995).

The Drug Free Workplace Act requires higher education institutions to publish a statement notifying employees that the unlawful use or distribution of drugs or alcohol is prohibited in the workplace and specifying the action that will be taken against an employee who violates the policy. Additionally, an institution must establish a drug free awareness program to inform employees of the dangers of drug abuse in the workplace (Smith and Fossey, 1995).

State legislation also affects the regulation of alcohol on campus. During the 1970's and early 1980's, the legal age for alcohol consumption in most states was 18 or 19; however, in 1984, Congress authorized the Secretary of Transportation to withhold

420 U.S.C. Sec. 1145g.
federal highway funds to states where the minimum drinking age was under 21.  
Accordingly, states with lower drinking ages amended their laws and the uniform drinking age in all states is now 21 (Gehring and Geraci, 1989).

Of course, the change in drinking age has complicated college alcohol management policies because higher education institutions now have two groups of students - one group can legally consume alcohol and one group cannot. A difficult dilemma faces college officials who must determine whether the better policy is to counsel underage students to abstain or to encourage them to drink responsibly, whether or not they have reached the legal drinking age (Cortney, 1990). The expanding collection of state and federal legislation concerning alcohol use makes it important for college administrators to be apprized of the expectations lawmakers and the public have regarding alcohol use by students.

Hill and Bugen's (1979) survey indicated that approximately 90 percent of college students drink. In addition to discipline and safety problems related to campus alcohol use, civil liability may be the biggest concern. Recent years have witnessed victims of alcohol misuse suing colleges and universities and their administrators alleging duties of oversight and protection for students, campus guests and themselves. During the last couple of decades, colleges and universities have become much more frequently involved in issues which have ultimately led them to the courts, typically as the target of suit for some alleged violation. Much of the litigation has resulted from the

23 U.S.C. Sec. 158.
changing relationships between the students of the institution, administrative staff and faculty and the federal government.

Many of the difficulties which face colleges and universities as a result of student consumption of alcohol is related to injuries which occur to students and third parties. These injuries and resultant lawsuits normally fall into the category of torts. Blacks Law Dictionary. (1990) defines tort as “a private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.” In order for a tort to be actionable, three elements must exist. These elements, which will be fully discussed in the Literature Review, include “existence of legal duty from defendant to plaintiff, breach of duty, and damage as a proximate result.”

Most alcohol-related tort suits against colleges and universities result from some sort of negligence upon the part of the institution or one of its agents. Negligence in general is defined in Blacks Law Dictionary. (1990) as “the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.”

Most of these tort cases are tried in the courts of the various states in which the torts arose. As a result, the dram shop legislation, alcohol regulation legislation, campus alcohol use policies and the status of liability legislation in the states will affect the results of specific cases. Even cases tried in the federal courts will be regulated by the state laws in force. Consequently, no universal predictions may be made. All
courts, however, tend to rely upon precedents and the general directions indicated by earlier cases in other courts. This research is designed to identify those trends to assist campus administrators in predicting the outcome of alcohol related lawsuits and avoiding them when possible.

Theoretical Framework of the Study

The theoretical background of the study will be provided by the tort branch of the American law. Tort law has been difficult to define and it is not easy to discover in the common law any general principle upon which it is based, unless it is the obvious one that injuries are to be compensated, and anti-social behavior is to be discouraged. Sir John Salmond (1928), one of the early writers on the subject of torts, contended that there is no such thing as a law of tort, but only a law of particular unconnected torts, that is, a set of pigeon-holes, each bearing a name, into which the act or omission of the defendant must be fitted before the law will take cognizance of it and afford a remedy.

New torts are being recognized on a regular basis and the history of common law is marked by famous cases of first impression in which a court struck out to create a new cause of action where none existed before. The law of torts is anything but static and the limits of its development are never set. When it becomes apparent that the plaintiff's interests are entitled to legal protection against the conduct or omission of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to recovery (Smith, 1921).

It is not easy to find any single guiding principle which determines when compensation is to be paid. However, for purposes of this study there appears to be one
central idea that prevails, that is, liability is imposed based on conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others. What is socially unreasonable often depends upon what is unreasonable from the point of view of the court and can vary among jurisdictions. The tort-feasor is usually responsible for acting in an unreasonable manner or acting in a way that departs from a reasonable standard of care. Decisions in tort cases are often occupied with striking some reasonable balance between the plaintiff’s claim to protection against damage and the defendant’s claim to freedom of action for the defendant’s own ends and those of society.

Socially unreasonable conduct is broader than a simple balancing test and the law often looks beyond the actors’ own state of mind. Many times the court measures acts, and the harm done, by objective, disinterested and social standards. The court may consider that the actor’s behavior, although entirely reasonable in itself from the point of view of anyone in the actor’s position, has created a risk or has resulted in harm to others which is so unreasonable that the actor should nevertheless pay for harm done. Sometimes courts look to the social consequences which will follow. Kionka (1992) suggests this rationalization is based on the theory that the law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole.

The underlying issue of community standard as it applies to a college campus will be the focus of this study. The administration of tort law on college campuses sometimes becomes a process of weighing the interests for which the plaintiff demands
protection against the defendant’s claim to untrammeled freedom in the furtherance of defendant’s desires, together with the importance of those desires themselves. When the interests of the public is thrown onto the scales of justice and allowed to swing the balance for or against the plaintiff, the result is a form of “social engineering” (Pound, 1920). It is a simple proposition to state that the interests of individuals on college campuses are to be weighed against one another and against those of the college, but today it is far more difficult to say where the public interest may lie.

Statement of the Problem

The documentation of alcohol abuse and alcohol related injuries on college campuses and the legally defined opportunities for relief continue to be areas of concern for higher education administrators. Although the primary focus of this research will be on the legal liability of colleges and universities for alcohol related injuries, the research regarding alcohol abuse on college campuses illustrates the problem confronted by administrators and the courts.

To many, combating alcohol abuse on campus is a response every institution should initiate to address one of the nation’s most serious social problems. Since Morris Chafetz, the first director of the National Institute on Alcoholism and Alcohol Abuse, developed a “University 50 Plus 12 Program” in 1973, a series of initiatives throughout the country have aimed to develop awareness and interventions in the area of campus alcohol abuse, particularly as it relates to students. More recently, BACCHUS (Boost Alcohol Consciousness Concerning the Health of University Students), a student organization with over 200 chapters in nearly every state in the United States and

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Canada, initiated the “Inter-Association Task Force on Alcohol Issues.” The uniqueness of an institution of higher learning, its special opportunity for cognitive enhancement and the social environment of a campus all play a role in campus alcohol use policies and the legal implications of alcohol related injuries to higher education institutions.

The problems associated with alcohol abuse and alcohol related injuries are not new to college campuses or society in general. Excessive consumption has been a part of collegiate life. At Harvard in 1800 to celebrate George Washington’s birthday it is reported that one student wrote “And each one to evince his spunk vied with his neighbor to get drunk” (Maddox, 1970). Various studies place the percentage of college students who consume alcohol at anywhere from 50 to 90 percent (Gallop poll, 1977; Presley, 1994; Presley, 1992). In addition to the recent study noted in the Chronicle of Higher Education in March, 2000, Henry Wechsler in a 1996 study reported that 44 percent of the college students he surveyed were “binge” drinkers.

The cost to colleges of alcohol abuse is significant, a cost that drains academic dollars from the classroom where it is sorely needed. Research indicates that alcohol-related misconduct is the primary reason for disciplinary action on college campuses (Gonzales and Wiles, 1981). Academic failure has also been linked with alcohol consumption by several studies (Engs and Hanson, 1985; Seay and Beck, 1984). Gadaleto and Anderson (1986) indicated that alcohol usage was reported as being involved in 61% of residence hall damages, 60% of violent behavior; 53% of damages to other campus property and 51% of the violations of campus rules. In addition to general problems described above, Harris and Harris (1996) reported that alcohol was
involved in 88% of the fatalities, 81% of the paralysis, 78% of the psychological injuries (mostly sexual harassment or assaults), 66% of the serious injuries and 56% of the minor injuries resulting in claims against fraternities. Alcohol was involved in 95% of falls from roofs, 94% of fights, 93% of the sexual abuse claims and 87% of the slip and fall claims against fraternities. And perhaps most significant today, underage drinking is involved in 61% of the alcohol claims.

Alcohol use frequently accompanies criminal activity on campus. On campus, about half of the assailants in courtship violence have been drinking, and campus law enforcement officers regularly report, anecdotally, that alcohol is a factor and a very large part of campus violence (Bogal-Allbritten and Allbritten, 1985). Furthermore, a study issued by the Center for the study of Crime and Prevention of Campus Violence at Towson State University reported that nearly two-thirds of students who admitted to having committed crimes said that they had been under the influence of drugs, alcohol or both at the time the crime was committed (Dodge, 1990). In addition, the risk of being a crime victim increases for students who use drugs or alcohol. The Towson State study revealed that student crime victims drank and used drugs more frequently that non-victims, had lower-than-average grades, and tended disproportionately to be fraternity or sorority members (Matthews, 1993).

Drinking on campus is not restricted to fraternity or sorority membership although membership is the best predictor of binge drinking (Wechsler, 1996). White males drink the most and are most likely to binge with white females close behind (Engs and Hanson, 1983). Research also indicates that students who have friends who did not
discourage drinking are more likely to consume alcohol (Lo and Globetti, 1993; Alva 1998). Further, students often drink because they think everyone else does (Haines, 1996) and they overestimate the amount others drink (Berbowitz and Perkins, 1986).

State legislatures and courts have responded by holding the provider of alcohol financially liable for injuries to third persons. In 1829 drunks were considered to be someone you poked fun at as evidenced by the poem contained in a New York court's opinion:

Not drunk is he who from the floor,  
Can rise alone and still drink more,  
But drunk is he who prostrate lies,  
Without the power to drink or rise  
*People v. Williams* (1829).

Drunks are no longer funny but are instead a source of potential liability that must be addressed by higher education administrators. Today, 42 states and the District of Columbia have dramshop liability created either by statute or common law. Only Arkansas, Delaware, Kansas, Louisiana, Maryland, Nebraska, Nevada and Virginia adhere to the old common law that the consumption, not the furnishing of alcohol, is the proximate cause of intoxication and any subsequent injury. In 1980 only one state held social hosts liable for injuries caused by their intoxicated guests. Today, 24 states either by statute or common law hold social hosts liable when they serve intoxicated adult guests. The same states also hold hosts liable when they serve minors.

The contributions of this study will be focused on helping higher education administrators, particularly those working in the office of student affairs, benefit from a theoretical understanding of tort law including the role of societal interests and the
interaction of campus alcohol-use policies and tort law in United States higher education.

The recent reports of alcohol related deaths on college campuses combined with renewed efforts on the part of colleges to change their social environment to reduce alcohol abuse indicates a ripeness for new court decisions regarding a college's legal responsibility for alcohol related injuries. This study will contribute new knowledge concerning the evolution of tort law as it applies to the legal liability of higher education institutions for alcohol related injuries. It is anticipated that the legal analysis developed in this research will be useful for understanding the evolution of higher education institution's alcohol related liability and for anticipation of further legal change in this area.

Method of the Study

Legal Research

The traditional methodology of legal research will be used to identify judicial reasoning concerning established legal principles and their application in relevant higher education alcohol related cases. The procedure will involve identifying controlling statutes and case law. A list of relevant federal and state cases will be compiled using legal finding tools including computer assisted research. A legal analysis of the judicial reasoning utilized in the identified cases will be completed.

Utilizing tort law analysis as a legal framework concerning the balance between a plaintiff's claim to protection against damage and the college's claim of freedom of action or choice of policy and the interests of society in general, an analysis will be
completed of reported federal and state cases of liability for alcohol related injuries brought against higher education institutions including analysis of cases brought against fraternities and non-university defendants. These analyses will identify the evolution of the legal concept of institutional liability for alcohol related injuries. A synthesis of the analyses will be completed to determine the appropriateness of present higher education alcohol use policies and how the recent changes to alcohol use policies may create a new basis of legal liability for alcohol related injuries.

**Administrator Interviews**

In addition to the utilization of legal research, a qualitative study utilizing interviews of student affairs administrators will be conducted to determine what they believe influenced the need for contemporary alcohol use policies and what influences affected the creation of the policy provisions. Qualitative research mixed with legal research, should capture a richer description of contextual factors and personal meanings and perceptions needed to understand how the contemporary campus alcohol use policies will affect the operations of college campuses. Additionally, it is anticipated that collecting the qualitative information will assist in comparing the views of those actually administering the alcohol policies with the reported cases illustrating the various views of the courts. The qualitative research should enrich the legal research and provide a deeper understanding of the implications to college campuses of the new alcohol policies currently being implemented.

The research will use several questions in a protocol each designed to offer student affairs administrators the freedom to voice their beliefs about their institutions.
without being influenced by my preconceived notions. The interviews will be conducted by telephone and will attempt to identify the factors that influenced the university's decision to adopt contemporary alcohol use policies and to identify the influences that affected the provisions utilized in the policy.

The interviews will be conducted with student affairs administrators from university sites that are participating in the Robert Wood Johnson Foundation “A Matter of Degree: Reducing High-Risk Drinking Among College Students” program (sometimes referred to as “RWJF” program). These grants are designed to support model approaches to reduce high-risk drinking by students on campus and in the surrounding communities through college/community partnerships. The grants are designed to change the present alcohol use culture that exists on college campuses. It is believed that student affairs administrators will be involved in both the policy aspects of adopting a campus alcohol use policy and the implementation of the policy once adopted. It is anticipated that these individuals will have keen insights into the potential legal problems as well as the societal impact of the policies through the administration of their office. Along with the interview material, the research will examine written information from the institutions that relate to the various campus' alcohol use policies.

The research will analyze and interpret the interview responses utilizing a constant comparative approach. The responses will be sorted by institution and reviewed for major themes. The interviews will be utilized to supplement the findings and analysis derived from the legal research and will be beneficial in determining the policy considerations as well as legal effect of the contemporary alcohol policies.
Definition of Terms

The primary source for the definition of legal terms used in this study will be Black's Law Dictionary (1990). An appendix of the legal terms utilized in this study will be included as Appendix “B”.

Organization of the Study

In Chapter 2 a literature review on topics that provide the background for the rationale and research of the study will be presented. A review of the societal impact of tort law and how tort law can shape alcohol use policies will be included. Additionally, campus responsibility for students' health and welfare including the doctrine of in loco parentis will be analyzed. The literature review will examine the various bases for liability for alcohol related injuries including duties of a property owner, negligent supervision, social host liability and dramshop liability. Finally, the literature review will outline the traditional application of liquor liability to higher education institutions.

The methodology of the research will be described in Chapter 3. The following will be identified and explained: the traditional method of legal research; data sources; organization and analysis; the synthesis of data from traditional legal research and the application of tort law theory to the data; and the standards of adequacy for legal research and the qualitative research methods for conducting the student affairs administrator interviews.

Chapter 4 will discuss the findings of the research in four sections. Section I will analysis the factors identified by the interviewed student affairs administrators as important influences in the formation of the alcohol use policy provisions. Section II
will highlight the relevant portions of the contemporary alcohol use policies that may affect the university's potential for liability for alcohol related injuries. Section III will address the evolution of the legal concept of tort liability for alcohol-related injuries. Section IV will analyze the contemporary alcohol use policies in conjunction with the existing legal jurisprudence regarding alcohol-related injuries.

Chapter 5 will present a brief overview of the study and summarize the study's major findings and conclusions. The chapter concludes with recommendations for university administrators and for future research.
CHAPTER 2

LITERATURE REVIEW

A review of the literature concerning liability for alcohol-related injuries provided the background for this study. This review was focused on six areas:

1. the influence of tort law on society and how it shapes alcohol policies;
2. campus responsibility for students, including “in loco parentis”, the change in age of majority, and change in the legal drinking age;
3. the various forms of potential alcohol liability: property owner, negligence, and statutory liability, including social host and dram shop;
4. the traditional application of liquor liability to higher education as established in Bradshaw v. Rawlings (1979);
5. fraternity facilities and functions; and
6. The Delaware Model of alcohol use reform and similar initiatives by other colleges and universities.

Influence of Tort Law on Society

Only recently, as legal history goes, did torts become recognized as a distinct branch of law. The first treatise in English on torts was published in 1859 by Francis Hillard of Cambridge, Massachusetts. Even though tort law is recognized today as a legitimate legal subject, a truly comprehensive definition still eludes scholars. The word “torts” is derived from the Latin “tortus” or “twisted.” Broadly defined, a tort is a

*Tort from the Latin tortus, a French word for injury or wrong, as “de son tort demesne,” in his own wrong. Jacob’s Law Dictionary, 1811, Vol. 6, p. 251.
civil wrong, other than breach of contract, for which the court will provide a remedy in
the form of an action for damages. It might also be helpful to enunciate the things a tort
is not. It is not a crime, it is not breach of contract and it is not necessarily concerned
with property rights or government. Nevertheless, tort law pervades the entire law, and
is interlocked at most every point with property, contract, and other accepted branches
of law. Included under the title of torts are miscellaneous civil wrongs, ranging from
simple, direct interferences with the person, such as assault, battery and false
imprisonment (all crimes but also actionable as torts) to various forms of negligence.
These wrongs have little in common and appear unrelated except by historical
development. It is often difficult to discover any general principle common to all,
except that injuries are to be compensated and anti-social behavior is to be discouraged.

Most modern writers tend to focus on specific torts; thus, there exists a scarcity
of writings on the general topic of torts. Some authors espouse the position that tort law
is broader than any named categories, and that some more or less vague general
principles run through it, no matter how difficult it may be to formulate them (Seavey,
1942). There is, of course, no rule that a tort must have a name (Smith, 1921).

Finally, there are many interferences with the plaintiff's interests, including
many instances of mental suffering (such as hurt feelings) which occur without physical
consequences, for which the law will give no remedy. Not only may a morally innocent
person be held liable for the damage done, but many a scoundrel has been guilty of
moral outrages, such as base ingratitude, without committing any tort. It is legal
justification which must be determined.
Tort law has certain characteristics that distinguish it from other branches of law. A wrong is called a tort only if the harm which has resulted, or is about to result from it, is capable of being compensated in an action at law for damages, although other remedies may also be available. A tort may also be described as consisting of a breach of duties fixed and imposed upon the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them. Tort duties are owed to persons generally, or toward general classes of persons. For example, an automobile driver is under a tort obligation of care to everyone in the driver’s path and is not free, as when making a contract, to single out one person only toward whom the actor will be bound. Liability in tort is based upon the relations of person with others; and those relations may arise generally with large groups or classes of persons or singly with an individual.

Function of Tort Law

The description of tort law enumerated previously illustrates the difficulty of distinguishing tort law from other branches of law. It is sometimes easier to view the function and purpose of the law of torts. For example, contract liability is imposed by the law for the protection of a single, limited interest, that of having the promises of others performed while quasi-contractual liability is created for the prevention of unjust enrichment of one person at the expense of another, and the restitution of benefits which in good conscience belong to the plaintiff. The law of torts is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required.
The law of torts is concerned with the allocation of losses arising out of human activities. Wright (1944) espoused that “arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others, in short, doing all the things that constitute modern living - there must, of necessity, be losses, or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another” (Wright at 240)

In a field of law where so many different individual interests are involved, it is difficult to isolate a single guiding principle that determines when such compensation is to be paid. However, there does appear to be a central idea that tort liability is based upon conduct which is socially unreasonable. A tort-feasor is usually held liable for acting with an intention that the law treats as unjustified, or acting in a way that departs from a reasonable standard of care. Tort court opinions generally attempt to strike some reasonable balance between the plaintiff’s claim to protection against damage and the defendant’s claim to freedom of action for defendant’s own ends, and those of society.

Tort Law as Policy Guidance

Tort law is often a battleground of social theory. While the primary purpose of tort law is to make a fair adjustment of the conflicting claims of the litigating parties, courts began as early as the 1900's to weigh the interests of society in general in disputes between private litigants (Bohlen, 1937). The influence of public policy on tort law is most likely to be controversial when it comes to bear upon a proposed change that is
accomplished by overruling an established precedent such as occurred in the recent tobacco litigation. Society has a two-fold interest in tort cases. First, society has an interest in having any single dispute between individuals resolved fairly and promptly. Second, society has an interest in the outcome because of the system of precedent on which the entire common law is based. Under this system, a rule once laid down is to be followed until the courts find good reason to depart from it. Therefore, other individuals now living and those unborn may be affected by a decision issued today. Accordingly, there is a belief that a conscious effort should be exerted to direct the law along lines that will achieve a desirable social result, both for the present and the future. It is incumbent upon campus administrators to know the present law of torts, societal efforts to affect the present law and the direction the law appears to be moving.

The administration of tort law today has become a process of weighing the interests for which the plaintiff demands protection against the defendant’s claim to untrammeled freedom in the furtherance of defendant’s desires, together with the importance of those desires themselves. When the interest of the public is thrown onto the scales and allowed to swing the balance for or against the plaintiff, the result is a form of “social engineering” as espoused by Pound (1920) in his Theory of Social Interests. A decision maker might deliberately seek to use the law as an instrument to promote the greatest good for the greatest number or instead might give greater emphasis to protecting certain types of interests of individuals as fundamental entitlements that are so central to an integrity of a person that the law gives those interests special protection.
Judicial Law

The process of weighing the various interests that may be affected by a rule of tort law is not a simple one, and the problems which arise are complex and seldom easy to solve. Generally, courts weigh the interests of individuals against one another in light of those of the general public, although it is often difficult to determine where the public interest rests. It is simple to state that the law will require of every person reasonable conduct not unduly harmful to neighbors; but the critical questions involve what is reasonable and what is undue harm. This research will attempt to address these questions by exploring the current reasoning and decisions of the courts and predicting where the law is heading.

Courts interpret the law as enacted by legislatures; however, when the law is silent or unclear, the courts formulate rules in their decisions that provide guidance for future action. The purpose of most laws is to provide general rules. This does however, occasionally create a situation where a particular case does not fit within the general rule. Thus, there is a constant struggle to make the general rule sufficiently flexible to allow for particular circumstances, yet rigid enough to allow attorneys to predict what the decision may be, and persons in the community to appropriately guide their conduct by that prediction. Often the course of the law will be adjusted by public opinion because the people elect the legislators who can change the law created by the judiciary to reflect the community’s position.

In deciding cases of first impression, that is, cases in which an issue has not been previously decided by any court and is not governed by any statute, the courts make new law. In those cases, courts by necessity must decide the controversy without legislative
guidance. Further, courts are not mandated to follow precedence, and they occasionally overrule a precedent (Keeton, 1984).

The general practice of adhering to precedent is supported by strong policy arguments concerned with similar treatment of similar cases and predictability of decisions. Both by the process of lawmaking in cases of first impression and by occasionally overruling decisions, courts change and develop the course of the law to reflect changing social ideas. Tort law is basically common law developed in case-by-case decision making by courts. However, modern tort law is heavily influenced by statutes. One function of statutes is to substantively change the law rules previously developed by courts, such as dram shop laws. Another function of statutes is to address gaps in the law not specifically provided in common-law. In tort law, courts are obliged to follow statutory mandates that are constitutional. Every statute, however, leaves issues open to interpretation and generally falls short of answering all questions about the subject matter it addresses. In tort law, the responsibility for answering the unanswered questions falls to the courts (See Rose v. Lund, 1982, where federal statute leaves "an hiatus" the Supreme Court must supply a rule of decision and provide the answer left by the statute).

A court may look to statutes not only as mandates on issues directly addressed but also as pronouncements of policy that carry significance beyond the particular scope of each statute involved (Boston Housing Authority v. Hemingway, 1973). A further concern encountered in tort law is that a statute while well adapted to circumstances existing at the time of its enactment may be less appropriate when circumstances materially change.
Historical Development of Tort Law

A review of tort law's historical development illustrates the influences of the social, economic and political forces of the times. Four influences are addressed below.

Moral Conduct

One factor shaping the development of tort law is the moral aspect of the defendant's conduct. In other words, law is influenced by the moral guilt or blame in the eyes of society that is attached to the defendant's acts, motives, and state of mind. Personal morals vary with every individual, but every community also has certain acts and motives which are held as morally right or wrong. These public opinions have often had an effect upon the decisions of the court. In a sense, the law of torts reflects current ideas of morality, and when such ideas change, the law tends to adjust as well. Today it is generally accepted that liability rests upon "fault", and "fault" can be legal or social and may not equate to personal immorality. The law finds "fault" in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual and in acts which are normal and usual in the community and without moral reproach in its eyes. The twentieth century has seen the development of entire fields of liability in which the defendants are held liable for well-intentioned and entirely reasonable conduct, because it is considered to be good social policy that their enterprises should pay their way by bearing the loss they inflict. Of course, many immoral acts are not by law torts. The courts will not entertain lawsuits for every deed

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7For example, see the development of driving and alcohol use and the formation of MADD.
of unkindness or betrayal and there are many evils in the world that are not
compensable. The extent the moral ideas of a future day may create new torts to deal
with such misconduct is yet to be determined.

Accordingly, while many tort cases are based on some moral delinquency on the
part of the actor, still others are based on considerations of public policy which may
have little connection with private morals. The ethical principals which underlie the law
are not the moral code of popular speech, but an artificial and somewhat sublimated
morality, which is formulated by the law and is called morality only by a use of that
term which is almost metaphorical (Vold, 1936).

Administration

Courts cannot remedy every individual wrong. There are limitations upon the
time of the courts. The law does not recognize trivialities. Trivialities such as
ingratitude, avarice, broken faith, brutal words and disregard of feelings of others are
beyond any effective legal remedy and are left to other means of settlement. Difficulties
in administration are very significant in new developments of the law and are overcome
slowly as the courts find some workable method of affording redress where it is merited
and justified as a matter of policy. As new methods of administering cases are
developed and innovative courts address new developments in tort law the floodgate of
previously ignored causes of action could burst and a flood of litigation involving
problems not previously recognized may be initiated.

Distribution of Losses

Another influence on the court’s decision is the relative ability of the respective
parties to bear a loss that must necessarily fall upon one or the other. This influence is
commonly referred to as the “deep pocket” theory. Often juries and sometimes judges have a tendency to favor the poor against the wealthy. However, a more distinct aspect of this theory relates to a party’s capacity to avoid the loss, or absorb it, or pass it along and distribute it in smaller portions among a larger group. For example, a 30,000 student university can increase tuition $10.00 and pass along a $300,000 judgment. Defendants like corporations, by price increases and insurance, are believed better able to distribute to the public at large the risks and losses which are inevitable in a complex civilization. Rather than place the loss on the shoulders of the individual plaintiff who would be ruined by the loss, the courts have often found ways to shift it to the defendants. However, courts are reluctant to shift the entire burden to a business or university if it may prove ruinously heavy. Certainly, in addition to concerns about the ability of the defendant to bear or distribute the cost, there are concerns about the fairness of imposing a burden where one is not technically at fault. Thus, like other factors influencing tort law, capacity to bear and distribute risk, even when plainly proved, is not alone decisive of liability. Other factors, including community notions of individual blameworthiness (Keeton, 1959) may explain why tort law has distinguished and continues to distinguish between, for example, prudent driving as to which strict liability is not imposed and prudent use of explosives as to which strict liability does apply.8

8 Maraist and Galligan (1996) differentiate between negligence and strict liability as follows: “In a negligence action, the plaintiff must prove that the risk presented by the defendant’s conduct was foreseeable, and that it outweighed the utility of that conduct. In strict liability actions the plaintiff needs to prove only one of those elements - that the risk outweighed the utility; whether the defendant knew or should have known of the risk is irrelevant, because that knowledge is irrebuttably presumed.” p. 8.
Prevention

Prevention of future harm has been an important influence in the area of torts. Courts are often interested in both compensating victims and punishing wrongdoers. When court decisions become reported or known, future potential defendants realize they may become liable; thus there is a strong incentive to prevent the occurrence of the harm and future conduct is shaped by the courts. Sometimes a reason for imposing liability is the provision of that incentive. Of course, the idea of prevention is seldom the controlling influence, but it often weighs as a reason for holding defendants liable and often affects future decisions of potential defendants who work to avoid liability (Williams, 1951). This influence of tort law is particularly important for campus administrators deciding campus alcohol policies.

Elements of Tort Law

There are many possible classifications of tort law. Dean Wigmore (1894) organized torts under three headings; (1) Damages, (did the plaintiff suffer legal harm); (2) causation (who is responsible for the harm; and (3) excuse (is there a sufficient excuse or justification).

Maraist and Galligan (1996) have succinctly described the basic tort concepts in their book, Louisiana Tort Law. Maraist and Galligan (1996) divide the basic tort concepts as follows: (1) duty; (2) breach; (3) causation; and (4) damages.

Duty

A person owes a duty to another person if he or she can foresee an unreasonable risk of harm to the other arising from his or her conduct. The inquiry is both a factual one and a legal one. The factual review can be called foreseeability in fact, i.e. is the
possibility of harm from the conduct of such magnitude that a reasonable person would take it into consideration in determining how he or she should act. The legal review balances the likelihood and severity of the harm from the conduct against the alternatives available to the actor, such as the cost of acting in a different manner. Generally, duty is considered a question of law for the court to decide. This is particularly true where the issue turns upon policy factors.

Maraist and Galligan (1996) suggest that when properly used, the formation of duty is so broad and so tautological that courts for various reasons have tended, in certain types of cases, to categorize by establishing *per se* no duty rules (Leonard, 1986). These rules arise in cases where a court denies recovery to a certain class of plaintiffs or types of damages, such as wrongful birth. If a duty is found, the court then looks to whether the duty was breached.

**Breach**

Breach asks whether the defendant, who owed a duty, acted reasonably. The breach inquiry focuses upon what the defendant did compared with what he or she could have done to avoid harm to the plaintiff. Maraist and Galligan (1996) suggest breach is a mixed question of law and fact, and traditionally is left to the jury if reasonable minds could differ.

**Causation**

In most jurisdictions, “cause” is subdivided into two separate elements: (1) cause-in-fact and (2) legal or proximate cause. The question to be answered with the first element is: was the defendant’s negligent act (duty/breach) a cause-in-fact of the plaintiff’s damages? This factual inquiry is generally resolved by applying either the
“but for” or the “substantial factor” test (Galligan, 1993). This issue is generally decided by the jury.

The second element is a shorthand way of asking: as a matter of policy, does society want to allow this plaintiff to recover from this defendant for these particular damages arising in this particular manner? The law may elect to relieve the defendant of liability because to make the defendant pay for specific damages occurring in a certain manner to a given plaintiff would offend some valid societal policy such as fairness, the proper allocation of resources, or the promotion of some societal value.

Legal cause (also known as proximate cause) has brought much grief to many. Stripped of the “tyranny of terminology” and the “regime of rules” that enshroud it, the legal cause inquiry may usefully be seen as merely a double check on the negligence system. As a general proposition, negligence rules impose liability for damages upon an actor for failing to act reasonably. In practice, these general rules reflect a balance of competing societal values, such as deterrence (but not over-deterrence) of conduct, reduction of the societal impact of accidents through compensation and risk spreading, satisfaction of the community’s sense of justice, proper allocation of resources, respect for the freedom of the individual, deference to legislative will and some adherence to how other courts have decided similar cases. However, when a specific loss is before a

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9 In most cases, the question is purely factual — can one say that “but for” the defendant’s negligence, the plaintiff would not have sustained the damage? However, in some cases the inquiry encompasses both fact and policy, as when the defendant’s negligence was a causal factor in the plaintiff’s injury but not a “but for” cause, and the court nevertheless finds cause-in-fact by using the broader “substantial factor” test, asking whether the defendant’s conduct was a substantial factor in bringing about the plaintiff’s injuries. These are usually cases where some important social policy justifies recovery and the “but for” test is not sufficiently flexible to permit that recovery.
court, the system requires that the court double check the general proposition to
determine whether, in the particular case, shifting the loss from the victim to the actor
represents a proper balance of those values.

While there is no dispute that the double check question must be asked, there is
much dispute as to when and how it should be asked. Initially, the common law
factored the question into the formula at the cause level, thus producing two “cause”
issues, cause-in-fact and “proximate” cause. The word “proximate” connotes nearness;
thus the term “proximate cause” skews the inquiry by leading the poorly tutored to
conclude that only the “last” cause-in-fact is the proximate cause. As a result, some
jurists have substituted a more accurate term, legal cause. For example, Louisiana
converted to a “duty-risk” analysis, and, more recently, has adopted, at least in part, the

Damages

Damages are essential to the negligence tort. The damage issue may be
subdivided into two parts: (1) can the victim recover these particular damages inflicted
in this particular way, and, (2) if so, what is the measure (amount) of such damages?
The first question is whether the plaintiff injured this defendant in the manner claimed
by the defendant. Sometimes this is a question of law for the judge. The second
question — the measure of damages — essentially is a fact issue within the somewhat

The Formula

Negligence is the failure to act reasonably under the circumstances. The factors
relevant to the inquiry are the likelihood of the harm that could result from the
defendant’s conduct, the severity of that harm, and the cost of avoidance, i.e. what the defendant would have had to do or to give up to avoid exposing others to the harm. In the 1940s, Judge Learned Hand espoused these factors into a “negligence formula.” The “Hand formula” states one is negligent if the burden (B) of avoiding a risk is less than the probability (P) of that risk occurring, times the gravity or severity of the anticipated harm should the risk arise (L). Set forth algebraically, an actor is negligent if \( B < P \times L \).

B is not just the direct cost of avoidance, such as maintenance or repairs, but it also includes the losses the defendant incurs in discovering the risk, i.e. the cost of discovering something is defective (Galligan, 1991).

\( P \times L \) represents the beforehand “cost” of the risk. Law and economics scholars and judges like the Hand formula because it is an economic statement of negligence — a definition tied to the efficiency of accident avoidance. An economist tends to encourage people to invest in accident avoidance until the last dollar invested does not produce further “net” safety. Accident avoidance beyond this point is arguably too expensive because a dollar invested in accident avoidance will yield less than a dollar’s worth of safety. To the economist, tort rules should encourage people to invest in safety until the marginal benefit derived from the last dollar invested equals the marginal cost of that additional safety. Negligence law can be sometimes equated to an invisible “hand” that assures efficient behavior.

The Hand test is not applied as a litmus test for negligence. For example, society values life and limb more than property and an unfeeling dollar-and-cents approach is generally not an acceptable way of modifying human conduct. Additionally, it is quite difficult to actually place real numbers on B, P and L. Judge

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Hand recognized this dilemma and suggested his formula was only an approach to understand the concept of negligence (United States v. Carrol Towing, 1947). Louisiana is one state that has applied Judge Hand's formula (Sistler v. Liberty Mut. Ins. Co., 1990; Washington v. Louisiana Power and Light, 1990).

It is unclear who should decide whether \( B < P \times L \). From a policy standpoint, perhaps the court should decide, because judges are generally more familiar with economic concepts than most jurors. However, the formula is a distillation of elements from the general common law approach; and at common law, the jury decides whether the conduct was reasonable or unreasonable. This would suggest that the formula is the jury's to apply.

**Defense to Tort Liability**

Contributory negligence historically barred a plaintiff's recovery in a tort action. The doctrine of contributory negligence provides that a plaintiff who is negligent is denied any recovery, even if his or her negligence is slight when compared to that of the defendant. Under the doctrine of contributory negligence, the plaintiff must act as a reasonably prudent person for his or her own safety and the safety of others. The plaintiff's standard of care, like that of the defendant, varies according to the conduct in which he or she is engaged. A child is generally held to the standard of a child of like age, experience, skill, intelligence and knowledge according to Maraist and Galligan. Contributory negligence is an affirmative defense and the defendant must specifically plead it. Contributory negligence should be distinguished from the "avoidable consequences" doctrine. Contributory negligence evaluates the plaintiff's conduct prior to his injury, while the "avoidable consequences" doctrine addresses it the post-injury.
Within the past four decades, many common-law states and Louisiana have instituted a comparative negligence regime. Louisiana has codified its change in Louisiana Civil Code Article 2323, which provides:

A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all person’s causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a non party, and regardless of the person’s insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person’s identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraph A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

Louisiana’s code established a pure comparative negligence regime in that the plaintiff’s contributory negligence does not bar recovery but reduces it by his or her portion of the fault. Thus, an alcohol impaired plaintiff who is 40% at fault can now recover 60% from a defendant, such as a university, 60% at fault. In considering the
comparative fault of a party, the court assesses the nature of the conduct of the parties. Various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought (Maraist and Galligan, 1996). Accordingly, under the doctrine of comparative fault, the fault of all persons who contributed to the injury must be determined and the partial fault of the plaintiff will not bar a recovery.

**Historical Basis of Tort Liability on Campus**

**Role of In Loco Parentis**

The historical basis of a university's liability for the tortious behavior of, or injury to, its students is derived from the centuries-old doctrine of *in loco parentis* (Blacks Law Dictionary 1990). Before universities existed as separate institutions of higher learning, the doctrine governed the teacher-pupil relationship in the schools of medieval England. Schoolmasters of the time simply exercised the same authority at school that parents did at home. Under *in loco parentis*, a headmaster's right to beat a student was virtually identical to the right of a parent.

As originally conceived, the doctrine was established to deal with disciplinary matters granting almost unlimited authority in that area. This authority extended to include not only the time students were in school, but also included time coming to, going from, and while at school-sponsored events away from school. Early decisions of American courts upheld the *in loco parentis* authority of a university administrator to
control and discipline college students (People v. Wheaton College, 1866). For example, Wheaton College forbade its students to join secret societies, in this case the Good Templers, and the State of Illinois brought an action under its constitution to have the college’s rule declared an infringement on the student’s right of association. The court found that whether the rule was judicious or not, it violated neither good morals nor the law of the land, and was therefore, clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family (People at 187).

The case most often cited for the proposition that this disciplinary authority extended to include tort liability of the university is Gott v. Berea College, (1913). In 1911, Gott purchased a restaurant in Berea, Kentucky. The restaurant had been established in its location across the street from Berea College for a while before Gott purchased it. On the first day of the Fall term, Berea College announced that eating houses and places of amusement in Berea, not controlled by the College, must not be entered by students on pain of immediate dismissal (Gott at 205). Following the announcement, several students violated the rule and were dismissed. The enforcement of the rule had the effect of injuring Gott’s business because students were afraid to visiting his establishment. The college defended its rule by stating that students who desire to be affiliated with the college agreed to abide by its rules and that because most of its students were from rural districts and unused to the ways of a town the size of Berea, the college authorities were compelled to prohibit the doing of things which they
“have found and believe to be detrimental to the best interest of the college and student body” (Gott at 206).

The Kentucky court held (1) the college owed no special duty to Gott or his business because the two were not contractually related; and (2) college authorities were entitled to take the utmost precautions to control the outbreak of an epidemic which might otherwise be caused by students eating in unsanitary public eating houses; and (3) like a father may direct his children, those in charge of boarding schools are well within their rights and powers when they direct their students what to eat and what forms of amusements are forbidden (Gott at 207).

This ordinary opinion basically dealing only with the authority of a university over its students became a landmark case for in loco parentis, which many commentators have looked to in establishing an institution’s duty to its students to care for their well-being while they are attending the university (Szablewicz and Gibbs, 1987; Comment, 1988). While the court in Gott never explicitly found a duty running from the college to its students, it did state that college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents. As the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy (Gott at 206).
Acceptance by universities and enforcement by the courts of the right of control inherent in the in loco parentis doctrine served to impose duties upon the university. Common-law negligence principles, standing alone, do not impose a duty upon a university to protect its students. Therefore plaintiffs and commentators have contended since Gott that the authority provided universities to control students' conduct also supplied the special relationship necessary to establish that affirmative duty (Note, 1990).

Transition

Until the 1960's, the relationship between a college and its students was much like that between a parent and child. Indeed, under the doctrine of in loco parentis for all practical purposes, the college was the de facto and de jure guardian of student's health, welfare, safety and morals.

The debate over student-college relationships did not arise overnight. The doctrine of in loco parentis can be traced back to the 18th century English common law (Blackstone 1770). While in loco parentis was initially developed as an English tort principal—a legal defense for educators accused of student battery based on parental delegation of authority—it eventually received a broader application in United States higher education.

Zirkel and Reichner (1986) suggest in loco parentis may have been imported to the United States from England as both an allowance and protection for the public school teacher to use corporal punishment. The case of State v. Pendergrass, (1837), has been used to justify in loco parentis in higher education because the justices held "the teacher is the substitute of the parent." Therefore, American colleges may have
adopted this concept from grade schools. On the other hand, the concept may have been directly transferred from English colleges. The English college was a small, cohesive community populated by minors who were not yet vested with any rights as adults. To the degree that colonial colleges were modeled after English colleges, *in loco parentis* may have seemed like the natural relationship between students and their institutions.

Colonial colleges were concerned with items such as housing, boarding, recreation, manners, morals, religious observances and general welfare as well as intellectual development of its students. The rationale for taking over responsibility for these aspects of students' lives was that the college was acting in place of the parents. It must be noted that at this time the typical college student was between fifteen and seventeen years of age (Leonard, 1956). In fact, it has been reported that at Harvard the “atmosphere resembled that of a low-grade boys’ boarding school straight out of the pages of Dickins” (Brubacher and Rudy, 1968). It was adapted more to restless and unruly boys than to responsible young college men and indeed, most of the students of that time resembled the former more than they did the latter.

Early American colleges emphasized discipline and structure but the control and authority was a primarily paternalistic habit as opposed to a legal rule. The courts had not utilized the name *in loco parentis* in the 1800s, but they did stay out of college administrators’ affairs. Generally, the concept of *in loco parentis* implied that colleges stood in place of their students’ parents. Colleges assumed the rights inherent in the parental responsibility. Administrators had a duty to protect the safety, morals and welfare of their students because parents transferred their authority and obligations to the institutions. In the early 19th century higher education was viewed as a privilege and
not a right. Most colleges were private institutions. Therefore, they were almost completely autonomous. Courts followed this view and allowed colleges broad powers in superseding individual student freedoms in the name of institutional parenthood.

By the beginning of the 20th century the college student population was becoming increasingly heterogeneous. The elitist approach to higher education was changing while at the same time the first judicial articulation of *in loco parentis* in American higher education was issued in *Gott v. Berea College*, (1913) as discussed above. This ruling became the basis for a judicial hands-off policy toward administrators’ decisions in American higher education. Thus, college administrators were able to control student conduct and impose sanctions with little or no review, much like a parent. As long as administrative decisions met a standard of reasonableness, which the courts chose to interpret broadly, and were not “unlawful or against public policy,” they were typically upheld. Thus, *in loco parentis* as a student-college relationship thrived through the early 20th century.

**Winds of Change**

Many of the applications of *in loco parentis* centered on the maintenance of campus order and student discipline and the associated authority of institutions to make and enforce their rules, including the ability to dismiss. The 20th century witnessed numerous forces blowing in different directions which created change on college campuses that affected the student-college relationship. No single event or movement alone caused the change, but instead the combined effect caused the altered relationship. It is important to briefly note each of the forces to fully examine the altered student-college relationship.
Societal attitudes, economic conditions and judicial interpretations all helped transform the public's perception of higher education from a privilege to a right or at least an important benefit. As will be elaborated below, changes in the profile of the university student population and in campus environments made it inevitable that judicial attitudes would be altered. Courts soon began to weigh the rights of students against the once sacred autonomy of universities to establish rules to manage the educational process. Therefore, the student-institution relationship shifted toward an uneasy balance between students' and institutions' rights. Some of the possible reasons why this shift occurred are addressed below as it is important to understand the forces that caused the change.

One of the forces that assisted in the decline in popularity of *in loco parentis* was the emergence of the German model of higher education. German higher education envisioned large diverse institutions that exhibited little concern for the private life of the student. In the early 20th century, state institutions embraced this concept because it allowed them to educate a large number of students. German education increased in popularity after World War II because it allowed institutions to accommodate the soldiers sent to college on the G. I. Bill. Enrollment increases resulting from the baby boom further contributed to the popularity of the German model. If colleges did not have to take care of students, it was believed the cost of educating them would be reduced.

The appropriateness of *in loco parentis* was also questioned by students. The increased student age, the lowering of the age of majority, the protests over civil rights and Vietnam, and general student rebellion against authority and "the establishment"
made it difficult to treat students as children and to abridge their rights without their consent. Students asked for adult status and treatment, and assumed more responsibility for their own actions.

**Ramifications of Age of Majority**

During the second half of the 20th century, mounting pressure pushed states to lower the age of majority from the traditional age of 21 to 18. Eighteen-year-old students could vote in most states and were required to serve in the armed forces; thus, they believed they should be accorded legal adult status. The question then became: what does legal adult status mean and how does it impact the college-student relationship?

The age of majority is legally defined as “the age at which, by law, a person is entitled to the management of his or her own affairs and to the enjoyment of civic rights” (Black’s Law Dictionary, 1990). This means that once a student reaches age 18, the student is of full legal age “at which the person acquires full capacity to make his or her own contracts and deeds and transact business generally” (Black’s Law Dictionary, 1990). The move to lower the age of majority was accelerated by the states’ ratification of the Twenty-Sixth Amendment to the Federal Constitution, which gave 18 year old persons the right to vote. Lowering the age of majority had a tremendous impact on higher education. Not only was the number of older non-traditional students on the rise, but now instead of the majority of students being minors under the age of 21 as in the past, colleges were suddenly filled with practically all adult students. This encouraged both the student and the college to develop a different perspective regarding their relationship.
The legal blow to \textit{in loco parentis} that changed student-college relations came with the Fifth Circuit’s ruling in \textit{Dixon v. Alabama State Board of Education}, (1961). In \textit{Dixon}, the court held that higher education students have constitutional rights that entitle them to due process. Although the court did not go so far as to hold higher education itself to be a right, it also did not hold higher education status to be such a privileged one that administrators could violate the Constitution with impunity. The court held that the governmental authority of the institution was not unlimited and could not be arbitrarily exercised. \textit{Dixon} marked the end of traditional judicial deference to university discipline decisions, thereby changing the posture of the student-college relationship. Now a state, operating a public institution of higher learning was prohibited from violating students’ rights simply because they were students.

The cultural revolution of the late 1960’s also influenced the student-college relationship. In the wake of student protests against the Vietnam war and racial inequality, a new student independence emerged. Society and the courts eventually perceived the college student as an adult rather than a child. An arm’s length relationship appeared to have developed between colleges and students that respected students’ individual, academic and political freedoms.

Historically Utilized Theoretical Bases for University Liability

Although \textit{in loco parentis} is not presently recognized as providing a special relationship necessary to establish the duty element in common-law negligence actions, other theories of recovery have been recognized and may provide the future basis for university liability for injuries resulting from alcohol consumption.
Common-Law Negligence

The traditional elements necessary to state a cause of action in negligence are as follows:

1. A duty or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against reasonable risk.
2. A failure on his part to conform to the standard required.
3. A reasonably close causal connection between the conduct and the resulting injury, known as “legal cause” or “proximate cause”; and
4. Actual loss or damage resulting to the interests of another (Maraist and Galligan, 1996).

Duty

Establishing a university’s legal duty to prevent injuries arising from student alcohol consumption often presented the greatest difficulty for the plaintiff. Primarily due to the demise of in loco parentis described above, courts became reluctant to impose a general duty on universities to prevent either student drinking or drinking to intoxication. Duties are generally created in three basic ways: (a) by statute, (b) by the status of the parties, and (c) by the foreseeability of the harm and subsequent failure to act to prevent the harm. The creation of duty by statute will be addressed later.

In American law, in order to be responsible for any consequences of negligence, a person must first owe someone a duty. This simple concept of “duty” is actually quite elusive and constantly changing as society changes. Duty is about setting limits on responsibilities owed to others. Duty acknowledges responsibility; no duty creates a
free space that allows conduct to occur without liability. Legal duty actually deals with freedom and responsibility; thus, it is natural for people to be concerned about tort imposed duties.

Bickel and Lake (1999) describe three levels of duty—no duty, ordinary duty, and special duty. No duty is often portrayed by the example that there is no duty to come to the aid of a stranger. If there is no duty, there is no liability.

If a court finds a duty, it is normally an ordinary duty. An ordinary duty requires one to exercise some care for others’ safety. To identify the appropriate level of care, courts postulate a standard of care which, if matched or exceeded, satisfies the duty owed. In most situations the standard of care that is owed is the level of care that an ordinary and prudent person would exercise in like or similar circumstances.

Special circumstances sometimes create special duties. For example, while there is no ordinary duty to aid a stranger, if a person’s conduct or instrumentality caused the need for aid, then a duty may arise. Sometimes a special duty is owed because a person is a professional like a doctor, lawyer or accountant and owes a special professional level of care.

It is important to remember that the term “duty” refers to the first element in a prima facie case of negligence. Accordingly, it is the foremost consideration in a negligence case because without duty there is little more to discuss. Therefore, duty should not be confused with liability. Duty is simply the first element of negligence and the other aspects of a negligence case must also be established.

10Restatement (Second) of Torts Sections 314, 322 (1965).
Because duty is so fundamental, courts typically make the duty element of a tort case the place at which they consider most of the social policy issues that a case raises. Policy/factor analysis and the weighing of competing factors is particularly necessary in university cases. As discussed previously, tort law is fundamentally common law, which courts have the responsibility to assess and reevaluate as social circumstances change. No single policy or factor is determinative of duty; however, foreseeability is always considered an important factor. Courts are increasingly willing to reexamine rules of decision in light of shifting social concerns as recently illustrated in the tobacco cases. In areas of rapid social evolution like university culture, the law is apt to change rapidly as well. Therefore, university law and negligence/duty law in the university context have changed and should be expected to continue to change. Naturally, this is difficult for students and university officials alike. A discussion of various duty issues is set forth in the sections that follow.

Custodial Relationship, Social Host Liability and Bradshaw

In the early 20th century efforts to establish a duty from a university to an injured plaintiff were predicated on allegations that the university assumed a custodial relationship with the student, thereby making protection of the student an obligation. This concept of duty was grounded on a principle similar to *in loco parentis* but was based upon Restatement (Second) of Torts Sections 314A and 315. Allegations of foreseeability of the harm were often interwoven with the alleged assumption of the custodial relationship, adding to the duty to protect the plaintiff.

Courts have sometimes equated the imposition of a duty to protect with a finding of social host liability when considered in the context of student alcohol assumption
and related injuries. Such an instance was discussed in Bradshaw v. Rawlings, (1979), a landmark case in the arena of university liability law in which the plaintiff, Bradshaw, was rendered a quadriplegic when a car in which he was a passenger struck a parked vehicle on the return trip from a class picnic. The sophomore class advisor participated in the planning of the picnic and also signed a check, drawn on class funds, that was later used to purchase beer. Additionally, flyers announcing the picnic and featuring drawings of beer mugs were prominently displayed on campus. However, neither the advisor nor any other faculty or staff member attended the picnic. The jury found in favor of Bradshaw and awarded damages against Rawlings, the driver of the car, the college, the beer distributor and the Borough of Doylestown, Pennsylvania. In charging the jury, the trial court did not hold the college to any greater duty of care than that of the reasonable person. However, because under Restatement (Second) of Torts Sections 314 and 315, no duty exists to control the conduct of third persons (such as Rawlings) to prevent them from causing harm to others (such as Bradshaw), a special relationship must be established between the college and either Bradshaw or Rawlings before the college could be found liable. The Court of Appeals for the Federal Third Circuit held that in submitting the question to the jury under the simple negligence standard, “the district court assumed that such a duty existed....”(Bradshaw at 138). Further, the appellate court, in an effort to determine whether a duty existed on the part of the university, proceeded to examine “the competing individual, public, and social interests implicated” in the case (Bradshaw at 138).

Beginning with the oft-quoted statement that “the modern American college is not an insurer of the safety of its students,” the appellate court reviewed at some length
the changes in the student-college relationship from the days of *in loco parentis* through the change in the voting age to 18 and student rights cases in the 1970s. The court found that, as a result of this change of relationship and reallocation of responsibilities, society now considered college students to be adults rather than children. The court concluded students had no special relationship with their university per se; if a specific duty of care existed, it would have to be proven by other interests.

Bradshaw submitted two such interests. First, he argued that the college regulation prohibiting alcohol use by students placed the college in a custodial relationship with an attendant duty of protection. Second, Bradshaw argued that the college had a duty at law either to control the conduct of a student using a vehicle off campus or to protect its students by providing transportation to and from off-campus activities.

In his first argument, Bradshaw relied on the college’s disciplinary rule prohibiting “possession or consumption of alcohol or malt beverages on the property of the college or at any college sponsored or related affair off campus and the same rule shall apply regardless of age” (*Bradshaw* at 141). The court held that where a college regulation merely tracks state law that prohibits the same conduct, the college does not assume a custodial relationship with its students under Section 320 of the Restatement of Torts.

Bradshaw’s second argument, that the college had a duty to either control Rawlings’ conduct by not allowing him to drive after the picnic or, alternatively, protecting Bradshaw by supplying transportation to and from the picnic, was based on several factors. Bradshaw argued (1) the college administrators knew that students
would drink beer at the picnic; (2) this conduct violated both college regulations and state law; (3) this conduct created a known probability of harm to third persons; and (4) the college knew of the probability of harm, and all these factors combined to impose a duty upon the college.

The court analogized this to an allegation of common-law social host liability, reasoning that because the Pennsylvania Supreme Court had been unwilling to find a special relationship on which to predicate a duty between a private host and his visibly intoxicated guest, the court was even less willing to find such a relationship between a college and its student under the circumstances of this case. However, four years later, the Pennsylvania Supreme Court in Congini v. Portersville Valve Co. (1983), combined the Restatement (Second) of Torts section 286 with a section of the Pennsylvania Crimes Code forbidding the serving of alcohol to minors, to find a social host negligent per se for having served an 18-year-old employee at a Christmas party. Accordingly, if Bradshaw were tried today, it is possible that liability would be imposed against the university.

**Role of Public Policy**

The court’s opinion in Bradshaw addressed public policy considerations in two ways. First, it expressed concern about holding the university to be an insurer of its students’ safety in light of the degree of independence demanded by and granted to students in the post “campus-revolution” era. The second policy concern was addressed under a discussion of the “blurred distinction” in Bradshaw’s argument “between establishing the existence of a duty and proving the breach thereof.” The decision summarized Bradshaw’s argument as a contention that the duty pursuant to a special
relationship, and attendant liability, was created by underage student’s beer-drinking and that the college breached its duty by failing to control student drinking when it had both the means and the opportunity to do so. Judge Aldisert reasoned that because a good number of citizens drink beer, drinking beer cannot be considered a harm-providing act; he further stated that beer drinking by college-age students was commonplace and accepted in many jurisdictions under the (then-current) trend toward 18-year-old drinking laws. The court concluded that “it would be placing an impossible burden on the college to impose a duty in this case” (Bradshaw at 132).

**Foreseeability and the Recent Public Policy Trend**

In light of current attitudes toward drinking, especially drinking and driving, the Bradshaw court’s public policy discussion may be anachronistic. The courts of the 1980s and early 1990s have invariably adhered to the Third Circuit’s statement of the student-college relationship in Bradshaw; however, it is quite possible that a court today applying contemporary social mores on the subject, might derive an entirely different public policy, holding a university liable for the foreseeable consequences of its failure to control its students or protect them from the harms that result from drinking. It may be that courts today will at least scrutinize the factual nexus between the provision of alcohol, the foreseeability of the student (possibly under age) drinking and the foreseeability of driving after the alcohol consumption. In Bradshaw, the issue of foreseeability was not discussed by the court in determining the college’s duty. This absence of discussion of foreseeability would likely not occur today. The holding in

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11At the same time Bradshaw was decided, 13 jurisdictions maintained a 21-year age requirement, 2 required 20 years, nine 19 years and the rest 18.
Bradshaw that no duty existed on the part of the college to its students virtually precluded recovery against the college. The fact that the court, when applying the licensee provisions of Pennsylvania law to find the supplier of the beer liable to Bradshaw, readily found underage drinking as well as the probable harm foreseeable, perhaps indicates that the court's notions of policy were the primary impetus steering it toward a finding of "no duty".

**Other Special Relationships**

Over the last couple of decades special relationships creating the duty to protect or to control the actions of third parties have been developed by applying imaginative theories other than the custodial relationship theory (Note, 1988). One particular case, Baldwin v. Zoradi, (1981) illustrates variations on special relationships created by contract. Baldwin also demonstrates the importance of the courts’ determination as a matter of law that a duty does or does not exist, the role of foreseeability as part of the duty equation, the critical part factual nuances play in the outcome of a case, and the important part played by the law of the jurisdiction, *i.e.* the particular state.

In Baldwin, the plaintiff suffered serious injuries in an automobile accident. Baldwin was the passenger in a car driven by a fellow student at California Polytechnic State University. Prior to the accident, the driver and other students had been consuming "great amounts" of alcoholic beverages in their dormitory rooms, after which several students decided to engage in an automobile "speed contest".

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12Bradshaw, 612 F.2d at 143. "We conclude that Bradshaw failed to establish a prima facie case against the college that it should be charged with a duty of custodial care as a matter of law and that the district court erred by submitting the case to the jury."
Baldwin sued the university and two dormitory advisors. The lawsuit alleged that all students lived in dormitories pursuant to a license agreement that prohibited alcohol possession and/or consumption and which created a “special relationship” sufficient to impose a duty upon the university and its employees to control the conduct of persons who might foreseeably injure others, such as the plaintiff. Baldwin also suggested three alternative bases for liability that are worth noting. First, Baldwin suggested the license agreement created a landlord/tenant “special relationship” with the mandatory duty to enforce the agreement’s provisions regarding alcohol consumption on the premises. Baldwin alleged that by failing to enforce the agreement, the university, through its dormitory supervisor, caused alcoholic beverages to be furnished to other defendants. The suit alleged that the other defendants, as a foreseeable result of the drinking, operated their vehicles while under the influence of intoxicants, proximately injuring Baldwin.

Baldwin’s second theory was based on the argument that the school catalog and announcements stating the rules regarding alcohol imposed a duty to enforce the rules, a duty which the dormitory advisors negligently failed to perform, proximately causing Baldwin’s injuries. A third theory claimed the university’s knowledge of violations of the licensing agreement combined with the lack of adequate supervision created a dangerous condition on the premises. The court reviewed the licensing agreement in

\[\text{Rabel v. Illinois Wesleyan Univ. 161 Ill. App. 3rd 348, 514 N.E. 2d 532 (1987). (holding representations in handbook, policies and regulations regarding discipline, and religious nature of university did not create special relationship with students allowing plaintiff to recover for injuries received during fraternity prank following fraternity drinking party.)}\]
context of California law, which recognizes a duty of reasonable care owed to a plaintiff if (1) the defendant had a special relationship to both the victim and the person whose conduct creates the danger; or (2) a special relationship of dependence was created. The court determined that the license agreement created neither of these special relationships, because no imminent danger or potential for loss to others was apparent in the Baldwin case.

The determination that no duty existed pursuant to a special relationship did not end the inquiry here as it did in Bradshaw. The court stated that “central to any decision regarding whether a defendant owes a ‘duty’ to exercise reasonable care is the concept of foreseeability.” Under California law, the ultimate existence of a duty of third person is determined by the following factors:

(1) the degree of certainty the plaintiff suffered injury;
(2) the closeness of the connection between defendants conduct and the injury suffered;
(3) the moral blame attached to the defendant’s conduct;
(4) the policy of preventing future harm;
(5) the burden to the defendant and consequences to the community of imposing a duty to exercise care with resultant liability for breach, and
(6) the availability, cost and prevalence of insurance for the risk involved.

The court cited Tarasoff v. Regents of the Univ. of Cal., 17 Cal 3rd 425, 551 P. 2d 334 (1976), as an example of this type of special relationship. In Tarasoff, a university psychiatrist failed to warn his patient’s victim of the patient’s dangerous tendencies after the patient had stated he would kill the victim. When he did in fact kill the victim, the court held that the patient-therapist relationship created a duty of reasonable care to protect others from the foreseeable results of the patient’s illness.
Therefore, even in the absence of a special relationship, California imposes a duty on a defendant and liability may attach if the foregoing factors are satisfied. Applying these factors to the Baldwin facts, the court determined that although the plaintiff was most certainly injured, there was "a lack" of a close connection between the failure of the trustees and dormitory advisors to control on-campus drinking and the speed contest. On the subject of moral blame, the court cited Bradshaw as pervasive authority, adding "the use of alcohol by college students is not so unusual or heinous by contemporary standards as to require special efforts by college administrators to stamp it out."

Turning to the future harm element, the court reviewed the legislative intent behind the Business and Professions Code and determined that the intent strongly disfavored selling, furnishing or giving away any alcoholic beverage to a person under the age of twenty-one. The court drew a distinction between giving or furnishing and the failure to stop a drinking party. The fact that no allegations suggested the university actually furnished alcohol led the court to a finding of no liability.

The court further found the fact the university had not directly served or furnished alcohol to be a factor mitigating against liability because the policy of preventing future harm would not be served by holding the university liable. Considering the burden to the defendant and the consequences to the community of imposing a duty of care upon the university, the court cited the difficulty of policing a modern university campus so as to eradicate alcohol consumption. Once again, the court followed Bradshaw in concluding that only by giving students responsibilities can they grow into responsible adulthood. Although the alleged lack of supervision had a
disastrous result to this plaintiff, the overall policy of stimulating student growth is in the public interest. Even though the negligence causes of action in Baldwin were not decided solely upon the issue of duty as they were in Bradshaw, it appears both decisions were grounded in public policy considerations, veiled only thinly by duty, foreseeability, or the two combined.

The Supreme Court of Utah expressly endorsed Bradshaw and Baldwin in its unanimous decision in Beach v. University of Utah, (1986). Beach, a 20-year old student, was severely injured during a geology field trip when she fell off a cliff at night while others slept. The faculty members in charge of the expedition knew she had been drinking before the accident and, in fact, had drunk alcohol themselves. The Utah Supreme Court held that neither the university nor the faculty members breached any tort duty by failing to supervise the student’s conduct, failing to enforce laws and school rules against underage drinking, or refraining from drinking themselves. The Court declared that colleges must not be saddled with unrealistic, unenforceable duties of supervision that undermine the educational goals of a college education:

It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students. Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education (Beach at 419).

These cases are forceful statements that colleges and universities have no general duty to supervise or control their student’s private conduct. They are subject to qualifications: the accidents occurred off-campus (raising no issue of the school’s
obligation to provide a reasonably safe campus); they did not involve curricular activities or social activities sponsored by the school itself; and each decision contained broad language that could be used to distinguish them in future cases. However, Bradshaw, Baldwin, and Beach stand as important precedents protecting colleges and universities from imposition of unrealistic duties or supervision.

Making the legal landscape even more confusing, some courts continued to apply a rule of in loco parentis while disclaiming the doctrine, as in the lower court decision in Whitlock v. University of Denver, (1985)\(^ {15} \). A majority of the appellate court upheld a jury award of $7.3 million to a student who injured himself jumping on a trampoline located prominently in his fraternity’s front yard following a night of heavy drinking. In affirming the school’s liability for failing to prohibit or to supervise such trampoline jumping, the appellate court purported to balance the burden of preventing the injury, the consequences of imposing such a duty on the school, and the social utility of the plaintiff’s conduct. It disclaimed any intention to apply in loco parentis liability.

It is noteworthy that the Whitlock majority performed no balancing test nor took any account of the impracticability and dubious social utility of requiring the school to supervise fraternity members’ private conduct. While the decision was reversed by the Colorado Supreme Court, Whitlock reminds us that tort law sometimes threatens to impose virtually absolute liability on bystanders whose only fault is their apparent ability to compensate for a grave injury. Other cases won by colleges and universities have come close to establishing sweeping tort liability for failing to control conduct in

\(^{15}\text{Whitlock is particularly important because the lower court found in favor of the student. It was not until the Colorado Supreme reversed did the university prevail.}\)
other contexts. Decisions in the early 1990s continued to reflect appreciation of the impracticability of reimposing a heightened standard of care on colleges and universities. In Tanja H. v. Regents of the Univ. of Cal., (1991) a female student brought suit after she was raped in a university dormitory by four football players, all of whom were underage and had been drinking at a dormitory party. In its decision refusing to find the university owed a duty to prevent the attack, the court stressed that the imposition of liability on the university for alcohol-induced student behavior would pose a serious threat to student freedoms. The court held “college students are generally young adults who do not always have a mature understanding of their own limitations or the dangers posed by alcohol and violence. However, the courts have not been willing to require college administrators to reinstate curfews, bed checks, dormitory searches, hall monitors, chaperons, and the other concomitant measures which would be

16 In one recent case, an intermediate New Jersey appellate court upheld a jury’s verdict for a university and against a student who fell from an upper tier at the school’s stadium during a football game. In Allen v. Rutgers Univ., 523 A.2d 262 (N.J. Super. App. 1987). The court reasoned that the jury was entitled to find that the student had himself been contributorily negligent by becoming severely intoxicated. The case qualifies as a near-miss however, because the trial court also submitted to the jury the question whether the university had been negligent for failing to enforce its rule against use of alcohol within the stadium.

17 See, e.g., Sterner v. Wesley College, Inc., 747 F. Supp. 263 (D. Del. 1990) (no duty to protect student from death suffered from fire in dormitory started by intoxicated fellow student); Fox v. Board of Supervisors, 576 So. 2d 978 (La. 1991) (no duty to protect visitor from injuries resulting from party hosted by students); Crow v. State, 271 Cal. Rept. 349 (Cal. App. 3 Dist. 1990) (no duty to protect student from attack by another student who became intoxicated at dormitory party); Rabel v. Illinois Wesleyan University, 514 N.E.2d 552 (Ill. App. 1987) (no duty to protect student from injury suffered as result of alcohol-related hazing prank) (The university’s responsibility to its students, as an institution of higher learning, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students).
necessary in order to suppress the use of intoxicants and protect students from each other” (Tanja H. at 920).

Furek. the Crosscurrent View

In at least one case decided in the 1990s, the Delaware Supreme Court attacked the logic and result in Bradshaw and Beach and concluded that “even though the policy analysis of Bradshaw has been followed by numerous courts, the justification for following that decision has been seriously eroded by changing societal attitudes toward alcohol and hazing.” In Furek v. University of Delaware, (1991), the Delaware Supreme Court ordered a new trial after a trial judge overturned a jury verdict against a university charged with injuries suffered by a student during a hazing prank in a fraternity house located on university property. The Delaware Supreme Court questioned the view that colleges owe no duty of supervision because college students are “adults” when “in the area of activity that was the subject matter of the dispute, alcohol consumption, the students were unquestionably not deemed adults under the law since most, if not all, participants were below the drinking age.”

The decision in Furek also challenged the notion that “supervision is inversely related to the maturation of college students.” The court stressed that aside from the opinion in Bradshaw, no legal or other authority is cited for the assertion that supervision of potentially dangerous student activities would create an inhospitable environment or would be largely inconsistent with the objectives of college education. Despite distinguishing Bradshaw, the Furek court held that colleges do not possess a special relationship arising from a custodial power and duty to control and supervise students conduct. Rather, the court opined that in its capacity as landowner and
provider of security and other services to students including particularly its rules against hazing at fraternity houses located on university land, a jury should be permitted to decide whether the university unreasonably failed to regulate dangerous conduct in instances where it exercises control.

It is unclear whether Furek will remain the minority view or become the new trend in tort law increasing liability to colleges and universities for the conduct of their students. The court's finding of pervasive conduct appears to be the catalyst that led to allowing the jury to decide whether the university failed to enforce its own regulations regarding dangerous conduct occurring on its own property. The Furek case certainly imposes greater duties on colleges than Bradshaw, but perhaps the most important holding is that the jury should be allowed to decide whether the school failed to implement effectively the regulations it had promulgated.

**University as Landowner**

Universities may be susceptible to liability pursuant to a special relationship that can exist if the university is the owner of land (landlord) as described in Furek above. Baldwin attempted to establish a special relationship by alleging the university knew of the ongoing violation of rules and combined with a lack of supervision, created a dangerous condition on the premises which proximately resulted in Baldwin's injuries. Liability in cases where a landowner/invitee or landlord/tenant relationship exists may be predicated either upon the elements set forth in Section 314A or Section 343 of the Restatement (Second) of Torts, or upon case law of the jurisdiction at issue. A landlord generally is not responsible for activities of a tenant carried on after the property is transferred, subject to several important exceptions, such as for portions of the land...
remaining in the landlord's control. A landowner owes a duty to warn invitees of any
danger of which he knows and expects the invitees would not discover. By pleading a
dangerous condition on the premises, Baldwin hoped to fall within the rule of Stockwell
v. Board of Trustees of Leland Stanford Jr. University, (1944). Stockwell stands for the
position that it is a question of fact for the jury whether reasonable care had been used in
the maintenance of the premises where the plaintiff was injured by a shot in the eye
from a BB gun while walking on campus. The court in Hayes v. California, (1974)
however, refused to characterize third-party conduct as a dangerous condition absent
some concurrent contributing physical defect in the property itself.

The Baldwin court distinguished Stockwell on the basis of notice. In Stockwell,
the university had known for some time prior to the injury that pellet guns were being
discharged on university property, but the university had failed to protect invitees. The
Baldwin court reasoned the conduct of students, who were not known to possess violent
propensities and about whom the university had no reason to know would drink to
excess and then operate motor vehicles, “does not rise to the level of foreseeable harm
as does a case where a tenant has a known vicious dog or where he uses rented property
as a firing range” (Baldwin at 294). Perhaps the most revealing statement regarding the
basis of the court’s decision in Baldwin is the final paragraph of the opinion. There, the
court stated “This action is on the cutting edge of tort law. Cases such as Tarasoff v.
Regents of Univ. of Cal., (1974) have expanded the concept of duty. But imposition of
liability here would extend it one step further. We believe that the public policy
considerations discussed herein indicate that the step should not be taken” (Baldwin at
295).
Statutory Torts, Negligence *Per Se* and Social Host Liability

Liability for negligence *per se* in alcohol-related injuries is based upon a violation of an alcoholic beverage control regulation, licensing statute, or a criminal statute that prohibits serving alcoholic beverages to either underage or visibly intoxicated persons. The exact meaning and effect of "negligence *per se*" differs from jurisdiction to jurisdiction, and many states use the phrase to describe all situations where a statute affects a tort action (Forell, 1987). For example, a court may decide that a violation is negligence *per se* and then say that this means *inter alia*, negligence as a matter of law, prima facie evidence of negligence, or evidence of negligence.

In one state, Oregon, the doctrine of negligence *per se* does not create a cause of action. Rather, it refers to a standard of care that a law imposes within a cause of action for negligence (*Gattman v. Favro*, 1988). When a plaintiff is attempting to show that the violation of a governmental rule means the defendant did not meet the standard of care required, and the rule itself was not meant to create a civil cause of action — but does state the legal standard of conduct was such that no question of due care is left for the fact finder to determine — the violation will establish the lack of due care element as long as the statute seeks to prevent the same harm that in fact resulted.

Statutory social host liability exists in some states. Generally, liability for serving intoxicating liquor may be established under various statutes by showing that the defendant either (1) served the person alcohol while that person was visibly intoxicated, or (2) served a person who was under the legal drinking age. The crucial aspect of these statutes is that they are strict liability statutes. The risk, potential harm and foreseeability factors have all been resolved by the legislature as a matter of law;
therefore, a plaintiff need not resort to any concept of negligence. Negligence is immaterial. The only question is whether the defendant engaged in acts prohibited by the statute and whether the violation of the statute resulted in injury. Another important aspect of these statutes is that they apply to all servers of alcoholic beverages, be they licensee, permittee, or social host. This may be particularly important in the university setting since a potential plaintiff need not analogize the university to a business as in some negligence actions or adopt a standard of conduct from another statute as in negligence *per se* actions. Normally, these statutes are only applied to innocent third parties injured by the person to whom alcohol was served (*Miller v. City of Portland*, 1980).

Dramshop liability has been extended in some states to noncommercial or social hosts who serve alcoholic beverages to minors or intoxicated persons. Social host liability is the most recent and potentially greatest concern for colleges and universities for alcohol related injuries. The scope of social host liability varies from state to state. Even the state of Pennsylvania where the *Bradshaw* decision was rendered has issued more recent decisions suggesting *Bradshaw* might be decided differently today because of intervening changes in the state’s social host law (*Congini v. Portersville Value Co.*, 1983). In the 1990 decision of *Millard v. Osborne*, (1991), the court stated that a university might be liable as a social host if it “was involved in the planning of these events or the serving, supplying, or purchasing of liquor” (*Millard* at 718). However, the court declined to impose social host liability where the school did not actually furnish alcoholic beverages. The court refused to hold that a social host should be liable if it merely should have known of events at which alcohol would be furnished to minors.
The cases seem to reflect a resistance on the part of courts to extend social host liability to universities and colleges beyond a “knowingly furnished” standard as that would in essence be in loco parentis in disguise. For example, the Pennsylvania court in Millard declined to hold a college liable as social host or property owner for the death in a motorcycle accident of a first year student who had been drinking at a fraternity party held in violation of a number of the schools written policy rules on alcohol. The court determined that no representatives of the college were present when the decedent was drinking at the fraternity house, and it could not be shown that the college assisted in the purchase or distribution of the alcohol in any way.

A federal court in Booker v. Lehigh University, (1992), rejected the “social host” claim of a student who was injured in a fall after drinking heavily at on-campus parties conducted in violation of the school’s alcohol policy. The court said that social host liability should not be imposed on a university that did not “plan or control the parties ... supply any of the alcohol or even remotely assist in plaintiff’s underage drinking binge,”(Booker at 237) because a looser standard would be tantamount to reviving in loco parentis.

In the state of Washington, a court in Houck v. University of Washington, (1991) ruled that a university could not be held liable for failing to prevent a student from possessing and drinking alcohol in his dorm room, because the room (subject to students’ rights of privacy) cannot be “premises” under the control of the university for purposes of social host liability.

Louisiana is one state with statutory language directed at providers of alcohol. Maraist and Galligan (1996) suggest that a frequently litigated issue is the scope of the
duty of a person who provides alcohol to another. The question then becomes whether the provider has a duty to act to prevent the person served or sold alcohol from injuring himself or others (Bourgeois v. Puglisi, 1993; Hollis v. City of Baton Rouge, 1991). Some legislatures in other states have preempted the issue by enacting “dram shop” statutes, imposing liability upon vendors. While in other states, the common law imposes a duty upon the seller of alcohol, both to the patron and to third persons injured by the intoxicated patron (Ellis v. N.G.N. of Tampa, Inc., 1991; Brignic v. Velvet Dove Restaurant, Inc., 1986). Many jurisdictions stop at imposing liability on the non-commercial providers, i.e. the “social host,” who generally have less power to monitor the guest’s consumption and are in a poorer position to spread the risk (Hollis v. City of Baton Rouge, 1991).

The Louisiana legislature partially resolved the issue of liability for providing alcoholic beverages. Louisiana. Revised Statute 9:2800.1 provides that the consumption (rather than sale, service or distribution) of alcoholic beverages is the proximate cause of any injury. The Louisiana statute provides that anyone who holds a permit to and sells or serves intoxicating beverages to a person of legal age to consume alcohol, is not liable to that person or to any other person injured by that person because of his or her intoxication. The statute also provides a similar immunity to a social host or to a host who owns property where alcohol is served in his absence

\footnote{La. Rev. Stat. 9:2800.1(B) (1991).}
and without his consent.\textsuperscript{21} The statute further states that (1) the insurer of an intoxicated person is primarily liable with respect to damages incurred and (2) the limitation of liability provided by the statute does not apply to anyone who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.\textsuperscript{22}

It is uncertain whether the Louisiana statute applies to the sale or furnishing of alcoholic beverages to persons under the legal drinking age. Perhaps the general provision that the consumption is the proximate cause may protect the seller or provider from such liability; however, the absence of a specific exemption, the limitation of the special sale and service sections to non-minors, and the obvious policy reasons for discouraging adults from providing alcohol to minors may lead to a finding of liability upon the seller and, perhaps the provider, both to a minor and a third person injured by the intoxicated minor's subsequent actions.\textsuperscript{23} In the pre La. Rev. Stat. 9:2800.1 case of Gresham \textit{v.} Davenport (1989), the Louisiana Supreme Court refused to impose absolute liability upon one who served alcohol to a minor. The court assumed that a minor may owe a duty not to serve alcohol to another minor, but the court ruled that breach of such a duty would not include the risk that the minor drinker, a passenger, would grab the

\textsuperscript{21}La. Rev. Stat. 9:2800.1(C) (1991); \textit{Vaughn v. Hair}, 645 So.2d 1177 (La. App. 3d Cir. 1994), writ denied, 650 So.2d 1186 (1995)(an employer that allows its employees to consume alcoholic beverages on its premises after they finish working for the day is a "social host" entitled to the protection of the statute).

\textsuperscript{22}La. Rev. Stat. 9:2800.1(D).

\textsuperscript{23}Honkins \textit{v.} Sovereign Fire \& Cas. Ins. Co., 626 So.2d 880 (La. App. 3d Cir.),writ denied, 634 So.2d 390 (1994), holding La. Rev. Stat. 9:2800.1 does not protect those providing alcohol to minors from liability to the minors and certain third party victims.
steering wheel of a car he thought was about to hit a mailbox and thus cause an accident that killed and injured other passengers in the car.

The Rights and Responsibilities of the Modern University

Robert Bickel, a university attorney with over twenty years of teaching education law, teamed with Peter Lake, a tort law professor to examine the body of texts, case law and commentary and authored a book that attempts to define the joint responsibility of the university, its students and to some extent parents, regarding the safety and quality of college life. Bickel and Lake (1999) provided an excellent discussion of the various eras of university law including a description of the courts approach to student alcohol related injuries. Bickel and Lake (1999) focused on three eras that are important for understanding the direction courts have followed when assessing liability for alcohol related injuries in the university context. The eras include in loco parentis and legal insularity, the bystander “duty”/ “no duty” era, and the duty era.

In Loco Parentis and Legal Insularity

In loco parentis although previously addressed above, needs to be touched on here for continuity. Bickel and Lake (1999) opined that in loco parentis promoted the image of the parental university and suggested that most problems were handled within the university, by the university and often quietly. Universities were grouped with other major social institutions such as government, family, churches and charitable organizations and provided with a certain insularity from the courts and law itself. Many areas of human activity at this time, prior to 1960, existed free from legal scrutiny. The courts favored universities very heavily and they won most cases. Basically, the courts did not scrutinize the activities of universities. Bickel and Lake
(1999) suggest however, that while *in loco parentis* was the most prominent feature of
the law in this period and should be remembered as such, the legal rules of *in loco
parentis* were just a feature of an overall system protecting colleges. Courts protected
universities by drawing upon a variety of legal paradigms from other recognized areas
of insularity. Universities were viewed as part family, part charity, part government,
part public and part private. However, as time progressed, the notions of insularity were
attacked. First on civil rights grounds and that layer of insularity was removed by the
courts. Later the layer of insularity for tort claims was removed. The fall of insularity
happened quickly. The story of *in loco parentis* became one of the rise and decline of
insularity from legal responsibility and the rise of justifiability of university life.
Universities, like other social institutions, have increasingly been asked to come to the
legal system and explain their conduct. The fall of *in loco parentis* led to the next era
referred to as the “bystander” era.

**Bystander Era**

In the 1970s and 1980s courts ceased relying on the concept of *in loco parentis*
and started approaching lawsuits using the legal analytical tools of “duty” and “no
duty.” Bickel and Lake (1999) rely on four alcohol related cases to support their theory
that courts in this period portrayed universities in the role of helpless “bystander” to
student life and danger. In the role of bystanders, colleges had no legal duties to
students; thus, they were not legally responsible for harm to students. The courts used
the death of *in loco parentis* to determine that universities could not control student
actions and were therefore not responsible when bad things occurred.
The four cases of Bradshaw, Baldwin, Beach and Rabel utilized by Bickel and Lake have been discussed above and will only be briefly discussed here. The Bradshaw facts portrayed a system of alcohol use broken or besieged at every point. Underage students were led to irresponsible, unlawful drinking and the inevitable drive home from an off-campus party. Beach involved an underage freshman biology student rendered quadriplegic during a required field trip that was supervised by a professor. The professor and the underage students consumed alcohol at a lamb roast and later at the campsite. Beach got lost and fell into a ravine. Modern universities conduct numerous field trips, externships and study abroad programs as an integral part of courses and summer programs. The Beach scenario could occur again at any time. Beach, like Bradshaw, involves the deliberate use and abuse of alcohol and the difficulties of monitoring and facilitating students’ alcohol use by university officials.

Baldwin involved a student injured in a car wreck that was the product of a speeding contest that was the end result of underage drinking at a university dormitory. The students were underage, yet had consumed alcohol on campus in violation of university rules prohibiting their alcohol use and in violation of California law (Baldwin at 812). In Baldwin the university not only failed to enforce anti-drinking rules on the night of the race, but generally looked the other way regarding on-campus drinking in its dormitories. The culture was one where rules and catalogs conveyed the image of regulated liquor consumption but in reality just the opposite was the case. Finally, Rabel involved a young female student who was injured when a male student, involved in a fraternity activity after a liquor friendly party, abducted her and then ran a gauntlet of fraternity brothers who struck him as he passed. The student fell while running
through the gauntlet causing Rabel’s skull to be crushed and inflicted life-altering head injuries to her.

In each of the above cases, the courts found the university was not legally responsible because there was no legal duty. The effect of using a “no duty” benchmark was creation of a new university immunity. The bystander courts according to Bickel and Lake (1999), chose not to see the university as a place of ordinary duty, ordinary risks and responsibility, but rather as unusual places where no duty or only special duty, if any, was owed. Basically, universities had no affirmative duty to protect their students from student-created injuries, particularly those involving alcohol. In other words, courts were telling universities do not cause harm, do not get involved, do not worry, be a bystander.

The Duty Era

Bickel and Lake (1999) suggest that the late 1980s through the 1990s have seen a steady erosion of no-duty-to-student bystander case law and the rise of successful student litigation regarding physical safety on campus. However, the trend has not necessarily included liability in alcohol related cases for a number of reasons. The new image suggested by Bickel and Lake (1999) views the relationship between student and university as one of shared responsibility and a balancing of university authority and student freedom. Duty is the method of monitoring the balance.

Courts are cognizant of the need to place some responsibility for student injury on the heads of students themselves. Courts are sensitive to the burdens that a university might otherwise face and to the almost infinite ways in which college students can get hurt. Some courts today are utilizing a new approach that analyzes the
university's potential failure to bring a risk to the attention of students or take other reasonable steps to minimize the risk of injury.

The case most noteworthy as signaling the beginning of the end of the bystander era is *Furek v. University of Delaware* (1991) discussed earlier. *Furek* consisted of a hazing incident involving alcohol use. A number of events transpired to lead the court away from the bystander era. First, the university had a policy against hazing, but it was not properly implemented. The campus police were not properly instructed concerning the university's policy. There were formal policy statements and announcements regarding fraternity-related disorder and danger, but the court found there was an insufficient plan of implementation. The court determined that the university guided many aspects of student life including housing, food, security, extracurricular activities and student life. Further, the court stated students are not solely responsible for their safety simply because they are adults. Finally, the court held the fact that students may be adults did not make university concerns and efforts related to student alcohol use inappropriate. Basically, *Furek* established that universities, when starting something must finish it properly when people (mainly students) have come to rely on what you have started. The duty of *Furek* was only that of reasonable care.

The imposition of reasonable care as suggested by *Furek* is still somewhat at odds with the four no-duty era cases which were alcohol-related. Even under Bickel and Lake's duty era theory, cases involving beer and liquor tend to weigh substantially towards no college liability. The basis for this trend is found in cases like *Beach*, *Baldwin* and *Rabel* that basically held students assumed the risks of alcohol use—on campus, off campus and even the risks of other students drinking. Also, the courts
noted the sense of futility of curtailing drinking by college students. Bickel and Lake (1999) suggest several trends are worth reviewing in determining the future era of alcohol related injuries and campus liability. Public policy regarding alcohol use and abuse by college students is under review as discussed in the Delaware Model section. Basically, social mores about drinking and liability may be shifting and with that shift may come tort law revisions. Further there appears to be a sense of urgency about liquor problems on campus and efforts to address them are being implemented by a number of universities. Finally, the attitude that all students, drinkers and non-drinkers assume the general risks of alcohol use appears to be waning and perhaps it is foreseeable that students are not solely responsible for alcohol-related injuries. The rules of duty may be changing. In fact, a recent decision issued by the Nebraska Supreme Court after Bickel and Lake (1999) published their book, held the University of Nebraska had a duty to protect a fraternity pledge who was injured while trying to escape a hazing incident. The lower courts had held the university owed no duty to the pledge. The pledge was handcuffed to a radiator and forced to consume massive amounts of alcohol. In an effort to escape, the pledge fell while sliding down a drainpipe and suffered head injuries. The court similar to Furek, found the university had been aware of criminal conduct involving members of the fraternity prior to the incident. The court determined the university was obligated to take reasonable steps to protect against foreseeable acts of hazing. The court did not decide whether the university breached its duty to protect or if a breach was the cause of the injuries. That

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24Leo Reisberg, "Court says U. of Nebraska had duty to protect pledge from hazing," The Chronicle of Higher Education. November 12, 1999, p. A55.
decision must await a full trial. It is noteworthy that the allegations suggested the university failed to enforce prohibitions against hazing, alcohol consumption, and physically abusive behavior.

Fraternity Facilities and Functions

In general, attempts to hold universities liable for injuries suffered at the hands of fraternity chapters have met with failure. As discussed previously, Bradshaw has stood for the position that colleges and universities neither function as insurers of student safety nor generally stand in a special relationship with students. However, efforts continue to reverse Bradshaw and revert to the doctrine of in loco parentis.

The decision in Furek represents the effort toward resurgence of in loco parentis. The facts in Furek reveal the plaintiff, a fraternity pledge, suffered first-and second-degree burns when a fraternity member poured oven cleaner on his head and back (albeit by mistake) during hell night activities. The fraternity mandated attendance at the secret hell night for all pledges as a condition to their acceptance as members of the fraternity. The fraternity house was located on premises owned by the university. Furek sued the local chapter, the national fraternity and the member who poured the oven cleaner and the university. Originally, the verdict apportioned liability against the university at 93% and the active at 7%. On appeal, the Delaware Supreme Court agreed that the national fraternity was not liable because it did not exercise day to day control over the local chapter activities and believed its anti-hazing regulations were being observed by the local chapter. The university was found liable based on its adopted policy against hazing which convinced the court that the university had assumed a duty to prevent hazing-related injuries. Unlike past decisions, the Furek court refused to hold
the absolute position that a university has no duty to protect a student from harm. The court did however, decline to award punitive damages because the same university anti-hazing policy that the court relied on to find liability against the university saved it from punitive damages. The court noted the policy was well intentioned and not characterized by a conscious disregard of a known risk. Of course, the court's holding that the university assumed a duty merely because it adopted a policy discourages universities from adopting future such policies which would not be in the best interests of students in general.

As noted earlier, the Furek decision is the minority view. The majority of the cases uphold the university's power to regulate the conduct and content of chapter social functions amid simultaneous disclaimers of liability by use of boilerplate terms and lax enforcement. In Millard v. Osborne, (1992), an 18-year-old student died in a traffic accident after drinking from a keg at a fraternity house (leased from the college). The chapter which had complied with the college's alcohol policy requiring registration, tapped the keg prior to its scheduled commencement. The allegations against the college included a claim that its policy shortcomings and administrative inadequacies contributed to the availability of alcohol. The facts revealed the college enforced its policies, at least on a partial basis, but most importantly the policy's language deferring responsibility to student hosts sufficed to relieve the college of liability.

In Booker v. Lehigh University, (1992) a 19-year-old female student attended four different fraternity parties and then tried to climb a steep trail home, but fell and suffered a cranial hematoma and other injuries. The court framed the issue as whether a university may be held liable to an underage student when due to her own efforts she
becomes intoxicated at an on-campus fraternity party and suffers injuries. The court concluded that the institution's social policy created no special relationship for liability to attach. Lehigh's policy placed the responsibility to prevent underage drinking on the host. The court basically upheld Lehigh's disclaimers of responsibility found in its policy.

Whitlock, another case reviewed earlier, involved a fraternity member, who while intoxicated, was seriously injured jumping on a trampoline owned by the fraternity and located on premises it leased from the university. The appellate court reversed a judgment entered by the judge and reinstated a jury's award of $7.3 million finding the university owed the fraternity member a duty to remove or supervise the trampoline. The Colorado Supreme Court disagreed and reversed thereby relieving the university of liability. The plaintiff alleged a negligent failure to act, rather than the commission of a negligent act. The court's decision reviewed past case law regarding university liability for student injuries and concluded that there were no grounds for an expectation or extension of a duty based on the school's very limited actions governing student recreation. Additionally, the university as property owner was not liable because the university created no covenants nor reserved any right to control the activities of either the fraternity or the member.

Millard, Booker, and Whitlock as opposed to Furek, hold that a university is not liable for leaving students to their own activities. In a university setting, universities grant students independence and autonomy in social and recreational choices and correspondingly, courts tend not to recognize students claims for liability which result from the alleged negligent failure to act or regulate on the part of the university.
especially when the student voluntarily chooses to engage in dangerous pastimes.

The imposition of liability for providing alcohol is a concern all universities should take notice of in preparing its campus alcohol policy. Since the demise of the *in loco parentis* doctrine and the campus revolution of the 1960's, the extent to which a university can, or should interfere in the lives of its students has been in question. Meanwhile, America seems to have reached a crossroads in its attitude towards drinking, and most definitely in its attitude towards drinking and driving. At the same time, America's young adults attending college are too young to legally drink alcohol, but at the same time too old to be controlled as children by their university administrators. As a result, the media and the public have gone on a crusade to get the drunk driver off the road, while the young who represent the portion of the population most endangered by the drunk driver, have continued the binge.

The role of the university in this conundrum — and the question of its liability to its students and to third parties injured by the students after they have been imbibed at university connected events — is a question with no easy answer that suggests an appropriate field of research.

The literature review suggests that the policy of exonerating the university from any liability to its students illustrated by Bradshaw, may be the easy way for taxpayers as well as insurance consumers, but the easy way has not reduced the alcohol-related deaths, injuries and problems experienced by universities. Ultimately, there may be no choice but to make the universities a source of prevention of alcohol abuse through supervision, education and, when necessary, discipline. In fact, the final section of this literature review is devoted to outlining just such a project which has gained momentum.
over the past few years and may have new and additional legal implications for universities. The final section of this literature review will describe the alcohol policy implemented by the University of Delaware including a review of its goals and objectives. It is the interaction of this renewed emphasis for alcohol control on campus with torts law that will be addressed later.

The Delaware Model

In 1999, Timothy F. Brooks, Asst. Vice President and Dean of Students at the University of Delaware presented a paper on "The Delaware Plan." A Compilation of Information Concerning the University of Delaware: Efforts to Curb Binge and Abusive Drinking Among Students" at the Stetson University College of Law 20th Annual Law and Higher Education Conference. Brooks provided information regarding Delaware's anti-binging efforts. In 1992 the University of Delaware conducted a CORE survey on campus. Over 60% of the students who responded to the survey indicated they were binge drinkers. Binge drinking was defined as the consumption of five or more alcoholic beverages at one time, in one sitting.

The University of Delaware attempted to address the reported problems through education programs in the residence halls, enhanced mandated alcohol education programs assigned as a result of disciplinary action and initiated a grant proposal designed to seek support from more aggressive efforts to curb alcohol abuse among students.

In 1996, the University of Delaware received the grant it sought from the Robert Wood Johnston Foundation. The grant was designed to develop a number of different and cooperative approaches to reduce binge drinking on campus. One idea was to
enhance the present judicial system to address the alcohol abuse problem. Accordingly, the University of Delaware published and enforced stiffer penalties for the illegal use of alcohol and revised its judicial process utilizing advanced technology to speed up disciplinary referral and the adjudication process.

The University developed a “three strikes and you’re out” rule. Some of the penalties for alcohol violations include parental notification, fines, substance abuse referrals and suspension. The University utilized the “dependency” loophole in Family Educational Rights and Privacy Act (“FERPA”), often referred to as the “Buckley Amendment” to notify parents of judicial action. The loophole allows parents, who claim students as dependents on their income taxes, to obtain student educational records, including discipline records, from institutions of higher education. The university also established objectives designed to curb binge drinking. These objectives included a very strict evaluation system for fraternities and sororities and provisions for proposed legislative changes in the area of social host and dram shop laws.

The University of Delaware has reported numerous positive changes in the University environment. A number of other universities have obtained grants from the Robert Wood Johnson Foundation program and have begun implementing significant changes. It is unclear at this time what legal impact these changes may have on a university’s potential liability for alcohol related injuries. The purpose of this study is to analyze the proposed changes in light of the old and recent jurisprudence to provide a

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25 20 U.S.C. Sec. 1232g.

26 Louisiana State University, Colorado University at Boulder, Georgia Institute of Technology, Lehigh University, University of Vermont, University of Iowa, Florida State University and the University of Nebraska at Lincoln.
better understanding of the effect of torts law on university policy making, particularly as it relates to campus alcohol policies.
CHAPTER 3
METHODOLOGY

The methodology adopted for this study follows a two prong approach. One prong will utilize qualitative methods including interviews of student affairs administrators and the other will utilize the traditional methodology of legal research. The legal methodology will be described first, followed by the qualitative research method.

Legal research is subject to the same general requirements as other forms of research. The task is to summarize pertinent findings, to trace further legal developments through related court decisions, and finally to analyze the decisions in the light of the problem under investigation (Mouly, 1997). The methodology of educational legal research differs from traditional qualitative research (McMillan & Schumacher, 1989).

In studying a legal issue, the researcher, where appropriate, first analyzes controlling statutes and where applicable, federal and state constitutions. Following that procedure, a list of court cases is compiled through the use of legal finding tools, including computer data banks. Each of these court decisions is read and analyzed, a process that allows the researcher to proceed systematically in the case-by-case analysis. The final step of the first phase of legal research is often a synthesis of selected cases (McMillan and Schumacher, 1989).

The second phase in studying a legal issue occurs after one has analyzed the relevant statutes and court decisions, and the researcher then examines secondary sources including legal periodicals and legal encyclopedias. After synthesizing both
primary and secondary sources, the analyst should be able to state a definitive position on the given legal issue.

This particular study primarily concerns state statutes and case law and will chart the judicial and legislative development of university liability for alcohol related injuries. Concentrating upon the progression of case law concerning higher education issues, evaluation will be made of cases from settings outside higher education in which similarities within cases led judges to refer to them as controlling. Understanding the role of the courts and their hierarchy is necessary to apply appropriate weight to the dicta and holdings of relevant cases to the evolution of the legal concepts.

Since the beginning of higher education until the middle of the twentieth century, courts have given great deference to the regulation and control of institutions by administrators and faculty members. Generally, the judiciary considered attendance in higher education institutions a privilege; thus courts tended to hold that administrators controlled the institution and determined actions that were in the students' best interest.

For purposes of this research, the hierarchy of the court system is important to determine the weight accorded to the decisions. Most states have court systems that mirror the system created by the Great Judiciary Act of September 24, 1789. The first Congress empowered by Article III, established the federal trial courts with three levels: (1) District Courts; (2) Courts of Appeal; and (3) The United States Supreme Court. Most states have similar levels.

The reported case law of the United States Supreme Court is central to any legal issue on which the Court has expressed an opinion. Reviews of federal appellate and district court decisions are important to explain the application of Supreme Court
decisions and the evaluation of legal principals. Reported cases of state supreme court
decisions are important for their states. Note, most state court decisions are not binding
outside the state where the decision was rendered; however, the reasoning may be
persuasive in deciding a case in another state. The subject of this research has not been
directly reviewed by the United States Supreme Court; thus no supreme rule of law has
been issued on this subject.

Sources of Law

Primary Sources

Understanding the role of courts within the legal system requires legal research
involving numerous methods and sources. Two general areas of sources exist in law.
First are the primary sources which include constitutions (both federal and state),
statutes and reported case holdings (Kunz, 1989). A hierarchy exists within primary
sources; constitutions are the highest order and case holdings the lowest.

Court decisions or holdings in case law comprise the classification of common
law. Holdings perform three functions; they answer questions that are not answered by
statutes, they interpret statutes, and they may hold statutes or actions to be
unconstitutional. Of note here is the obiter dicta of an opinion. Commonly referred to
as dicta, these are the statements and commentary by the court that are not necessary to
the decision. Although dicta is not a part of the court’s official opinion, dicta is often
given consideration because of its persuasive value, particularly if it is given by a
prestigious jurist.

Court decisions are a major source of material for this research, along with
statutes. In legal research, court decisions are considered “primary authority” and are
therefore "mandatory and persuasive." Other primary sources are the United States Constitution and state constitutions although they will not be extensively discussed because they are not directly relevant to the questions researched.

**Secondary Sources**

Secondary sources comprise the second main body of legal sources, which are for persuasive purposes only. Some secondary sources include dictionaries, treatises, encyclopedias, legal periodicals, the American Law Reporter annotations and loose-leaf services. Annotations such as the American Law Reporter (A.L.R.), were created when legal publishers selected "leading cases" for full-text publication, and provided commentaries or annotations, which described other cases with similar facts, holdings or procedures. The A.L.R. is an early set of annotated reporters that is currently published in two series: ALR5th for general state legal issues and ALR Federal for issues of federal law (Cohen and Olson, 1992). Loose-leaf services provide access to cases faster than bound reporters. In loose-leaf form, publishers reproduce official slip opinions without adding headings and mail them to subscribers the day after they are announced by the court.

Additional finding tools include Shepard's Citations and digests. Digests are legal publications that reprint in "subject arrangement" the headnote\(^{27}\) summaries of each case's points of law. The summaries are grouped under alphabetically arranged topics and then organized into numerical subdivisions within each topic. Digests allow researchers to scan summaries of numerous cases on similar legal issues.

\(^{27}\)Headnotes summarize the points of law discussed in a case with digest classification numbers for easier reference.

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Sheppard's Citations is used to update American case law. The body of published American case law contains many decisions which have long since been overruled or limited to specific facts. Before relying on a case, a researcher must verify its current validity. Sheppard's Citations is the tool most utilized. Sheppard's Citations verifies the current status of cases and lists virtually every subsequent case citing the decision at issue. Sheppard's Citations allows a researcher to trace the development of a legal doctrine from the time a known case was decided to the present. Sheppardizing as this updating is called, accomplishes the following purposes:

1. Tracing a case's judicial history by providing parallel citations for the decision and references to other proceedings in the same case.
2. Verifying the current status of a case to determine whether it is still good law or has been overruled, limited or otherwise diminished.
3. Providing research leads to later citing cases, as well as periodical articles, ALR annotations and other sources.

Legal periodicals are also important secondary sources of law. Legal periodicals are among the most highly influential secondary sources in American law. Some articles have led directly to major changes in legal doctrine. The most serious and highly reputed legal periodicals are the academic law reviews produced at the major American law schools. Other sources of periodicals include specialized academic journals and legal newsletters. All named secondary sources, finding tools, and several computer search services including ERIC and Westlaw were reviewed and used to support this research.
Data Sources

For this study, a search of appropriate federal and state decisions, was conducted through a number of research procedures, including the descriptive word method, the topic method, and the table of cases method. Relevant cases were most often located in the United States Reports, if they reach the United States Supreme Court level. Shepard’s Citations were used to determine the current validity and case history of relevant cases. Federal legislation was reviewed in the United States Code (U.S.C.), the United States Code Annotated (U.S.C.A.), and the United States Code Service (U.S.C.S.). State legislation was reviewed in the appropriate state service.

Finding tools include commentary cited in the Index to Legal Periodicals, the legal encyclopedias of American Jurisprudence and Corpus Juris Secundum, and all appropriate digests. In addition to traditional legal research tools, other resources were identified through the computerized data bases finding tools of ERIC, and WESTLAW. Finally, general information on alcohol policies and current efforts to regulate were obtained from newspaper articles and university websites.

The appropriateness of each source was reviewed to determined its value. Distinguishing cases and secondary sources will follow traditional legal research methods. The initial process included consideration of: the parties, the location and subject matter, the legal theories argued, the relief sought and the court’s holding. Second, consideration was given to the courts’ discussions of their decisions and their dicta, particularly where higher education institutional policies and practices are addressed directly. Relevant connections in holdings were identified through dicta and secondary sources to detect any consistent principles. Observed principles were then
applied to subsequent cases to examine the degree, if any, that there is consistency of application by the courts.

Legal Process

Generally, for an opinion to reach a level within the court system to be reported, the appellant (the dissatisfied party) must have proved in the documents of appeal and in argument, that error was committed at the trial level. The error that occurred had to satisfy the appellate court that it was of the type that required review of the lower court’s decision. Often, the higher court (except in Louisiana) will not review factual determinations of the lower court but will limit their review to errors concerning issues of law.

Two levels of appeal are available in the federal courts and in most state judicial systems. The first level of appeal is usually an intermediate court that has mandatory jurisdiction, requiring the court hear the appeal. Some systems do not have mandatory appeals; thus, the appellate court has the discretion to review cases. Appeals from the intermediate level sometimes are presented to courts that possess discretionary review, which means the courts have the authority to deny review of appeals. If the court (with discretionary jurisdiction) decides to hear the case, the case is then treated procedurally as though there was mandatory jurisdiction.

An appellate court may rule in several ways. Most often, the court will affirm or overrule the lower court’s decision, which may be done in part or in whole. However, the decision may be to remand the case, or portions of it, to a lower court for further proceeding. Not all final decisions of appellate courts result in reported decisions, although many cases are reported annually. This research was limited primarily to those
cases that are reported and serve as precedent unless and until they are overturned by a subsequent court. This research also noted some pending cases that have been discussed in various media publications.

Conceptual Framework

“Legal research is as much an art as it is a science. There are as many approaches to legal research as there are problems to be solved . . . . Each researcher must develop a system which best suits his or her needs” (Jacobstein and Mersky, 1981). The general conceptual framework for this research, Levi’s (1949) Basic pattern of legal reasoning, is dependent upon the doctrine of precedent. Therefore, conclusions on the law, as it presently stands, will depend upon the past decisions of a court in a given jurisdiction (Casad, 1976).

In legal research, each court case in which a decision is rendered serves a dual purpose. First, the case resolves the controversy brought by the parties because of the particular facts at issue. Additionally, it sets a precedent for future cases that arise with similar facts and legal issues. As a result, the holdings become what attorneys call res judicata for the parties and stare decisis for future cases. Res judicata is a legal doctrine that refers to the finality of a court’s disposition of a legal issue, and particularly, its conclusiveness in terms of deciding the rights of parties who come before it.

Stare decisis, when translated from Latin, means “to abide by, or adhere to, decided cases” (Black’s Law Dictionary 1990) or in other words, to follow the precedent drawn from the previously stated principles of law of past reported cases. Stare decisis, that is, law based on previous decisions forms the basis of common-law decisions that define the essence common-law. The purposes for the doctrine of

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precedent were discussed by Karl Llewellyn. Llewellyn suggested that the doctrine of *stare decisis* is based upon:

\[ \ldots \text{Laziness as to the reworking of a problem once solved; the time and energy saved by routine, especially under any pressure of business; the values of routine as a curb on arbitrariness and as a prop of weakness, inexperience and instability; the social values of predictability; the power of whatever exists to produce expectations and the power of expectation to become normative \ldots that curious, almost universal sense of justice that all men are properly to be treated alike in like circumstances (Cohen 1985).} \]

Previously reported case law, therefore, is of great value to determine the development of the legal concepts and legal principals created by the courts in deciding tort law cases. To identify the appropriate reported holdings, Levi’s (1949) “steps of precedent will be used as a guide to trace cases that may be identified within the line of precedent for this research. They are:

1. similarity as seen between cases;
2. the rule of law inherent in the first case is announced;
3. then the rule of law is made applicable in the second case.

Lack of pure consistency within case precedent is inherent in tracing court decisions; however, inconsistency is not a weakness within legal research. Moreover, the variance in court holdings has been noted as a necessity within the legal process, including the application and interpretation of statutes and the Constitution. Inconsistency assures that both sides of a controversy may be argued before a tribunal. Inconsistency in precedent allows common law to be changed as the common ideas of society vary (Levi 1949).

Justice Cardozo (1924) addressed this contradictory aspect of law by expressing that: “...law, like other branches of social science must be satisfied to test the validity of
its conclusions by the logic of probabilities rather than the logic of certainty. When there is such a degree of probability as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law, though the judgment has not yet been rendered, and though, conceivably, when rendered it may disappoint our expectation.”

Reasoning

Traditionally, the common law reasoning by courts that establishes precedent has been considered founded in inductive reasoning. Levi has argued that this proposition is correct, but only partially. Levi agreed that courts tend to consider the particular facts of a case and then espouse a conclusion that is to be made applicable to future similar cases. However, when a court applies the definition of a specific term, then the court applies the general to the specific set of facts before it. Therefore, the decision is partially reached through deductive reasoning.

This research effort applied reasoning similar to the courts’ consideration of reported precedent, with inductive and deductive approaches. It extracted consistency in development of judicial interpretation of university liability for alcohol related injuries and identify any consistent legal principals that recur in higher education cases. Findings from the review were synthesized to identify implications for institutional policy and practice. Finally, all cases were shepardized to determine if they have been overruled or if they were still valid law.

Data Organization

Data was presented chronologically when possible but also was presented by cause-of-action. This method of presentation illustrates the evolution of university
liability, legal principles and reasoning, and the critical commentary concerning university liability for alcohol related injuries.

Data Analysis

Federal and state legislation were reviewed to identify the existing legal provisions contributing to the evolution of law relevant to alcohol related liability of higher education institutions. Each court decision was analyzed to identify legal principles and precedents established concerning liability for alcohol related injuries by higher education institutions. Critical legal commentary was reviewed for clarification of legal principles and corroboration of court findings concerning higher education liability for alcohol related injuries. Additional relevant material indicated by data sources was also reviewed. A final analysis was conducted to answer the questions posed utilizing the conceptual framework of tort law.

Synthesis

A legal analysis of the relevant cases was completed. Then a summary analysis was used to integrate the results of the legal research. This analysis provided an explanation of how the law concerning university liability for alcohol related injuries evolved.

The syntheses of the findings of the analyses provided a full understanding of how and why the legal concept of university liability for alcohol related injuries evolved. The outcome will provide higher education administrators with a framework for understanding university liability for alcohol related injuries and assist them in formulating appropriate campus alcohol-use policies.

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Standards of Adequacy for Legal Research

The criteria for judging legal research differ from those used in other types of research. A specific concern of legal research is the criticism of sources (McMillan and Schumacher, 1989). Internal criticism of sources was used to determine the credibility of stated facts concerns the accuracy and trustworthiness of stated facts. This research addressed trustworthiness through the evaluation of statements made by parties in court cases in terms of chronological and geographical proximity to events, competence, bias, and the conditions under which the statements were made. Accuracy of facts were addressed by considering common knowledge, motivation of concerned parties, and agreement with other known facts (McMillan and Schumacher, 1989).

Other criteria for judging the adequacy of legal research included a clearly stated legal issue or topic with a defined scope or limitations, logical organization of commentary, appropriate selection of sources for legal topics under consideration, unbiased treatment of topics, and logical relation of conclusions to analysis (McMillan and Schumacher, 1989). These issues were addressed in Chapter I as well.

Another issue in evaluating legal research concerns the stated objective of legal research, “understanding the law at the point in time” (McMillan and Schumacher, 1989). This issue was addressed by providing a distinct time frame for this study. Therefore, a limitation was established for considering relevant case law and legislation, excluding background information, from 1960 through 2000.

A final step in validating the legal research involved presenting the research to selected legal readers. The external readers provided corroboration and clarification of interpretations of legal principles presented in this study. Three respected jurist were
requested to read and criticize this research and analysis. First Magistrate Judge Pamela A. Tynes, of the United States District Court for the Western District of Louisiana reviewed the research. Magistrate Judge Tynes handles numerous tort law cases and has experience applying both federal and state law to tort facts. Second, United States Fifth Circuit Court of Appeals Judge John M Duhe, Jr. reviewed the research. Judge Duhe has served as a state district judge, a federal district judge and as a federal appellate judge and has experience applying both federal and state tort law at the trial level as well as appellate review of tort law from federal district courts located in Texas Mississippi and Louisiana. Finally, John Bivins, a senior partner in the law firm of Roy, Bivins, Judice & Henke reviewed the research. Mr. Bivins has practiced law for over 30 years and handled thousands of tort cases in both federal and state courts. These jurists provided comments on the research and provided additional validation of the research.

Definitions

Unless indicated otherwise within the text, definitions of legal terms as used in this research are from Black’s Law Dictionary (1990) Appendix “B” contains a list of legal definitions utilized in this proposal.

Student Affairs Administrators Interviews

A second purpose of this study was to investigate the influences that guided student affairs administrators in the adoption of their contemporary campus alcohol use policies. It was hoped that this investigation would contribution to what is known about the influence of tort liability on decision-making by those in policy making positions. Student affairs administrators were chosen for the interviews based on the belief that
student affairs administrators are intimately involved in both the policy aspects of adopting campus alcohol use policies and the manner and method of its implementation once adopted. It is anticipated that student affairs administrators will have keen insight into the potential legal problems as well as the societal impact of the policies.

The research questions were:

1. What factors influence higher education institutions' decisions to create contemporary alcohol use policies?
2. What influences affected the provisions adopted as the contemporary alcohol use policies?
3. How has the evolution of campus liability for alcohol-related injuries changed over the past four decades?
4. What are the legal and practical implications for colleges and universities of the present status of campus liability for alcohol-related injuries?

Since the study required the collection of interviews and alcohol use policies, qualitative research methodology was chosen to investigate and evaluate the research objectives.

Student Affairs Administrators Interview Research Design

The selection of a qualitative methodology for the interview portion of this study was chosen as the best means of analyzing pertinent descriptive data from both interviews and alcohol use policies. As a form of scientific inquiry, Munhall and Boyd (1993) describe the process of qualitative research as follows:

Qualitative research involves broadly stated questions about human experiences and realities, studies through sustained contact with persons in their natural
environments, and producing rich, descriptive data that help us to understand those persons’ experiences.

The emphasis is on achieving understanding that will, in turn, open up new options for action and new perspectives that can change people’s worlds. (pp. 69-70).

The interview process for this research was limited to one interview but on two occasions, a second administrator from an office was interviewed to increase the descriptive data. This study obtained data by interviewing student affairs administrators in their own offices through the use of telephone interviews. Each telephone interview lasted between 60-120 minutes. The interviews were open-ended to obtain the administrators beliefs based on their experiences as an administrator.

Human Instrumentation

Merriam (1988) states that a qualitative approach offers the researcher a unique opportunity to create an understanding of a problem or situation. Because the necessary data are primarily descriptive, the qualitative approach utilizes the researcher as the “main instrument of investigation” (Burgess, 1984) and as the “data gathering instrument” to analyze the data (Lincoln & Guba, 1985). Glesne and Peshkin (1992) describe the qualitative researcher as follows:

Since qualitative researchers deal with multiple, socially constructed realities or “qualities” that are complex and indivisible into discrete variables, they regard their research task as coming to understand and interpret how the various participants in a social setting construct the world around them. To make their interpretations, the researchers must gain access to the multiple perspectives of the participants. Their study designs, therefore, generally focus on in-depth ... interactions with relevant people in one or several sites.

The researcher becomes the main research instrument as he or she observes, asks questions, and interacts with the research participants. (p. 6)
Thus, the qualitative researcher is able to examine firsthand the thoughts, perceptions and experiences of the research participants within their settings leading to “a descriptive record of written and spoken words and behaviors” from the respondents’ point of view (Taylor & Bogden, 1984, p.11). Whenever possible, the qualitative research strives for a thick description of the phenomena under study (Geertz, 1973). Thick description is the presentation of solid descriptive data, through the discipline and rigor of qualitative analysis, in such a way that others reading the results can understand and draw their own interpretations (Patton, 1990). This study was limited to single interviews with administrators. The interviews provided data from the point of view of the student affairs administrators and described their problems and concerns as they believed they existed. The descriptions were captured on tape and transcribed for use in this study.

Data Analysis Procedures

The data analysis procedures involved three processes: data collection, data reduction, and verification and conclusion. The approach is consistent with Creswell’s (1998) description of a data analysis spiral in which the researcher engages in the process of moving in analytic circles rather than using a fixed linear approach. Data analysis was conducted as a simultaneous activity with data collection, data reduction, interpretation and narrative report writing.

Data Collection

The data collection steps as outlined by Creswell (1994) include (a) setting the parameters for the study, (b) collecting information through observations, interview, documents, and visual materials, and (c) establishing the protocol for recording
information. The parameters for the study included the setting, the interviewees, the events, and the process (Miles and Huberman, 1984). The setting for the current study was student affairs administrators at universities participating in the Robert Wood Johnson Foundation “A Matter of Degree: Reducing High-Risk Drinking Among College Students” grants. The administrators were chosen based on their position within the office of student affairs. Each interviewee was either a Vice-President for Student Affairs or a Dean of Students. For this study, five Vice-Presidents and four Dean of Students were interviewed. These individuals were chosen because they were involved in both the drafting of the alcohol policies as well as the enforcement of discipline for violations of the policies. Each interview was conducted via the telephone at a prearranged time convenient to the interviewee and in the interviewees’ office.

Documents and taped interviews were the primary sources of data for the influences that affected formation of the contemporary alcohol policies. The primary sources of information were the interviews. Hand-written notes were taken during the interviews and expanded into narrative immediately following each interview. Later, the interviews were transcribed for easier reading.

The approach to data collection for historical documentation of the institution’s efforts regarding alcohol use control began with a review of the institution’s documents and publications on the Internet and forwarded by the student affairs administrators. The documents included student handbooks and alcohol use policies and regulations. Secondary sources included newspaper articles written by agencies external to the universities.
Analysis of Student Affairs Administrators’ Experiences

Semi-structured, open-ended interviews of student affairs administrators were used to explore the student affairs administrators experiences. Each interview was tape recorded with permission and transcribed verbatim. This approach to data collection also allowed for enrichment, expansion and enhancement of the data. Eleven student affairs administrators were contacted to participate in the study and eight accepted.

No attempt was made to randomly select informants for the taped interviews. The informants were purposefully selected (Patton, 1990) for their university’s participation in the Robert Wood Johnson Foundation “A Matter of Degree: Reducing High-Risk Drinking Among College Students” grants and their recent efforts to revise their campus alcohol use policies. The Robert Wood Johnson Foundation was established as a national philanthropy in 1972 by the founder of Johnson & Johnson. The foundation is the largest United States foundation devoted to improving the health and health care of all Americans. The foundation awards grants to multiple sites for the following goals: (1) assure all Americans have access to basic health care at reasonable cost, (2) improve care and support for people with chronic health conditions, and (3) promote health and prevent disease by reducing the harm caused by substance abuse involving tobacco, alcohol and illicit drugs.

The grants awarded under the title “A Matter of Degree: Reducing High-Risk Drinking Among College Students” have been issued to the following higher education institutions: (1) University of Colorado at Boulder, (2) University of Delaware, (3) Florida State University, (4) Georgia Tech University, (5) University of Iowa, (6) Lehigh University, (7) Louisiana State University, (8) University of Nebraska-Lincoln,
University of Vermont, and (10) University of Wisconsin-Madison. The grants are being utilized by the universities to initiate programs to develop model approaches to reduce student high-risk drinking on their campus and in the surrounding community by developing college/community partnerships.

The overall strategy employed for sampling the informants who were student affairs administrators was one of purposeful sampling because these informants had assisted their university with altering the universities alcohol use policies. Anonymity was assured for all interviews since all were still associated with their respective universities; however, several agreed to be quoted in this research.

The limitations of interviews as sources of data are recognized and acknowledged. The limitations include the following: (a) information received "indirectly" was filtered through the views of the interviewees; (b) the presence of the researcher may have biased the responses of the interviewees; (c) and the interviewees varied in their level of perception and ability to articulate.

An additional limitation on this study involved the selection of the informants for interviewing. This study purposefully selected participants from institutions participating in the Robert Wood Johnson Foundation, “A Matter of Degree: Reducing High-Risk Drinking Among College Students” program (RWJF”). The RWJF program provides grant funds to higher education institutions to assist institutions in forming partnerships with their surrounding community to change the alcohol environment that exists on college campuses. The RWJF program attempts to change the alcohol culture through multiple means including campus education programs, alternative alcohol-free activities and coordinated efforts with the community around the campus to restrict
alcohol advertising and service directed at students. Additionally, the grant provides funds to lobby for legislative changes to reduce alcohol consumption by college students and to address alcohol use in the feeder high schools.

The decision to not utilize random samples for the student affairs administrators interviews may increase the difficulty in generalizing the results of the interview findings. If student affairs administrators were randomly selected, the findings could reveal other influences not reported by the selected participants or could result in a different hierarchy of priorities or influences. Further research in this area utilizing random samples is recommended.

Interview Process

Each interview was conducted in one session, with the researcher allocating two hours for each, but recognizing that a session might be longer or shorter. Only one interview was scheduled per day to facilitate my effectiveness as a human instrument. The session dates and times were determined in cooperation with the interviewee to establish a time that was convenient to both the informant and myself. Each interviewee was requested to sign the “Interview Release Form” illustrated in Appendix “C”, prior to the initiation of the interview session.

Each interview session was recorded with a recorder placed next to a speaker telephone. Limited notes were also taken during the interview. Because of the nature of the inquiry, the interview questions were designed to allow for the free flow of thought processes to capture the “essence” of the experience. The basic approach utilized to collect the qualitative data through open-ended interviews was the “general interview guide approach” as described by Patton (1990).
The general interview guide approach involves outlining a set of issues that are to be explored with each respondent before interviewing. The issues outlined are not necessarily taken in a predetermined order nor are the questions actually worded in advance. The outline was shared with the informants at the onset of the interview. The outline then served as a checklist to ensure that all issues were covered. Actual questions were formulated during the interviews in response to the interviewee’s specific statements within the context of the research questions. The outline used to guide the interview sessions are found in Appendix “C”.

Actual questions posed during the interview process were stated in the most general way so as not to “lead” the interviewee to a particular direction of thought. The context of the interviewee’s experiences within their institution included the people, events, settings, activities and artifacts particular to that institution. A protocol for recording information was established to organize the interview. The protocol included: (a) opening statements of the interviewer, (b) the key research questions, (c) probes to follow key questions, (d) space for interviewer’s comments, and (e) space to record reflective notes.

Data Reduction

Data reduction included a process of selecting, focusing, simplifying, abstracting, and transforming the “raw” data from the transcribed interviews and field notes. This process began with the selection of the conceptual framework and identification of research questions, developed to guide the study as well as the selection of methods of data collection. Thus, the process of data reduction began before the data was collected and continued until the data was actually coded for themes, clustered and
summarized. According to Miles and Huberman (1984), data reduction is a key component of analysis which sharpens, sorts, focuses, discards, and organizes data so that conclusions can be drawn and verified. The role of the qualitative researcher is to focus on “critical incidents” in order to make gradual sense of a social phenomenon by using sampling activities such as contrasting, comparing, replicating, cataloguing, and classifying the object of one’s study. Categories and variables were modified to fit the data as the study progressed. Following the interviews, I coded the data and developed a list of categories of concepts for analysis. In conjunction with this approach, and over time, the constant-comparative approach was also utilized. The constant-comparative analysis method of qualitative data as described by Lincoln and Guba (1985) utilizes a simple scheme of unitizing and categorizing processes to identify emerging themes. This method was primarily used in the analysis of the interview data.

I identified recurrent themes occurring within each interview and wrote these down. I then sorted the data by themes and numbered the units to correspond with the themes. I then determined the frequencies of each unit to compare with each different interview. The frequencies convinced me that the following themes persisted over the range of student affairs administrator interviews: change catalysts, policy influence, post implementation changes, fraternities, challenges, and perceived benefits.

Conclusion Drawing and Verification

The final step in the analysis of the qualitative data involved conclusion drawing and verification. This phase was characterized by analyzing meanings, noting patterns, themes and explanations, possible causal flows and propositions. While the initial conclusions may be vague, they become increasingly explicit and grounded (Miles and
Conclusions were verified in this phase by checking results with informants and the analysis proceeded with emerging meanings. For this study conclusions were checked by interviewing two additional informants from offices where other informants had been previously interviewed. Additionally, policies from the selected institutions were reviewed to verify data that was obtained. Finally, institutional web sites and student handbooks were examined to verify information supplied by the informants.

Refinement and Validation of the Research Process

According to LeCompte and Goetz (1982), the researcher's central concern should be directed toward an accurate and faithful portrayal of the client's "life ways." Accurate reporting of colleges and universities is not a simple task due to their complex and inconsistent institutional environments according to Crowson (1987), who asserts that trustworthiness is an especially salient concern and issue in the study of higher education. Lincoln and Guba (1985) note that well-designed qualitative research should focus upon "trustworthiness" and "confirmability" rather than the more conventional notions of reliability, validity and objectivity found in quantitative research. The following section addresses several strategies that were considered in this qualitative study to assist with trustworthiness.

Trustworthiness

Lincoln and Guba (1985) emphasized the need to meet four constructs in order for well-designed qualitative research to have an established norm of trustworthiness in the research findings. These constructs are identified as credibility (the accuracy of portrayal); prolonged engagement (persistent observation, triangulation); transferability
(a study's database may be applicable to another context); dependability (process is consistent, internally coherent, ethically aboveboard); and of confirmability (findings are grounded in data, logical, and acceptable and can be confirmed by someone other than the researcher) of research findings (Lincoln and Guba 1985).

For this study, trustworthiness was addressed in several ways. First, the interviewees were provided the opportunity to be anonymous to protect their identity. The interviewees provided information that appeared credible as it was echoed by several interviewees. Second, although the interviews lasted only 60-120 minutes, supplemental information in the form of alcohol use policies, student handbooks and brochures substantiated the data provided by the interviewees. The data supplied by the interviewees was consistent with the data obtained in policy reviews and information obtained on university websites. The information obtained through the interviews was consistent between the various interviewees selected across the country.

**Triangulation**

Triangulation, the use of multiple data sources and collection methods, was also utilized in this study. Internal validation was promoted by utilizing multiple sources of data including documents from the universities and their websites in addition to the interviews. Triangulation (supporting a finding by showing that independent measures agree with it or, at least, do not contradict it) was used to counteract bias. The use of multiple data sources was to ensure dependability of a finding by seeing or hearing multiple instances of it from different sources, and by assuring that the findings were consistent with other findings. The objective was to promote reliability and internal validity by utilizing multiple sources of data including newspaper articles, university
alcohol use policies, websites and student handbooks. This study utilized documents from the selected universities described previously, to supplement the interviewees data and provide additional sources of data. The documents reviewed included a wellness resource book and wellness center health update discussing binge drinking and describing alcohol resources from Boston College; website alcohol policies from Georgia Tech University, the University of Delaware and the University of Wisconsin at Madison and general alcohol use policies from each of the selected institutions.
CHAPTER 4

RESEARCH RESULTS

The purpose of this study was to identify and analyze (1) the influence of tort liability for alcohol-related injuries that led to the formation of campus alcohol policies at institutions participating in the Robert Wood Johnson Foundation program, "A Matter of Degree: Reducing High-Risk Drinking Among College Students" program, (2) the social and legal influences that shaped the contemporary campus alcohol use policies at these institutions, (3) relevant portions of the contemporary alcohol use policies that could affect tort liability for alcohol-related injuries, and (4) the policies in conjunction with the jurisprudence to determine if the policies increase or decrease a campus’ potential for tort liability as a result of alcohol related injuries.

Interviews with student affairs administrators provided insight into the various catalysts that prompted changes to existing campus alcohol policies. The interviews further provided insight into the influences that shaped the formation of alcohol policies at institutions participating in the RWJF grants. A search to identify common alcohol use policy provisions produced a number of relevant provisions that appear to permeate most campus alcohol policies. Finally, a search to identify case law regarding campus liability for alcohol related injuries discovered three lines of cases that are illustrative of a campus’ duty of care that could support a finding of university liability.

Chapter 4 is divided into four sections, each correlating to the research findings. Section I analyzes the factors that student affairs administrators identified as significant to them when they developed or implemented alcohol policies. Section II highlights portions of existing alcohol policies that may affect a university’s potential liability for
alcohol related injuries involving its students. Section III addresses the evolution of the legal jurisprudence regarding alcohol related injuries. Section IV analyzes the contemporary alcohol use policies in conjunction with the existing jurisprudence regarding alcohol-related injuries.

Section I: Summary of Student Affairs Administrators Interviews

Letters explaining the proposed research and requesting a telephone interview were mailed to the highest level student affairs administrator and to the former highest level student affairs administrator if the present administrator had been in place for less than a year. The institutions were chosen based on their participation in the Robert Wood Johnson Foundation grants program: “A Matter of Degree: Reducing High-Risk Drinking Among College Students”. The letter, attached as Appendix “C” outlined the research and requested permission to conduct a telephone interview, tape record the interview and utilize the interviewee’s name in the research. Ten administrators responded and nine agreed to be interviewed. Of the nine interviewed, four requested their name not be used in the research.

The interviews were scheduled on separate days and conducted by telephone. Notes were taken during the interviews and transcripts were prepared utilizing the tape recordings of the interviews. A review of the data obtained during the interviews revealed six major themes that ran consistently through the interviews. The themes were categorized under the following titles: (a) Change catalysts, (b) Local influences on policies, (c) Post implementation changes, (d) Fraternities and the Massachusetts Institute of Technology incident, (e) Future challenges, and (f) Perceived benefits. The data were unitized and placed within each of the above categories or in a separate
category designated as miscellaneous. Categorizing included bringing together into
categories the units of data that appeared to relate to the same content. The process of
unitizing and analyzing the data into themes and categories provided the mechanism for
organizing the data into a manageable form.

Change Catalysts

A common theme found in all the responses related to the catalyst, or multiple
catalysts, that led to the revisions of a university’s campus alcohol use policy. By far
the greatest impetus for change came from alcohol problems related to residential life.
All of the participants shared stories of complaints received by residential life advisors.
“Resident life staff bombarded our office with complaints ranging from loud parties at
2:00 in the morning to sexual assault and intimidation by individuals who had
consumed alcohol,” reported one participant. Another participant indicated students are
paying a lot of money in tuition and do not appreciate having their study and sleep time
interrupted by inebriated students. Residential life personnel also reported problems
with residential hall damage, vandalism and noise, all associated with alcohol use. Dr.
Smith of the University of Delaware along with other student affairs administrators
reported alcohol related problems in resident halls that ranged from vandalism to vomit
and from violence to victimizations. Another participant indicated 60% of the reported
problems that occurred in that university’s residence halls were related to alcohol use.
A final participant revealed the major problems incurred by their university involved
alcohol related incidents in residence halls. “The cost of tuition is too high to allow
alcohol impaired students to disrupt the educational environment that is sought by most
students” was a comment voiced by one participant and echoed by others.
A second strong catalyst reported by many participants was the results of a CORE alcohol survey study administered by their campus or as a part of the Harvard alcohol study. "Our campus had a party reputation, but we didn't realize the extent of our problem until we reviewed the results of our CORE study in 1992. At that point we had evidence to support our belief that a problem existed," reported one participant. Many of the participants reported "appalling" findings, with binge drinking rates above 60% for the semester surveyed. "The Harvard study really caught our attention and after reviewing our campus' high reported rate of usage we knew something had to be done," voiced one participant. Finally, Dr. Nester of the University of Vermont noted, "The CORE and Harvard studies were important to us because they effectively converted anecdotal information that everyone recognized into hard data that could be addressed."

About half of the participants identified the university president as an important catalyst for prompting changes in alcohol use policies. One participant reported "Our President got results quickly. When the President became a fan of the new alcohol-use policy movement, it really took off." All the participants acknowledged the president was important in determining how expeditiously the changes took place. One participant noted that "when the President supported our plan which included a no alcohol rule in the dorms, 300 students moved out, but over the past three years we have more than gained those students back." Some described their past president and administration as the "good ole boys" who utilized alcohol when they were in school and who believed alcohol was simply a part of college. However, all of them described their present president as either highly in favor of the new policies or at least not against
the new policies. Dr. Nester reported Vermont’s President came on board three years ago and quickly understood the alcohol use problem that existed. The President took the initiative and assisted with the change process by authoring a lengthy article in the alumni magazine highlighting the legal and moral responsibility of the University by declaring the University’s “highest calling is that of the custodian of a positive learning environment of its students.” The President continued by illustrating the way alcohol abuse was damaging the learning environment of the campus and reducing the educational quality of campus life. Other participants reported similar beliefs regarding the power of the presidency. The attention given by the president determined how fast the change process took place while all agreed change would not have occurred without the active support of the president.

Other catalysts described by the participants included a desire to clarify and unify present alcohol use policies into one consistent policy that complied with federal and state law. One participant indicated “we originally had a sort of don’t ask, don’t tell policy where most residential advisors just looked the other way because they did not know what was enforceable. We decided we needed a clear policy that everyone understood.” Gail DiSabitino of Georgia Tech University reported that “we worked with three policies, one under the Dean of Students, one under the general counsel and one under the President. It became clear we were not all on the same page. Our final policy consolidated the previous three based on suggestions from focus groups assembled to review the policies.” While all the participants agreed a consistent policy was important, only a few indicated it was one of the reasons for revising their policy. Town complaints added fuel to the fire but were only a marginal catalyst to change.
Finally, two participants suggested a major alcohol-related incident such as a campus death or major injury was a catalyst for their change.

Local Influences on Policy

Most universities created task forces to study campus alcohol-related problems and design a new alcohol use policy. Some were fortunate to have obtained their Robert Wood Johnson Foundation grant prior to the creation of their policy, others made their changes earlier and simply modified or enhanced their alcohol abuse prevention after receipt of the grant. The task forces ranged in size from two to over a dozen members. Most task forces included representatives from residential life, campus police, campus counseling, campus health clinic, President’s office, and student representatives from the student government, Greek system and residential housing. Public members often included representatives from the mayor’s office, local law enforcement, Chamber of Commerce and alcohol industry. In all cases, university counsel reviewed the policies to be sure they complied with federal, state and local laws and regulations. All of the participants or their predecessors were members of the task force.

The primary concerns in drafting the policies can be grouped into three general categories and are based on the problems related to the consumption of alcoholic beverages. The first relates to physical injuries to self and others, property damage and fighting. The second concerns damage to social relations. The third involves impaired academic performance (inefficiency in homework, classroom or lab performance; late papers, missed classes or exams; failure to study for exams, inability to perform academic functions due to disruptions caused by students consuming or having consumed alcoholic beverages). “Our primary concern was the overall welfare of the
students,” noted Gail DiSabitino of Georgia Tech University. “The safety of our students is our utmost concern. We developed our policy with safety in mind,” reported Dr. Stump of the University of Colorado. “We wanted to create an atmosphere of learning on campus, but we felt we could not control off-campus activity.”

Based on the above concerns, the participants rated influences on the formation of the policies, which when analyzed revealed that the number one influence was improvement of the campus learning environment and campus security. The concerns of the residential hall staff and students in resident halls most influenced the policies. The concern regarding management or supervision of fraternities was rated second most influential in policy development. The president in most cases was a “pro-policy” change agent or at a minimum acted as a neutral person regarding change. Town-gown issues were reported as influential by a few participants, but were not significant for any participants. “Although we had to express concern about the conduct of our students off-campus, we focused on campus activity, not activity in the community. If we received a criminal report from the police, we would also consider campus discipline, but we did not go looking for off-campus violations,” explained one participant. Captain Scott of Florida State University reported, “the community thinks alcohol use by students is a big problem if you believe all the letters to the newspaper. For us, community opinion was not necessarily influential, maybe a four on a scale of one to ten. However, we did form a partnership with the community and conducted several town hall meetings to get input from the community. We considered their input, but primarily focused our efforts on student rights including the right of students to learn in peace.” Finally, the potential for tort liability for alcohol related injuries was near the
bottom for all participants, save one, although all participants indicated they were concerned about tort liability.

If the responses of these participants represents an accurate view of all the recent task forces utilized on American campuses to revise alcohol use policies, the results suggest several interesting things. First, student affairs administrators believed the creation of a positive and safe learning environment was of paramount importance; thus, the alcohol-use policies attempted to meet the goal of a good learning environment even if the alcohol-use policy increased the potential for tort liability. “Our job in student affairs is to create a quality student campus. Alcohol use is damaging the learning environment here so we attempted to change that,” reported Dr. Nestor of the University of Vermont. This postulate was tested during the interviews and was confirmed by the several administrators. Captain Scott stated, “it is our responsibility to help educate and guide students on the responsible use of alcohol.” Gail DiSabitino indicated, “we focus on educating our students on the responsible use of alcohol.”

Dr. Nestor observed that he did not ignore the legal consequences of his university’s policy as legal counsel was involved in the changes; however, the potential for tort liability was “not the driving force.” Dr. Stump acknowledge that he believed the university had a responsibility for the well being of its students, which was a higher responsibility than a concern about potential tort liability for doing what they believed was right. From a policy standpoint, student affairs administrators, while concerned about tort liability, were more concerned about the welfare of their students; therefore, the policies that were enacted were primarily designed to create a more positive and safe learning environment.
Post-Implementation Changes

Although not directly related to the issue of influences on alcohol-use policies, post-implementations were important as justifications for the continued use of the implementation of the alcohol-use policies. The participants reported numerous post-implementation changes in student alcohol use that they associated with the new policies. Captain Scott reported a reduction in alcohol use violations after the new policy was enacted. “The policy appears to be working. We hope the rates go down more as we implement additional changes from the RWJF grant.” One vice-president reported, “we changed our policy before we obtained the grant, mostly because of the problems with residential life. The vandalism involving alcohol was making our dorms a mess and driving students out.” One change reported by participants indicated rates of reported vandalism, disruptions, assaults and fighting in residence halls went down significantly. Another change indicated the use of alcohol at athletic functions went down and was restricted to limited areas. Dr. Stump stated, “alcohol use was available in our stadium a few years ago. Now we limit the locations alcohol is available. We even have designated areas around the stadium that are alcohol-free.” Research regarding alcohol use and abuse increased, thus providing hard data to analyze problems and intervention strategies. Parental notifications apparently reduced second and third offenses. “The University of Delaware began the practice of notifying parents of student alcohol violations,” reported Dr. Smith. “Since the policy was enacted, I have received volumes of telephone calls from parents universally expressing appreciation for being informed by letter and indicating they had expressed their concerns to their children.”
Big athletic schools reported the greatest resistance to alcohol regulation at athletic events. Dr. Stump reported one of the first major changes involved restricting the use of alcohol in the football stadium. Alumni and students all fought against the changes, but due to strong presidential leadership, alcohol was officially removed from refreshment stands at many universities. Prohibitions such as no kegs, and no departures from the stadium during the game, were also implemented at the University of Colorado and Florida State University.

A concern expressed by most participants involved the perception that students were leaving the “friendly” confines of the campus and drinking in town or in cars. The issue of liability for students leaving campus to drink and drive was noted by several participants; however, unless their university policy applied to off-campus activity they believed there was little they could do. Dr. Stump noted Colorado’s alcohol-use policy “did not apply off-campus. We have no jurisdiction when they leave campus.”

Most administrators expressed the belief that alcohol-related incidents were down, but that alcohol consumption probably had not been significantly reduced. “Since enacting our policy we appear to have better security on campus and less reports of room-mate conflicts and physical assaults,” reported one dean. Gail DiSabito opined, “the alcohol use level has remained constant, what is changing is our expectations for student behavior and our enforcement for improper behavior.” All the participants believed the process of changing the drinking culture would be slow because alcohol use and abuse was a societal problem that did not suddenly materialize when a student enrolls in college. The signal a student receives from the community is often times contrary to the message of the university. Dr. Nestor of the University of
Vermont noted, "College life here is attractive partly because of the looseness of alcohol. It is a part of our economy and a big selling point of our tourism."

**Fraternities and the Massachusetts Institute of Technology**

All of the participants discussed their concerns regarding fraternities and alcohol use and abuse. Each university was different in its approach to alcohol issues related to fraternities. The two extreme positions were represented by the University of Colorado which took a hands off approach, and the University of Delaware, with its five star recognition program. The five star program awards points and credits to Greek organizations based on five categories: (1) academic performance, (2) financial management, (3) community service, (4) leadership, and (5) quality of membership intake. Less than a three star rating means the loss of social privileges. Regardless of the university approach, several common factors emerged during the interviews. For the University of Delaware, the problem with fraternities was not new. Dr. Smith described the Greek system at the University of Delaware as out of control and exhibiting a negative attitude about learning. Reports of hazing and alcohol consumption were commonplace. In 1992, the faculty senate attempted to phase out the pledge period in its entirety. Later, the five-star accreditation program was adopted to regulate and monitor the Greek system. The belief at the University of Delaware was that alcohol was at the center of the Greek system and permeated the culture. Dr. Smith suggested Greeks traditionally had poor grades, poor personal management, and generally did not live up to their professed values. The University of Colorado, according to Dr. Stump, viewed Greeks as off-campus organizations over which the university had no jurisdiction or control. If the problems occurred off-campus in non-university owned
housing, the university took no action. The campus judicial policy may apply to certain off-campus activity, but the alcohol policy did not. At the University of Colorado neither the Greeks nor the university wanted control to rest with the university and there was no move to bring fraternities under university jurisdiction. “As far as we are concerned, the university wants no control of the fraternities as they are off-campus and their houses privately owned. It is a mutual decision because the Greeks do not want us to control them anyway,” reported Dr. Stump.

The primary issues surrounding fraternities involve whether the fraternity houses are owned by the university and whether they are located on campus. Issues of landlord liability and premises liability exist for fraternity house owned by universities or located on university land. Application of alcohol policies also depends on the status of fraternities with the university. “Our alcohol policy applies to everyone, on and off-campus,” reported Dr. Smith. “The university does not attempt to regulate the fraternities as they are off-campus and beyond our reach,” stated Dr. Stump.

Most participants agreed fraternities were a problem because of their alcohol culture and strong alumni support. However, as discussed above, the approach to working with fraternities varied among institutions. One issue that was addressed by all the participants was the Massachusetts Institute of Technology (“MIT”) situation that ended in the death of Scott Krueger due to an overdose of alcohol. Most participants believed MIT’s alcohol culture contributed to the incident. “I know of several instances where reported alcohol problems were never disciplined at MIT,” reported on participant. The perception among the participants was that the administration at MIT knew about the alcohol problems that existed in its fraternities and yet chose to do little
about it. Housing at MIT is limited and fraternity houses are considered sanctioned housing by the university. Despite numerous violations, the administration at MIT allowed the fraternity house at issue to remain open. “A hands off approach is trouble. There is a higher standard out there and closing your eyes is not going to work,” indicated one participant. Most participants expressed the belief that MIT’s housing policies led parents of entering students to believe fraternity houses were appropriate housing for their students and that the houses were monitored by the university, which proved not to be the case. One participant included as his wish, the total elimination of the Greek system as it was the biggest headache of all student affairs administration.

Future Challenges

The fifth category that emerged from the interviews related to the challenges the participants anticipated in the future as well as a wish list to improve their particular campus. The greatest challenge facing student affairs administrators appears to be the frustration of educating a new group of first year students each year. Most participants reported a belief that there exists a pattern of alcohol usage by high school students before their arrival at college. The studies by the University of Delaware, as a part of the Robert Woods Johnson Foundation, tended to support this belief. Dr. Smith of the University of Delaware reported, “Our studies indicate alcohol use and abuse starts in high school or earlier. The habits are already there. It appears 30% of the high school students don’t use alcohol, 30% do use and abuse it and 40% start in high school but do not begin binge drinking until college.” All of the participants reported that the highest rate of alcohol offenders was in the first and second year students with a tremendous drop off in numbers of offenders after the sophomore year. Another challenge voiced
by many participants was the application of their alcohol use policy off-campus and to non-students. Some participants expressed concern that their policy only applied to students and did not include guests, alumni or faculty. Another noted that while the campus could control the flow of alcohol on campus, it could not restrict the off-campus supply of alcohol. The financial benefits to local citizens as a result of student spending on alcohol is tremendous. Many businesses attempt to lure students away from campus with drink specials. “It is incredible what bars advertise. On Mondays its 50 cent shots, Tuesdays is 25 cent draft, Wednesdays is 3 for 1 and on Thursdays its either ladies night where ladies drink free or $5.00 for all you can drink from 7-11. All of these specials are designed to encourage the abuse of alcohol by students,” Gail DiSabatino of Georgia Tech University observed.

A major challenge discussed by several participants involved the attempt to change the overall alcohol culture. “Problems exist because alumni glorify alcohol, and the community constantly advertises that alcohol makes you smarter, sexier and more successful,” complained one participant. “It is hard to combat that kind of mentality.” Several participants opined that excessive alcohol use was the real problem, not reasonable use. Captain Scott of Florida State University explained, “It is a societal problem, not just a campus one. Society teaches students that alcohol is good and necessary to be successful and socially accepted but society stops short of teaching how to be responsible drinkers. We feel it’s our job to fill the void created by the societal problem and educate our students on all the aspects of alcohol use and abuse while maintaining a safe and positive learning environment for the students that attend our university.”
Finally, it is clear from the interviews that student affairs administrators care about the students attending their university and that care came through in their wish lists for a better campus. Most participants wished there was less alcohol available in the community. Dr. Stump of the University of Colorado would like to see a limit on liquor licenses. To him, it appeared there was a liquor store or restaurant or bar serving liquor on every corner. Additional strength in the Alcohol Beverage Control Board to limit or control alcohol outlets would be helpful, Dr. Stump suggested. The pro-alcohol message from the alcohol industry and society also frustrated many of the participants. A number of participants indicated a desire for their alcohol use policy to be more comprehensive so it would apply off campus and to guests or alumni on campus the same as students.

Perceived Benefits

The participants uniformly agreed their campuses' new alcohol policies were better than the old policies because they were consistent, clear, realistic and enforceable. The benefits received were noted as reasons to keep the policies in place. “We have seen improvements with just our policy changes. We hope by implementing additional programs with our RWJF grant we can make even more significant changes,” reported Captain Scott of Florida State University. The participants all reported a reduction in alcohol-related incidents since the adoption of their policies. Nevertheless, most also stated a belief that student alcohol consumption had not gone down. Instead, it had merely moved off campus and into cars. The following are examples of improvements cited by the participants: (1) vandalism was down by 30% (University of Colorado), (2) alcohol overdoses, which led to hospitalization, went down by 20% (Georgia Tech), (3)
More than 300 extra upper-class students wanted to remain in the residence halls after the first year of the changes (University of Delaware), (4) the recidivism rate for alcohol offenses was low with 630 first offenses, 143 second offenses and 51 third offenses (University of Delaware), (5) residence hall students reported at the end of the first year a much better living and studying environment (University of Boston), and (6) parents were overwhelmingly positive about being contacted concerning their sons and daughters alcohol violations (University of Delaware). Most participants noted the CORE surveys combined with the new alcohol policies had significantly increased research at their institutions on the issue of alcohol use and abuse and the ramifications on the learning environment in general. Dr. Nestor reported, “The CORE and Harvard alcohol use survey was important to us because it supported our gut feelings. It was much harder to get things changed before we had the data to support our belief that alcohol was causing problems on our campus.” Participants reported that the number of repeat offenders has been reduced and progress with the community had been reported.

In conclusion, the student affairs administrator interviews provided clarity regarding the catalysts for change and the impact of the potential for tort liability on the formation of their campus alcohol policies. The two most prevalent themes that emerged from the participant interviews were (1) concerns raised by residential life staffers and the desire to create a safe and positive work environment, and (2) a president who supported a change in the present policy. These themes were reported by almost all the participants and formed the basis of the alcohol use policies according to the participants. Although the potential for tort liability was not reported as a major influence in the formation of the alcohol use policies, it did nevertheless, impact the
some final policies. For instance, Dr. Stump explained that the University of Colorado did not attempt to regulate its fraternities partly because it did not want to assume the responsibility of monitoring the fraternities when it knew it could not effectively do so. The University of Delaware, according to Dr. Smith, took the opposing view, saying his institution had "wrapped its arms around the entire Greek system" in an effort to properly regulate their conduct. The University of Delaware believed it could not distance itself from the fraternities and avoid liability under the bystander theory. The University of Delaware adopted the policy that a university cannot escape liability with a hands off approach but instead must move toward an in loco parentis stance to direct student behavior while attending college.

Section II: Contemporary Alcohol Policy Provisions

Federal Law

All campus alcohol use policies are subject to the laws of the jurisdiction in which the campus is located. The primary federal law that impacts campus alcohol use policies is the Drug-Free Schools and Communities Act of 1989 as amended (the "Act")28. The Act applies to each college and university that receives federal funds in any form, including all institutions attended by students receiving guaranteed student loans.29 Each college must certify to the Department of Education that it has implemented a program designed to prevent the illegal use of drugs and alcohol. At a minimum, the program must prohibit the unlawful possession, use, or distribution of drugs or alcohol on college property or as part of a college activity. The campus must

distribute a document annually to all students describing the health risks associated with using or abusing alcohol; available counseling programs; local, state and federal legal sanctions; and the college’s sanctions for violating the alcohol use laws. The campus must also establish sanctions up to and including expulsion and referral for criminal prosecution. In addition, the campus must ensure consistent enforcement of its sanctions, provide upon request a copy of its program to the Secretary of Education, and review its program at least every two years. Under 34 C.F.R. Section 86.5, the Secretary of Education, has established sanctions for colleges’ inadequate implementation of the Act, and audits a sample of college programs each year.

It is important for that colleges to note what the Act does not require, as well as what it demands. Campuses are not required under federal law to assume new obligations to protect students from their own use of illicit drugs or abuse of alcohol, or to protect students or third parties from the actions of students using drugs or alcohol. As will be analyzed more fully later, schools must be careful that their programs do not unintentionally assume unwanted additional duties or infringe their students’ rights to privacy and due process.

The Act requires colleges to adopt rules prohibiting student conduct that violates the law; it does not mandate any additional standards of conduct for lawful drug and alcohol-related activity. Similarly, the Act requires only the promulgation and imposition of sanctions for the unlawful possession, use or distribution of drugs and alcohol. The Act only requires that a college’s standards for student conduct mirror

\[55 \text{ C.F.R. Section 33,580 (1990).}\]

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applicable state and federal law governing drug and alcohol use. Thus, a college adopting these minimum standards is unlikely to assume unintentionally a duty to protect students and third parties from the actions of its students using alcohol or drugs. The research findings derived from the administrators discussed in Section I indicate that student affairs administrators generally agree that colleges should and must go beyond the minimum standards established by the Act.

The most problematic language in the Act concerns the scope of school-related activities that must be covered by the policy. The Act requires at a minimum that an institution’s policy prohibit the unlawful possession, use or distribution of drugs or alcohol on college property or as part of a “college activity.” The specific reference to actions on college property necessitates the need for colleges to exercise care not to inadvertently assume any duty as landlord to protect students from the consequences of their own conduct or the conduct of other students.

The regulations promulgated under the Act define a “college activity” to include all student activities, on or off campus, considered to be university-sponsored events. This definition is broad and could be interpreted to include any event attended by employees of the college or sponsored by student organizations officially recognized by the college, including fraternity events held off campus. Accordingly, some colleges have included language in their policy statements that reach conduct occurring at off-campus events, while being careful not to assume any enforcement obligations apart from taking action when and if such circumstances come to the attention of school

officials. The range of monitoring and supervision varies among institutions as discussed below.

The Act requires colleges to inform students about available treatment options and to establish and enforce sanctions for the illegal use of drugs and alcohol. The Act does not require treatment programs or drug testing designed specifically to identify students using illegal drugs. Any college that provides treatment or adopts a screening program will likely be held to the standard of care of any institution operating a health care program. If a college requires professional counseling for students who have been found to be substance abusers, the counselors should be competent, adequately trained, and possess all professional credentials and qualifications.

The Act does not require that the institution's written policy specify what methods an institution will employ to enforce its disciplinary sanctions as long as the actual enforcement is effective and consistent. Even if no active measures are utilized to identify alcohol offenders, passive enforcement of the prohibition against unlawful alcohol-related behavior generally includes acting upon reliable information obtained from such sources as the observations of residential advisors. (Sterner v. Wesley College, 1990). A college that implements a more active enforcement role should use the same realism and consistency in selecting enforcement techniques as it does when setting the appropriate standard for students' use of alcohol. The more intrusive the enforcement mechanisms, the more likely a collision with student's rights to privacy will occur.

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55 C.F.R. Section 33, 595, 20 U.S.C.A. Section 1145g(a)(2).
Additionally, the college may find it assumed a degree of control and supervision that exceeded what the school can actually achieve. If the college selects a highly intrusive enforcement procedure, it may run into conflicts with the Act itself. The Act requires the college's disciplinary sanctions to be consistent with local, State, and Federal law. Therefore, any policy must conform enforcement practices with all legal standards concerning students' privacy rights and guarantees of procedural due process.

State Law

In addition to compliance with federal law, all colleges are subject to the laws of the state, county and city in which they are located. For example, according to Aderson and Gadaleto (1992), in 1991, 25% of college campuses banned beer completely and 32% did not allow hard liquor on campus. Most of these colleges were located in counties that were dry (i.e. no alcohol could be sold in the county), while others were affiliated with religious organizations that forbade or discouraged alcohol use. State and local laws vary greatly among jurisdictions. A review of the alcohol use policies in force at the universities presently participating in the RJWF program identified several categories of policy elements that will be discussed below and later analyzed within the torts law framework to determine the extent to which the elements affect a college's potential for liability for alcohol-related injuries.

Mandated Requirements

Consistent throughout the alcohol use policies reviewed, was a summary of the state laws and local regulations concerning the legal drinking age, possession of open

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320 U.S.C.A. Section 1145g(1)(E).
containers, and the sale or distribution of alcohol to individuals under the legal drinking age.

A second consistent policy element was a description of the places and times alcoholic beverages could be consumed. This policy element generally outlined where alcoholic beverages could be consumed on campus. Generally, the policy listed permissible locations for consuming alcohol, such as the student union, the faculty lounge, the stadium parking lot, residential dormitory rooms (if the resident is of legal drinking age) and designated locations for outdoor functions. The policies often identified locations where alcohol consumption was completely prohibited such as first year dormitories and classrooms. In addition to location restrictions, many policies contained time restrictions. For example, some policies indicate no alcohol on weekdays until after 4:00 p.m.. Others restrict alcohol use to home athletic events and then only in designated areas around the athletic facility. Additional restrictions applied to the sale of alcohol as opposed to the consumption of alcohol. Most policies contained strict rules regarding where, when and how alcohol may be sold primarily because of the increased exposure to tort liability that can occur due to the legal status of an alcohol vendor.

Very few of the conditions for use of alcohol at private and public functions are required by law but instead were implemented by the colleges in what many administrators described as efforts to change the drinking culture. Below is a list of conditions for use of alcohol at private and public functions that were almost universally required in the policies that were reviewed.
1. If alcoholic beverages are served, non-alcoholic beverages, in addition to water, must be readily available at no cost.

2. Certified and trained alcohol servers must be used if alcohol is served. The servers must be trained to recognize signs of intoxication and be empowered to stop service to individuals exhibiting signs of intoxication.

3. Beer service is restricted by prohibiting the use of kegs or other self-serve mechanisms. This restriction generally includes a prohibition against serving hard liquor in large bowls mixed with other liquids.

4. When individuals are permitted to bring their own alcoholic beverages and when alcohol will be served in containers, policies generally limit the quantity available based on anticipated attendance such as one 6-pack of beer per person.

5. Food is required at all functions where alcoholic beverages will be available and some policies limit the quantity and quality of food such as food high in sodium content.

6. Drinking games are prohibited.

7. Fraternities and other organizations that recruit members are required to hold dry rushes.

8. Many policies require security personnel to be available at functions where alcoholic beverages will be served.

9. The hosting organization must provide a method of restricting service of alcoholic beverages to individuals under the age of 21.
10. An organization wishing to serve alcoholic beverages must obtain a permit from both the alcohol beverage control board and the college, which will require verification that items 1-9 above are met.

A fourth provision of campus alcohol policies involved advertising and endorsement of alcoholic beverages on campus. Many policies restrict alcohol advertising in campus newspapers and forbid sponsorship of school events by alcohol producers and distributors. A number of colleges now refuse to allow campus logos to be placed on promotional items and others restrict the distribution of alcohol related paraphernalia. If a college allows advertising of functions where alcohol will be served, it is normally required that the advertisements include references to non-alcoholic beverages. Additionally, some policies prohibit the sole or primary purpose of the function to be the consumption of alcohol and some policies state that no references to the amount of alcohol can be contained in the notice of a social function.

Finally, all policies have procedures for adjudicating violations of the alcohol policy. Many campuses have adopted the University of Delaware's "three strikes and you're out" policy. Under this provision a student is expelled after the third violation of the alcohol use policy. Some policies only apply to on-campus violations while others only apply to students and not guests or alumni. All of the enforcement provisions contain language that addresses the due process rights of students and provides students with notice of the alleged violations, an opportunity to present the student's story and a hearing before an impartial student discipline panel.

Student affairs administrators interviewed for this study clarified the scope of review they intended in their policies. The policies were intended to regulate the
consumption of alcoholic beverages on campus and at campus events. The provisions were designed to delineate the use of alcohol in university owned housing units. Further, the policies were prepared to control the marketing and sale of alcoholic beverages on campus and provide a campus basis for enforcing state and university laws and regulations regarding alcohol use. All of the administrators voiced concerns over third party liability for alcohol-related injuries and most indicated that the death of Scott Krueger at MIT was a clear reminder of the need for a comprehensive campus alcohol use policy. Finally, the administrators commented that the alcohol policies assisted them in promoting the alcohol awareness and education programs available on campus. Student affairs administrators uniformly believed that they played a key role in responding to the numerous changes the law brought to their institutions. Student affairs administrators believe they have the opportunity and obligation to assume leadership in responding to both the educational mission of their campus and the legal requirements of the drinking age laws and corresponding potential for tort liability.

The student affairs administrators who I spoke with, generally concurred with the central idea of tort law, that is, liability is imposed on conduct which is socially unreasonable. However, the hands-off or by-stander position is not tenable to most. The very make-up or identity of a student affairs department is one of caring for the student and providing a positive educational environment for the students to learn and mature. The changes in alcohol use policies were efforts on the part of student affairs administrators to change the contextual environment where drinking takes place on campus. The changes focused on what student affairs administrators believed were acceptable standards to change the drinking environment.
The differences in campus alcohol use policies were as telling as the similarities when it comes to the two primary views of the role of student affairs administrators and the influence of potential tort liability for alcohol-related injuries. The interviews and policy analysis revealed that alcohol regulation policies differed in two significant areas. First, the scope of the campus policy differed among institutions in that some policies applied only to off-campus activity. Second, some policies attempted to regulate fraternity activity. The differences are most clearly defined by the University of Colorado and the University of Delaware.

The University of Colorado initiated its policy changes in an attempt to construct a consistent policy that corresponded to Colorado law. The first major change involved the prohibition of alcohol sales in the football stadium along with stricter regulations on tailgating at the football games. Two significant catalyst were: (1) the concerns reported by the residence hall advisors and (2) the results of the Harvard alcohol study, which reported high use of alcohol at the University of Colorado. The University of Colorado alcohol use policy does not apply to off-campus activity. Since most Greek organizations at the University of Colorado are housed off-campus in private housing the University does not try to control or regulate them. Dr. Stump described Colorado’s philosophy as follows: “At Colorado there is a feeling that Greeks cannot be controlled; thus, to avoid liability the University does not regulate or monitor the off-campus Greeks thereby eliminating the custodial relationship aspect that could lead to liability for the alcohol-related injuries caused as a result of off-campus alcohol use by Greeks.”

The University of Delaware also began its policy modifications as a result of the Harvard alcohol use study, which reported high levels of alcohol use by its students.
The University President decided something needed to be done, so he initiated an alcohol use committee to study the problem. During this same time period, the University of Delaware began a campaign to bring its Greek system under control. The final result was a comprehensive alcohol use policy that not only applied off-campus but also included a five-star Greek accreditation plan that closely monitored Greek activity. Dr. Smith described the Greek system as follows: “Delaware chose to tackle the issue of off-campus and Greek behavior head-on as opposed to a hands-off policy. The University believed a tough stance with students was the only way to change the alcohol culture that existed at Delaware. The five-star plan evaluates Greeks on five categories: academic performance, financial management, community service, leadership and quality of membership intake. Each fraternity and sorority is ranked by stars. A five star level provides privileges including social gatherings, less than a 3 star rating loses social privileges.” In addition to the five-star plan, Delaware began utilizing the “financial dependent” clause in the Family Educational Rights and Privacy Act of 1974 (“FERPA”)34 to notify parents of alcohol use violations. Dr. Smith reported, “Parents are in favor of the notification. I receive calls weekly thanking me for notifying them and assuring me they have discussed the issue with their child.” Dr. Smith believes universities cannot distance themselves from tort liability by utilizing a hands-off approach. Dr. Smith suggests the courts are moving back toward an in loco parentis stance, which recognizes a duty of care toward students. If a dangerous condition exists that could have been corrected by the university, tort liability may attach. Dr. Smith

3420 U.S.C.A. Section 1232g.
believes the MIT scenario supports Delaware’s position that a university cannot ignore a problem but should instead embrace it to show the university has met its duty of care.

The administrative interviews revealed a basic diagram for the formation of an alcohol use policy. For example, Gail DiSabitino explained the procedure utilized by Georgia Tech University as follows, “Initially we formed a committee comprised of student leaders, residential hall advisors, IFC members, the Director of Housing, someone from legal, someone from campus police and someone from student life. We also brought in representatives from the athletic department, and the President’s office.” Captain Scott of Florida State University expanded their task force to include “the local police, representatives of various neighborhoods, the mayor’s office and local school board.” First, a task force or committee is formed to consider the implications of the alcohol drinking laws and to recommend new or revised policies or procedures that may be needed and what their content should be. The task force or committee is generally comprised of representatives from the student union, student affairs, Greek council, residence hall system, university police, student newspaper, office of the university general counsel, student health center, public relations office and the president’s office. Additional members sometimes include representatives of the community, including members of the alcohol beverage control board, mayor’s office, local newspaper, chamber of commerce, local police department, neighborhood housing or real estate agency, and restaurant associations. Student members included representatives from the student government and various other student organizations.

The scope of the task force varied, but generally focused on the effect of the drinking laws and regulations on the campus, including:
1. Consumption on campus and at university sanctioned events;
2. Marketing and sale of alcohol on campus;
3. Use of alcohol in university-owned housing units;
4. Enforcement of state and university regulations;
5. Concern for third party tort liability;
6. Alcohol abuse programs on campus; and
7. A plan for implementing the task force recommendations.

Most administrators interviewed indicated they still had continuing concerns about alcohol use and abuse by students, thereby substantiating the need for their extensive alcohol education programs and projects. In addition, the administrators noted that compelling reasons for stiffening their regulations concerning student drinking were found in court actions that held third parties liable for alcohol-related damages. It was a common belief that college student affairs administrators must play a key role in responding to the changes that drinking laws and court cases interpreting those laws bring to their institutions and to their students. Student affairs administrators believe they have the opportunity and obligation to assume leadership in responding to both the educational mission and the legal requirements of the drinking-age laws. The focus for student affairs administrators appeared to be on efforts to address campus programs that assist student leaders in dealing with increased needs for creative social programming and events consistent with the stipulations of the drinking age laws and the accompanying modifications in campus policies. Section III will analyze the evolution of the concept of campus tort liability for alcohol-related injuries and where it appears to be heading.
Section III: Analysis of the Jurisprudence

One purpose of this study is to identify and analyze the evolution of the legal concept of campus tort liability for alcohol-related injuries. A search to identify case law regarding tort liability for alcohol-related injuries produced three lines of cases that may affect a campus' potential tort liability for alcohol-related injuries. Each line of cases involves the use of alcohol by students on and off campus.

Most cases involving alcohol-related injuries - on or off campus - have been resolved in favor of colleges and universities. The courts have determined that the colleges owed no legal duty to the injured individual; thus, there was no liability on the part of the institution. Traditionally, institutions have successfully argued that after the student revolutions of the 1960s, colleges became more distant from student life. The campus' previous close supervision gave way to adult responsibility and freedom. The courts determined that students, like other alcohol consumers, became legally responsible for the harms they caused and were the morally responsible parties.

Institutions have been and often still are considered bystanders and in terms of foreseeability, students are in a better position to know of the risks associated with drinking. A line of cases supports the continued view that in spite of the new policies, colleges are still bystanders and no new duties have been imposed. The most famous cases representing this view are Bradshaw v. Rawlings, (1979), a decision of a federal appellate court; Baldwin v. Zoradi, (1981), a decision of a lower California appellate court; Beach v. University of Utah, (1986), a decision of the Utah Supreme Court; and Rabel v. Illinois Wesleyan University, (1987), an intermediate Illinois appellate court decision. These courts all used a no duty concept to limit the liability of a university for

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student injury. The image these decisions convey is one of a disabled university (no longer able to exercise parental discipline and control), helplessly watching hordes of free students plied with alcohol making poor judgments. Since these decisions were published, at least three more recent cases have followed their lead and relieved institutions of their liability for tort liability for alcohol related injuries: Albano v. Colby College, (1993); Whitlock v. Denver, (1987); and Hartman v. Bethany College, (1991).

The facts of Bradshaw, Beach, Baldwin and Rabel highlight the problems faced by modern universities and are worthy of reiterating. After reviewing the facts and law applied in these cases, the contemporary alcohol use policies in place at the selected universities will be analyzed in light of the jurisprudence. Bradshaw, which involved an off-campus party, is the case most often cited for no campus liability. In Bradshaw, an eighteen year old college sophomore was seriously injured in an automobile accident. He was riding as a passenger in the back seat of a vehicle driven by an intoxicated fellow student. The students were returning from an off-campus sophomore class picnic. The drinking age in Pennsylvania was twenty-one and this was a sophomore class event where most individuals were under-age.

The picnic more closely resembled an off-campus drinking fest. The driver reported he drank for several hours to the point that he blacked out and was unable to recall anything from the time he left the picnic until after the accident. The picnic was an annual event, planned with a faculty advisor, who co-signed the check that was used to buy beer. The evidence presented did not indicate that the faculty advisor or any other responsible faculty member attended the picnic. Copies of flyers for the event were made on college equipment and tacked up all over campus. The message
conveyed by the beer symbol on the flyer indicated it was a wet party. The sophomore class president (under-age) succeeded in purchasing six half kegs of beer from a local distributor.

**Beach** involved liquor and the difficult problems associated with student curricular activities which are carried out off campus. In **Beach**, an under-age first year student at the University of Utah was rendered a quadriplegic during a required field trip in the Deep Creek Mountains of Utah. The field trip, a weekend expedition at a remote location, was a required part of the course in which she was enrolled. The trip was supervised by a professor who told students that they were to follow instructions during class time but afterward they were free to do as they wished. During the trip, the student fell from a cliff into a rock crevice in an area where she waited suffering for several hours until she was discovered and rescued. In addition to the normal risks associated with field trips to remote locations, **Beach** involved alcohol-related facts. On a prior trip, the same under-age student had experienced a previous problem. During the earlier trip, under the same professor's control, the student drank wine and fell asleep in some bushes near camp. On that occasion, the student was located by some other students and returned to safety.

The second episode resulted in a more serious outcome. On the Sunday in question, the students were taken to a lamb roast hosted by a local rancher. Although this was a freshman biology course in a state with a 21 year old drinking age, the professor, nonetheless assumed that most people at the lamb roast were drinking alcohol and he himself had several beers. The record reflects the student consumed a mixed drink, plus three or four home brewed beers at the roast. The professor, who had also
been drinking, drove the student and others back to the camp-site in a van. The students continued to consume alcohol on the way including whiskey from an unidentified source. Upon returning to the camp, the student got lost and fell into the crevice, while attempting to reach her tent 120 feet from the van.

Baldwin represents injuries that are sustained off campus, but stem from on-campus drinking. The injured student in Baldwin was injured in a car wreck that was the product of a speeding contest that culminated after under-age drinking at a university dorm. The students involved were under-age, but had been consuming alcohol on campus in violation of university rules prohibiting alcohol use and in violation of California law.

The accusations in Baldwin included not only that the university failed to enforce anti-drinking rules in this instance, but that the university generally looked the other way regarding on-campus drinking. The claim implied the university culture was one where rules and catalogs conveyed the image of regulated liquor consumption, but in reality it was just the opposite. The victim in Baldwin alleged the Trustees and dormitory advisors permitted a dangerous condition to exist at the residence hall in that consumption of alcohol by minors occurred regularly, and the defendants knew or should have known of these occurrences but failed to take appropriate steps to stop the activity. Baldwin alleged the university was liable by knowingly acquiescing in the consumption of alcohol by minors on campus over an extended period of time. The Trustees, and their employees thereby created an unsafe condition, to wit, a safe haven or enclave where large groups of minors could, would and did gather and consume alcoholic beverages to excess, with complete impunity from any laws or rules and
regulations. The court in Baldwin dismissed the case on the pleadings prior to full discovery and prior to establishing all the facts.

Finally Rabel, another case dismissed on the pleadings, involved a fraternity prank. A young woman college student was requested to meet a visitor in the dormitory lobby. The visitor was a male student who was involved with a fraternity. The male student had just come from a fraternity sponsored liquor-friendly party with a mission. The fraternity instructed the student to abduct a female student and then run a gauntlet of fraternity brothers who would strike him as he passed by. He did as he was instructed and forcibly grabbed the female student, threw her over his shoulder, and ran towards his task. Unfortunately, the student was not up to the task. As he ran with the female student, he fell, and the female student’s skull was crushed, inflicting permanent, life-altering head injuries.

The fraternity member and the fraternity settled for a small sum leaving the university to defend assertions similar to those raised in Baldwin. The allegations in Rabel stated that:

The University holds itself out to the public, prospective students and others as a University that does not allow alcoholic beverages on its campus or in its fraternity houses, and as a University whose agents stated primary concern is the general student welfare.

The university by and through its agents and employees stated to plaintiff and plaintiff’s family, the public and prospective students by direct statement and otherwise that the University strictly controlled the activities of its students, including a ban on alcohol consumption and further, it represented and held itself out as having a strong religious background with a tradition of strong supervision and control of student activities and a premium price was charged to students as tuition to this private University in reliance upon those statements and others.
At all times herein, the university was aware of the excessive drinking occurring at the Fiji Fraternity and was aware of the lengthy and boisterous parties and activities, including the activities at Pfeiffer Hall described herein on May 1, 1982.

The university, not regarding its duty to the Plaintiff personally and as a student at Illinois Wesleyan University, and its duty to others arising out of its specific representations to Plaintiff and Plaintiff’s family, the public and prospective students, its stated policies, its customs and practices, its high tuition, and the special relationship between the university and its students, failed to take any effective action on April 30, 1982 or May 1, 1982 to discourage the excessive drinking of its students and others, or to discourage the lengthy and boisterous party and activities associated with that party, or to supervise and control said party or to provide adequate protection to the University Community at large and to plaintiff in particular (Rabel at 556-57).

Despite the allegations set forth above, the court dismissed the case against the university indicating the university did not owe a duty to Rabel to protect her from the alleged risks. Rabel illustrates a non-partying student who is victimized by intoxicated students on campus. The “look the other way” culture alleged in Rabel involved a particularly well-known risk-related association, the college fraternity; however, the courts refused to hold the university responsible.

Bradshaw, Baldwin, Beach and Rabel are all variations on the common theme that alcohol, college students, and activities like driving, field trips, and dormitory and fraternity parties threaten student health and safety. The jurisprudence established by this line of cases portrays the university as a helpless bystander to student misconduct because the institution owed no duty to these adult students.

Bradshaw is cited and quoted extensively in Beach, Baldwin and Rabel. The courts, following the Bradshaw line of cases, tend to agree with the Rabel court in professing the notion that higher education does not create a custodial relationship, but
rather a merely educational relationship. These cases stand for the proposition that 
causes of campus related student injuries, particularly drinking injuries, are beyond the 
control of a university and universities are powerless to change this circumstance.

Several images can be painted from this line of cases regarding the potential for 
tort liability. First, students are adults immediately upon entering the university. 
Students are not in the custody or under the control of the university. Second, students 
lost a right of protection from harm when they won their freedoms and individual rights 
in the 60's and 70's. Third, universities are not, cannot and should not be insurers of 
dangerous behavior on campus. Fourth, universities cannot realistically enforce campus 
regulations, especially those involving alcohol use and campus activities. Universities 
can promulgate rules regarding alcohol, but they are not responsible for enforcing them. 
Students are to bear their own consequences for their adult choices. Fifth, the university 
is a crucible for major social problems, but is helpless to do much except educate 
students in academic subjects in classrooms. Sixth, college drinking, by minors 
especially, is an inevitable fact of campus life, with unavoidable negative consequences. 
The court in Bradshaw at page 141 stated: "What we know as men and women we must 
not forget as judges, and this panel of judges is able to bear witness to the fact that beer 
drinking by college students is a common experience." Finally, it appears the courts 
believe they need to protect universities from injury claims involving the use of alcohol.

In each of the Bradshaw line of cases, the courts concluded that the university 
was not legally responsible for the harm caused because there was no legal duty. 
Although the Bradshaw line of cases are widely known and quoted, there are two other 
lines of cases that must be acknowledged before a complete analysis of the new alcohol
policies can be accomplished. The next two lines of decisions discuss a university's responsibility for alcohol-related injuries that result from its status as landlord or property owner, social host and the Furek crosscurrent cases that address the issue of foreseeable alcohol misuse.

**University as Proprietor**

In their capacity as property owners, colleges and universities are subject to the legal duty to maintain safe premises. Basically, a property owner owes a duty of reasonable care to invitees and licensees who come to the premises to live, transact business, work, see football games or engage in other legitimate activities. As will be discussed in more detail later, the Delaware Supreme Court has opined in Furek v. University of Delaware, (1991), that a school is obliged to supervise dangerous activities arising on its property.

The university is not the insurer of the safety of those who come onto the campus, and it is not responsible simply because a student injures himself or another on school property. A university may be liable if it fails to remedy a foreseeably dangerous state of affairs of which it is, or should be, aware. For example, in Brown v. Florida State Board of Regents, (1987), liability was found because the university knew swimming was occurring without lifeguards in a university-owned lake recreational area and allowed it to continue. Further, liability may attach when a university knows of potential behavior problems such as rowdiness at a football game and fails to provide adequate security such as the case of Bearman v. University of Notre Dame, (1983).

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35Restatement (Second) of Property Section 17.3 (1977); Restatement (Second) of Torts Section 341-343 (1975).
From the above general principles, there emerge a few generalizations about how a college’s duties as proprietor may embrace student drinking. Universities may need to be alert and respond quickly to disorderly conduct on campus before it results in injury. If there are recurring disturbances or rowdy behavior at sporting events, during fraternity rush or during particular social weekends, a university may be required to make reasonable efforts to prevent recurrence and to provide additional security. Additionally, a university may run the risk of liability by failing to effectively deal with repeat student offenders or groups of offenders whose conduct eventually results in personal injury or property damage.

The university’s responsibilities as proprietor are not much different from the responsibilities described in the Bradshaw line of cases; however, a line of cases, most notably Furek, have imposed a “duty of care” in certain circumstances. One court viewed the adoption of strongly worded university policies as creating an implicit contract between the university and its student. In Nieswand v. Cornell University, (1988), the court held that an implied contract to provide a certain level of campus security arose from a series of documents, brochures, leaflets and pamphlets Cornell sent to prospective students and to students accepted for enrollment. Normally implied contract cases are limited to claims seeking tuition refunds or enforcement of post-graduation employment guarantees; however, universities must be careful when adopting alcohol use policies so as to not suggest an alcohol free environment exists for students. Still other courts have rejected the premise that the university is not imputed with the knowledge of its employees like the professor in the Beach case and have held a university responsible for the knowledge of a student employee. In Sterner v. Wesley

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College. (1990), the court held the university knew of the abuse of alcohol occurring in its dormitories because the university had chosen to rely on residential advisors and similar student employees to aid enforcement of the rules; thus, they were the eyes and ears of the administration. A court could conclude that because the student employee acted as the college’s enforcement agent, the advisor’s knowledge of an unsafe drinking environment could be imputed to the university itself. With regard to premise liability, a university should identify and respond quickly to disorderly situations. The university should anticipate recurring patterns of rowdiness or dangerous conduct with heightened security and take steps to prevent repeated misconduct by particular individuals or groups.

University as Vendor of Alcohol

Any entity or individual who sells alcohol commercially bears special risks and responsibilities. Universities that sell alcohol in union pubs or at functions are not immune from these duties. All states have laws or regulations governing the sale of alcoholic beverages and generally require vendors be licensed. These laws are called dramshop acts and make it unlawful to sell alcohol either to a minor or to an already intoxicated person. Dramshop laws typically provide that it is unlawful to sell (and sometimes give) alcoholic beverages to a person who is intoxicated or who is not of legal age to drink. In some states these laws impose sanctions without regard to the seller’s actual knowledge of the purchaser’s age or sobriety. Dramshop laws may apply to numerous situations in which universities sell alcohol to students or even

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*Iowa Code Section 123.49 (1999).*
adults, including university sponsored dances, fund raisers, sports events or alumni gatherings.

Many states’ laws impose civil liability on those who sell alcohol in violation of the dramshop provisions, for any injuries to third parties that result from the prohibited purchaser’s consumption of alcohol. Some of the dramshop statutes allow no defenses based on the reasonableness of the sellers’ conduct or the foreseeability of the harm - the wrongful sale of alcohol and resulting injury conclusively establish the seller’s liability, Haaf v. Mitchell, (1984). In some states where no dramshop statutes exist, the courts have nonetheless judicially created a cause of action for civil damages by third parties against the seller (Largo Corp. v. Crespin, 1986; Nehring v. LaCounte (1986). Some courts have directly incorporated into the tort law the duty expressed by the criminal law, reasoning that violations of the dramshop act are negligence per se Congini v. Portersville Valve Co., (1983).

The potential for sweeping strict liability under dramshop laws is a consideration for every institution that sells alcoholic beverages. As discussed later, most student affairs administrators and all of the policies reviewed addressed this issue. A further consideration addressed by the policies relates to the responsibility for sales of alcoholic beverages by organizations such as fraternities, clubs and extracurricular associations.

**University as Social Host**

In some states, universities are subject to an extension of dramshop liabilities from commercial sellers of alcohol to non-commercial or social hosts who serve alcohol

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37 Mich. Comp. Law Section 436.22.
to minors or intoxicated persons. Social host tort liability varies from state to state. In states without social host tort liability the courts generally stress the differences in commercial vendors and social hosts such as experience in complying with local liquor license requirements and identifying purchasers who may be intoxicated or underage. Further, commercial settings are easier to control. The server in a commercial setting has custody of the alcohol and may refuse to fill an order. Social hosts, by contrast, are not trained, they do not provide alcohol for profit and they often have little control over guests' access to beverages. In addition to judicial activism in this area, some legislatures have adopted language so broad it could encompass a university as a social host.38

The question of what constitutes behavior as a social host is critical for universities. Any time a university serves alcoholic beverages at an official reception or ceremony liability may attach. Similarly a college could be considered a social host where, for example, drinks are served during seminars at professor's homes, departmental receptions or athletic banquets. The Bradshaw line of cases has had some impact in this area by requiring proof of actual control over premises before imposing social host liability upon colleges. In Houck v. University of Washington, (1991), a court refused to hold a university liable as a social host where the university did not exert genuine control over the dormitory room where the underage drinking took place. The court relied on earlier decisions finding a dorm room is a private residence subject

38 Ala. Code Section 6-5-71 (a) (1999)(authorizing private right of action against persons "who shall by selling, giving or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person").
to warrantless intrusions only upon a showing of compelling need. An alcohol policy with invasive enforcement techniques could expose a university to an allegation that its own conduct establishes sufficient evidence of actual control to justify imposition of social host liability, if the reasoning of the Houck court prevails.

The hallmark of the opposing line of cases that followed Bradshaw is Furek v. The University of Delaware, (1991). Knowledge of the facts of Furek are necessary to an understanding of how the new alcohol use policies may affect a campus’ potential for tort liability. About 1977 the University of Delaware began to take notice of students who were injured in fraternity pledging activities. The director of health services at the university specifically reported two injuries to the vice-president for student affairs and labeled them hazing incidents. The university responded in writing by immediately admonishing fraternities about hazing. Later the Dean of Students issued a formal statement that hazing — including beating, mental and physical intimidation and forced games of humiliation — would not be permitted on or off campus. In 1979, an assistant dean called a meeting of the presidents of the fraternities about matters involving disruptive behavior and hazing. The Dean also spoke to the campus about hazing deaths occurring around the country and made it clear the university was willing to revoke the charters of any fraternity unwilling to comply with the university’s anti-hazing policy.

Hazing, however, continued at the university. Further, a breakdown occurred in policy implementation. The campus police were not properly instructed concerning the university’s position on hazing. There were formal policy statements and announcements regarding fraternity-related disorder and danger, but there was an
insufficient plan of implementation. Campus police officers observed obvious indicia of fraternity hazing such as the marching of pledges with paddles, pledge line-ups and pranks. On a night just before Hell Night, several suspicious looking students were actually stopped by campus police, but no action was taken because there appeared to be no clear rules regarding such disorder for the police to enforce nor any effective instruction on how to use discretion in these matters.

In 1980, Furek pledged a fraternity and entered Hell Night, which consisted of a long hazing ritual featuring paddling, eating from a toilet, and being covered with food and other organics. These rituals were exactly what the university had sought to prohibit. During the ritual, one fraternity member poured oven cleaner over Furek while he was blindfolded. Furek was chemically burned and scarred severely and permanently. The Bradshaw line of cases held that for a university to bear responsibility, the university must possess a special relationship with students, one premised on custodial control. The Furek court, on the other hand, suggested that a more subtle form of relationship may exist between students and their university.

Furek determined that the university/student relationship is unique and is more than strictly educational, a rejection of the Bradshaw premise. Furek further noted that, the primary function of the university is to foster “intellectual development through an academic curriculum” (Furek at 516). Many other aspects of university life are university guided such as housing, food, security, extra curricular activities and student life. The court further noted that students are not solely responsible for their own safety simply because they are adults. Finally, the court opined that the mere fact students are adults does not render university concerns and efforts related to student alcohol use
inappropriate. The university is in a unique relationship with students because of the
“situations created by the concentration of young people on a college campus and the
ability of the university to protect its students” (Furek at 519).

The Furek court established a different vision of university/student relationships
than that of the Bradshaw cases. The legal principles that Furek relied upon to reach its
ultimate conclusion that the university had a duty to the student reflect a shift away from
the affirmative duty/special relationship/custody concepts of the Bradshaw cases. The
duty of care in Furek arose not from special relationships, per se, but from ideas of
reliance and assumption of responsibility/creation of risky conditions. Basically, Furek
is about a university starting something and finishing it properly when students have
come to rely on what the university has started. Furek reflects the possible creation of a
duty that exists under unique and special circumstances. Colleges, according to Furek,
guide the creation of a community in which the college remains a major player in what
activities are promoted or discouraged. In this regard, the Furek court held that the
university had been committed to providing security on the campus in general, and in
particular had undertaken to provide a level of security to students on campus and
endeavored to eliminate hazing by fraternities. To the extent the university did not
fulfill its commitment, the university may be legally responsible. The duty the court
found was to use reasonable, not all possible care. Such duties can be breached by a
university when the campus police are given an ineffective implementation plan
regarding an know danger, thus permitting students to flagrantly disregard policies.

The Furek decision does not appear to impose strict liability, nor does it seem to
require babysitting students. The Furek duty is only a duty of reasonable care. While

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students will be injured in alcohol-related incidents, Furek suggests that universities are not always responsible. Instead, Furek sends a message that a university cannot make rules and policies regarding alcohol use and then fail to take adequate steps to enforce them. Nor may a university fail to give campus police and others the authority and guidelines to enforce the policies through intervention. Inappropriate drinking can be dangerous conduct. College drinking is a major social concern and a source of risk on campus. The Bradshaw line of cases reflects the position of hands thrown in the air, probably in memory of prohibition. Furek and its progeny hold that courts will not hold, as a matter of law, that universities have no duty to protect students from alcohol-related injuries.

The Furek court does not place the entire burden of protecting students on the university. Instead, Furek stands for the proposition that it is potentially a shared responsibility between university and student. In Furek, the court found both the student who poured the oven cleaner and the fraternity responsible parties. It is becoming more common for courts to hold individuals and associations like fraternities liable for injuries caused. Certainly, the student victim may also be partly to blame. A student who deliberately goes along with known unauthorized activities and fails to use care to protect him or herself is often found partially at fault. Furek does not appear to disable affirmative defenses but merely states that a university can properly be considered as one of the responsible parties in an accident. There will be situations where the student’s own misconduct is so egregious that courts will bar claims against the university as a matter of law; however, this does not mean the university has no duty.
One potential consequence of Furek, is the perception that if a university becomes involved in an activity, it becomes liable. Dr. Stump of the University of Colorado indicated, “It is the University’s position that it can not control the dangerous activities of fraternity members; therefore, it is better to leave them off-campus and unsupervised.” Therefore, universities may decide that it is better to be uninvolved or push the students and their dangerous activities off campus. There is a belief among some student affairs administrators that the university is better off not getting involved. This question will be faced by student affairs divisions for years to come.

“Assumption of duty” is a concern of many university administrators. “We try to do what the law will uphold. Our policy basically does not go beyond what the law requires as far as enforcement is concerned,” reported Dr. Nestor of the University of Vermont. It conjures up the image of the university voluntarily assuming a duty not imposed by law, that the university is then bound to carry out with reasonable care or be liable for its negligence if it fails to do so. If a university believes the Bradshaw line of cases will be followed, there is fear that to affirmatively intervene in student activities, programs or conduct will lead to liability in the event of failure to act. The alternative option to universities is to avoid assuming a duty it would not ordinarily have.

The results of the student affairs administrators interviews suggests most college and university administrators are not going to ignore student conduct or activities that invite danger such as alcohol abuse. Adopting policies of deliberate indifference is professionally distasteful to them. One participant was adamant that a hands off approach would be a disaster. “We believe it is better to show we care and attempt to protect our students instead of pushing the problem off-campus.” Actually, most
student affairs administrators believe that deliberate indifference increases the chances of student injury and enhances the likelihood of a finding of negligence. The popular approach is to defeat a lawsuit by avoiding the injury in the first place.

A review of the student affairs administrator interviews indicates these colleges are not disengaged from student life. Most have taken affirmative steps to protect the environment in which risks occur. In most instances, a college which features substantial on-campus housing, sanctions and regulates Greek life, and provides a panoply of student services has engaged itself in student life to a point where withdrawal or disengagement from student life and safety issues such as alcohol use, would be impracticable and unprofessional. It does not appear that the creation of regulations alone is what engages a college. Instead, it is the creation of a guided, facilitated environment which suffuses student/university relationships with a responsibility of reasonable care to guide student growth and development. In fact, the student affairs professionals stated their role was that of student developers and all had a problem with legal rules that encouraged disconnection or passivity in student/administrator relationships.

The struggle of student affairs professionals is illustrated by Leine and Cureton (1998) in which they described the modern college student as one who increasingly likes to party off campus in non-fraternity situations. In some instances like Baldwin the activities begin on campus, but carry on off campus. Colleges struggle, as described by the student affairs administrators, with whether it is preferable to encourage students to stay on campus or to push drinking off campus. Furek logic might encourage an administrator to establish defacto policies that put college drinking issues in the lap of...
the greater community. If the Furek jurisprudence is adopted in the future, courts will likely look to the unique situation of each college to assess its relationship with its students. The ramifications of duty assumed - the amount of care necessary so as not to be in breach of duty - will necessarily vary from college to college.

Responsibility for Student Alcohol Use

The Bradshaw line of cases were all alcohol related injury cases. Furek and its prodigy are not all alcohol cases. In most instances, cases involving beer and liquor weigh substantially against college liability. In the cases of Bradshaw, Beach, Baldwin and Rabel, students assumed almost all the risks of alcohol use - on campus, off campus and even risks associated with other students who were drinking. The courts of the past have basically treated alcohol use on campus like a dangerous college sport, with known and obvious dangers. There appear to be a number of reasons for this. One is that legal rules still tend to treat liquor liability within narrow boundaries. For example, social hosts have historically not been subject to law suits. Another reason is the continued sense of futility described by the student affairs administrators that college-aged drinking is an inevitable feature of college life.

Another reason appears to be that many plaintiff/victims have not invoked sympathy from the courts. In cases like Beach, it is the drinking student who seeks refuge in tort law. The more recent case of Albano v. Colby College, (1993) supports this position. In Albano, an underage member of the college tennis team was hurt on an annual trip to Puerto Rico following his excessive consumption of alcohol, which the coach specifically prohibited. The courts tend to see the consumer as assuming the risk and generally bar recovery. Tort liquor liability is generally reserved to protect innocent
third parties, not drinkers. If the tort issue is presented as a premises/dormitory safety issue, assumed duty, and/or control of dangerous persons, a student tends to fare better than if the claim is that liquor caused or facilitated the injury.

Basically, courts still reject college liability for student liquor injuries in most circumstances as described below. The Colorado Supreme Court in University of Denver v. Whitlock, (1987) found that a university was not liable for injuries suffered by an intoxicated student as a result of his use of a trampoline at a campus fraternity although the lower courts did find for the student. The Supreme Court required a special relationship be shown.

In Hartman v. Bethany College, (1992) a federal court found against a college freshman who claimed that because she was a minor, the college had a duty to prevent her off-campus drinking.

In Booker v. Lehigh University, (1993) a federal case, a female student admitted she voluntarily consumed significant alcohol before she fell on a rock trail as she went home to her sorority. Booker asserted that the university had a general duty to control student consumption of alcohol on campus and that a breach of this duty caused her to fall. The federal court disagreed, but did note that if the university, not a fraternity, had served liquor or otherwise planned or purchased and supplied liquor, the result would have been different.

In cases where students have become intoxicated and been attacked suddenly by other students, the courts have ruled against the victims in the absence of some foreseeability L.W.V. Western Gulf Association, (1997) and Tanya H v. Regents of the Univ. of Cal., (1991).
The Next Evolution

Based on the jurisprudence described above it appears that the mere fact that a university regulates alcohol use does not create a specific duty to particular individuals. In spite of the jurisprudence above, there is evidence of a shift away from a no liability approach in cases involving student alcohol-related injuries. For example, in Furek and Booker, the courts placed accountability on the university, if it supplied liquor or planned the activity. Furek rejected the culture of non-enforcement of liquor/hazing rules. Fundamentally, the basic reasons courts traditionally found no liability are coming under fire in social policy circles. What was reasonable conduct in the 60s, 70s and 80s may not be considered reasonable conduct for tort law purposes in the 90s and the new millennium. For example, there has been an increase in responsibility for liquor injuries beyond the traditional bar and vendor categories by establish social host liability. Second, there is a push to resolve perceived liquor problems on campus illustrated by the recent rash of alcohol related deaths and the funding of changes by the Robert Wood Johnson Foundation. There also appears to be a shift in attitudes toward the young students who are victims and drinkers. There appears to be an increasing sentiment from the public and parents that general risks of alcohol use are specifically foreseeable and that students are not solely responsible for alcohol-related injuries. Two recent events illustrate this shift, a hazing case from Nebraska and an alcohol-related death at MIT.

In November 1999, the Nebraska Supreme Court in Knoll v. Board of Regents of the University of Nebraska, (1999) ordered a trial to determine whether the University of Nebraska had failed in its obligations to a 19 year old freshman pledge
with the Phi Gamma Delta ("Fiji") fraternity. The court ruled the University of Nebraska had a duty to protect a fraternity pledge who was severely injured while trying to escape a hazing incident.

The court records indicate that as part of a pledge event, four or five members of the fraternity confronted Knoll in the basement of an academic building, tackled him, and handcuffed him to one of the members. Knoll was taken to the fraternity house; handcuffed to a radiator and forced to drink 15 shots of whiskey and brandy and three to six cans of beer. Knoll became sick and was taken to a third-floor bathroom and handcuffed to a toilet pipe. Later, Knoll broke free and tried to escape through a bathroom window by sliding down a drainpipe. Knoll fell and suffered head injuries leaving him brain-damaged. The Phi Gamma Delta house is on land owned by the fraternity’s alumni corporation, but the fraternity is considered on-campus housing and is subject to Nebraska’s student code of conduct.

The Nebraska Supreme Court noted several important items in reaching its decision. First, the university had been aware of criminal conduct involving members of Phi Gamma Delta during the five years preceding the accident. One member had been convicted of sexual assault, one was found drunk and unconscious, while two others had attempted to break into a sorority house. The university was also aware of hazing activities by at least two other fraternities. The Supreme Court ruled the University of Nebraska was obligated to take reasonable steps to protect against foreseeable acts of hazing, including abduction of students on the university’s property, and that harm naturally flowed from the university’s failure to act. A similar finding regarding alcohol use and misuse on campus could be consistent with the court’s
reasoning. The attorney for the Knoll family was quoted by Reisberg (2000)

"Institutions of higher learning are going to have to recognize that they have a
responsibility to take reasonable steps to protect students from acts of hazing and similar
conduct." The damages sought by the Knoll family are based on allegations that the
university had a duty to protect Knoll because he was abducted by the fraternity
members on university property, and that the university failed to enforce prohibitions
against hazing, alcohol consumption and physically abusive behavior. Knoll is
important in that it opens the door for tort liability based on the university’s failure to
protect against foreseeable acts of alcohol abuse and the harm that naturally flows
therefrom.

The most recent and perhaps most significant case is not a case at all, but a
settlement that never went to trial. In September 2000, the Massachusetts Institute of
Technology ("MIT") agreed to pay six million dollars and to acknowledge some
responsibility for the alcohol-related death of Scott Krueger, an 18-year-old fraternity
pledge. The background to this settlement is documented not in published opinion but
instead is reported by Leo Reisberg of the Chronicle of Higher Education.

Long before Krueger drank himself to death at a Phi Gamma Delta initiation
event, numerous signals were present that the social life in the Greek system at MIT was
out of hand. In 1996, three Boston College students were hospitalized on separate
occasions for alcohol poisoning after partying at Phi Gamma Delta at MIT. The dean
for student development at Boston College requested help from MIT to address the
issue. Neighboring college administrators reported MIT had a long history of ignoring
complaints about hazing and dangerous drinking in its Greek system; however, a
shortage of student housing led MIT to continue to funnel freshmen into unsupervised fraternities. The Suffolk County District Attorney’s Office, after spending a year investigating the death, decided not to charge university administrators, but did file manslaughter charges against Phi Gamma Delta. The charges did not proceed because the chapter disbanded. In an un-precedented move, MIT revoked the diploma issued to Krueger’s pledge trainer after he graduated from MIT.

MIT originally took the position that the university’s housing system had nothing to do with Krueger’s death and that the university could not be legally responsible for the actions of individual students in privately owned houses. MIT housing brochures stipulated that first year students were required to live “on campus” in “institute housing,” however, the definition of “institute housing” included fraternity houses, many of which were located across the Charles River, in Boston, about one mile from campus. Four days after his arrival at MIT, Krueger pledged and moved into the Phi Gamma Delta house. On the night at issue the pledges were told to gather together at 8:30 p.m. to watch the movie Animal House, and collectively drink a certain prescribed amount of alcohol. The chapter’s pledge trainer gave the initiates beer and a bottle of Jack Daniel’s which they consumed prior to meeting their big brothers. Krueger’s big brother gave him a bottle of Bacardi spiced rum. Throughout the evening, Krueger complained of nausea and finally lay down on a couch. When he began to lose consciousness, two students carried him to his bedroom, placed him on his stomach and put a trash can next to his bed. Later Krueger was found unconscious and covered in vomit. A fraternity member dialed campus police. Krueger lapsed into a coma and died 40 hours later from alcohol poisoning and from suffocating in his vomit.
In response to the incident, MIT and the national fraternity suspended the chapter. The Boston Licensing Board, which issues housing, restaurant and alcohol licenses, revoked Phi Gamma Delta’s “dormitory license.” Daniel Pokaski, a Boston Licensing Board commissioner blamed MIT for allowing Krueger to join a fraternity for which he was not prepared. “It was a total abrogation of what a university should be doing, which is to guide people on their own for the first time” (Reisberg, 2000). The Boston Licensing Board had issued two previous warnings to Phi Gamma Delta, in response to two large parties there, in February, 1996 and February 1997. Further, investigators reported that police and paramedics were called to Phi Gamma Delta 15 times in the 5 years before Krueger’s death.

The settlement with MIT includes 1.25 million dollars to endow a scholarship fund established in the name of Scott Krueger and Reisberg (2000) also reported 4.7 million dollars in compensatory damages for the family. The President of MIT acknowledged in a letter to the Kruegers that “the death of Scott as a freshman living in an MIT fraternity shows that our approach to alcohol education and policy, and our freshman housing options, were inadequate.” Under campus housing policies at MIT, first year students must decide within a few days whether to live in a dormitory or a fraternity house. The Phi Gamma Delta house was considered institute-approved housing despite a significant history of alcohol-related incidents. For its part, MIT has since Scott Krueger’s death promised to make several changes to its housing and alcohol policies to address the concerns raised by the incident. By August 2002, all freshmen will be required to live in dormitories, and fraternity and sorority rush will no longer take place during freshman orientation.
The Nebraska and MIT incidents both involved alcohol use by underage students. Although the MIT case will not go to trial and the Nebraska case has not concluded, it appears that a significant shift in the evolution of tort liability for alcohol-related injuries is occurring. Whether it's a social policy change or a modern view of reasonable care, courts appear willing to hold a university responsible to take reasonable steps to protect students against foreseeable acts of hazing and alcohol abuse and the harm that naturally flows therefrom. Universities today are addressing the use and abuse of alcohol by students and have adopted policies to guide students and comply with state and federal law. The final section of this chapter will address the affect these new policies described in Section II have on a campus' potential for tort liability for alcohol-related injuries.

Section IV: Integration of Alcohol-Use Policies with Analysis of the Jurisprudence

The current evolutionary process of campus tort liability for alcohol-related injuries is sending out conflicting messages to student affairs administrators. The traditional cases highlighted by Bradshaw suggested universities should only adopt policies that comply with legal requirements and not include provisions that require universities to assume duties not required by law. The Bradshaw cases suggest universities cannot control students' conduct and thus they will not be legally responsible if they do not try. Furek cautions universities that if they assume duties they must take reasonable steps to fulfill those duties. Knoll and the MIT case indicate universities may have a duty to care, that is, a duty to protect students from known dangers such as alcohol abuse and the consequences that flow therefrom. Based on the
above, it is difficult for universities to know how far they should go in developing their alcohol use policies. Student affairs administrators believe they know what should be included in alcohol use policies and although they realized they may incur some additional liability by going beyond the legal requirements for alcohol use policies, the needs of the students and the desire to create a positive learning environment and a safe campus took priority for them.

Several primary policy provisions were drawn from the research findings summarized in Section II above for analysis with the jurisprudence. The areas of analysis included (1) Location of alcohol service on campus, (2) Additional requirements when alcohol is served, and (3) Discipline and enforcement of policy provisions.

With the exception of the University of Colorado’s view of fraternity management, the student affairs administrators interviewed for this study were not comfortable with the Bradshaw bystander approach to alcohol use management. All of the administrators indicated an understanding of the bystander concept that if the university was not involved and did not try to regulate student conduct, no custodial relationship would exist and the university would not be legally responsible for student’s alcohol use misbehavior. However, the student affairs administrators believed their duty to students went beyond concern for legal liability (although it was not dismissed) and that they had an obligation to guide students toward responsible behavior. Accordingly, the contemporary campus alcohol use policies all go beyond what the law requires and attempt to educate students on the appropriate methods of service and consumption of alcohol.
The first group of provisions to be analyzed involve time, and place for use or service of alcoholic beverages. The law only requires provisions that restrict the use and purchase of alcohol by individuals under the legal drinking age; however, most policies extend beyond this requirement and prohibit alcohol in classrooms and limit possession of alcohol to certain areas and at certain times on campus. For example, alcohol may be allowed in certain designated areas prior to athletic events or may be available at certain university functions or in the union pub. The law does not require these limitations, but student affairs administrators believe they are necessary to promote a positive learning environment. Restrictions on possession also applies to residential housing where alcohol is permitted only in rooms where at least one of the occupants is over the legal drinking age, while some campuses have alcohol free housing regardless of age.

The only increased exposure to tort liability that could occur from a location restriction provision would involve repeated violations of the provision that are ignored by the university. In Furek the court noted the university was aware of past hazing problems but had not corrected it. In Bearman, the court found the University of Notre Dame knew of the alcohol problems in the stadium but did not do anything to enforce its alcohol ban, thus creating an unreasonably dangerous condition. Once again it appears the failure to correct a known danger is the basis for potential liability.

The provisions outlining the procedures for service of alcoholic beverages were designed to reduce a university’s exposure to dramshop and social host liability. Most of the conditions for selling alcohol require (1) a license, (2) trained servers, (3) method of identifying underage individuals and (4) security available to handle problems. The
increased exposure to tort liability for selling alcohol has led to strict rules regarding where, when and how alcohol may be sold on college campuses. Most institutions have limited sales to the Student Union, faculty lounge and the occasional alumni function. Unless improperly performed, the provisions for service and sale of alcoholic beverages on campus should reduce the university’s exposure to tort liability.

The provisions for service of alcoholic beverages at private and public functions are not generally required by law but are mandated by college regulations to provide guidance toward responsible behavior by students. Student affairs administrators believe they are necessary to accomplish their efforts of educating students on appropriate conditions for providing alcoholic beverages. The provisions mandate restrictions on certain activities and a requirement for others. For example, most policies require non-alcoholic beverages, in addition to water, be available at no cost if alcoholic beverages are served. Food must also be served with limits on food with high sodium content. Advertising for functions where alcoholic beverages are available must include references to non-alcoholic beverages, must not reference the amount of alcohol available, and cannot list as the primary purpose the consumption of alcohol. Two final requirements of most policies include the presence of security to monitor the activities and the use of certified and trained alcohol servers capable of recognizing the signs of intoxication and having the authority to stop service to individuals exhibiting signs of intoxication. Once again these provisions should help insulate a university by establishing the university took reasonable steps to protect students, as long as the provisions are not ignored and the university does not fail to properly enforce the provisions.
University provisions also generally prohibit certain things that the university has determined contribute to alcohol abuse. For example, alcohol must be served in single service containers for monitoring. Accordingly, beer kegs and other self-service mechanisms are prohibited. Drinking games and drinking paraphernalia like tubes are not allowed. The quantity of alcohol available must be gauged toward the number of anticipated participants and provisions for identifying students under the legal age for drinking must be enacted. These provisions should assist universities to comply with any duty to care as long as the provisions are enforced by the university.

The final major component of contemporary university alcohol use policies concerns discipline of students and enforcement of policy provisions. Several universities have adopted a “three strikes and you’re out” policy. This policy provides progressive discipline for students who violate the alcohol use policy. On the third violation the student is suspended from the campus. Some universities have provisions for contacting parents regarding their child’s violations. The University of Delaware places students on probation, fines them $50.00 and notifies their parents if they are dependents. Dr. Smith reported that parents were grateful for the information and appreciated the policy. Florida State University, according to Captain Scott, requires a student prepare a five page essay describing the events that led to their first violation of the alcohol use policy. The essay is kept by the student affairs office. If the student commits a second offense the parents are notified and a copy of the essay describing the first offense is sent home.

Discipline and enforcement of policy provisions is mandated by law; however, it is incumbent upon universities to create alcohol use policies that can and will be
enforced. If the policy provisions are unenforceable or if universities turn their heads or simply ignore violations, Furek, Knoll and MIT type liability is possible. If a university creates an image of an alcohol free campus and conveys that image to students and their parents, they may be increasing their exposure by increasing their duty to students. In a way, the reasoning of the court in Tarasoff v. Board of Regents of the Univ. of Cal. (1976), a California case involving a psychologist who failed to warn a victim that his patient was going to kill her, may be used to establish the university knew the campus was not alcohol free and alcohol abuse was occurring, but failed to inform parents and students. Additionally, if the university states it will notify the parents of alcohol violations but does not, and the student is later injured due to alcohol use, the university may be liable. The parents will certainly claim they would have taken steps to avoid the later injury if they had known of their child’s previous alcohol problem. This liability falls under the heading of failure to warn.

In general, the contemporary campus alcohol use policies appear to reduce the university’s exposure to tort liability for alcohol-related injuries by establishing that the university is prepared to meet the challenges of campus alcohol use and providing the means by which the university can meet its duty of care and its duty to protect students from known dangers. However, student affairs administrators must be careful not to extend the university beyond what it can reasonably accomplish to avoid assuming a duty not required by the law and then being unable or unwilling to meet that duty. The lessons of Furek, Knoll and the MIT case illustrate that the courts will no longer allow universities to close their eyes to the known dangers of alcohol abuse and thereby avoid all legal liability as suggested by the Bradshaw line of cases.
CHAPTER 5
CONCLUSIONS, DISCUSSION AND RECOMMENDATIONS

This chapter begins with a brief overview of the study, reiterating its importance, purpose and intended contributions. A summary of the study's major findings and conclusions follows. The chapter concludes with recommendations for university administrators and for future research.

Overview of the Study

This study was designed to explore the influence of tort liability for alcohol-related injuries on contemporary alcohol use policies in place at 10 colleges and universities participating in the Robert Wood Johnson Foundation “A Matter of Degree: Reducing High-Risk Drinking Among College Students” program. Additionally, the study utilized legal research to establish the evolution of tort liability for alcohol-related injuries that involved colleges and universities from the 1960s to the present. Student affairs administrators were interviewed to identify the social and legal influences that shaped the need for and boundaries of the contemporary alcohol use policies in place at institutions participating in the RWJF program.

First, the student affairs administrators were interviewed to determine the influences that prompted the adoption of contemporary alcohol use policies as well as the influences that shaped the actual policy provisions. Second, legal research was conducted to (a) attempt to map the evolution of campus tort liability for alcohol-related injuries and (b) analyze the contemporary campus alcohol use policies in conjunction with the continued evolution of campus tort liability for alcohol-related injuries. It was anticipated that the potential for tort liability was the initializing force behind the
creation of the contemporary alcohol use policies and that the policies were designed to reduce the campus' exposure to tort liability.

The design of the study was two fold. First, the study was initiated to determine the present evolutionary status of campus tort liability for alcohol-related injuries. Second, the study attempted to isolate the societal and policy influences that shaped the contemporary campus alcohol policies at select universities.

A review of the influence of tort law on society revealed that originally tort law was directed toward compensation of individuals, not the public, for losses they suffered due to the actions or inactions of others. In a field of law with many types of individual interests it was difficult to isolate a single guiding principle that determined when compensation should be paid. However, one theme that appeared consistently was the idea that tort liability was based upon conduct which was socially unreasonable. The tort law judicial decisions appeared to attempt to strike some reasonable balance between the plaintiff's protection from injury and the defendant's right to do what he pleased. Socially unreasonable conduct is measured by a societal standard, not an individual standard. For example, the unabomber may believe his conduct of mailing bombs to protest certain actions is reasonable; however, from the point of view of the community, it is socially harmful and unreasonable.

Tort law from a university's point of view is a constantly moving target as it is often the area where society's shifting policy goals are expressed. What was perfectly acceptable by society yesterday becomes questionable today and perhaps outrageous by tomorrow. The influence of public policy on torts law is often controversial when a case proposes to change the current law. Student affairs administrators must be
cognizant of the present law as well as societal efforts to change the law. Tort liability for alcohol-related injuries is an arena that is subject to change with the next judicial decision.

The connection between the perceptions of student affairs administrators and the law of higher education is important and will have an impact on university operations and programs. The law helps create the foundations of the university environment and apportions the rights and responsibilities of the participants in university life. Tort liability can alter the parameters of risk and foster a range of effects on the university and its students including the style of control of student life. Ultimately, the university both creates and mirrors society, which is always changing. Consequently, an examination of the influences that shaped the contemporary alcohol policies and their relationship to the evolution of campus tort liability for alcohol-related injuries was undertaken.

The influences on campus alcohol policy revisions were selected for examination in this study because the legal literature suggests that tort law shapes policy by defining socially reasonable conduct through judicial decisions. If the courts determine that once-appropriate conduct has now become socially unreasonable, the law in essence has changed. In the arena of student affairs, many competing interests exist. Most students are away from home for the first time and need guidance on their journey to adulthood. Student affairs departments handle almost all student activities outside the classroom from residential housing and cafeterias to recreational programs.

To assist in understanding the function of student affairs with regard to alcohol use, an interview protocol was created to facilitate interviewing student affairs...
administrators at select universities. The questions posed sought to elicit information regarding student affairs administrators' beliefs on the influences that led to the creation of the contemporary alcohol use policies and what effect the potential for tort liability for alcohol-related injuries had on the formation of the alcohol use policies.

The data for the interview portion of the study was collected from nine student affairs administrators that were either Vice-Presidents or Dean of Students and employed by universities participating in the RWJF program. Student affairs administrators were chosen because they were involved in the formation of the contemporary alcohol use policies and were charged with enforcing the policies.

In addition to drawing conclusions about the influences that affected contemporary alcohol use policies, the intent of the study was to identify through legal research whether the contemporary alcohol use policies increased or decreased the higher education institute's potential for tort liability for alcohol-related injuries. Extensive legal research was conducted through the review of statutes and case law to describe the legal evolution of campus tort liability for alcohol-related injuries. A further goal of the study was to identify theoretical and practical implications that will contribute to the existing knowledge base and will help direct policy decisions. From a theoretical perspective, the information gained in this study added to our understanding of the influences that effect the creation of campus policies including the effect of tort law. Finally, a better understanding of how policy creation works allows for the formation of plans by policy makers to insure an appropriate process for future policy formation. The section that follows summarizes the major findings and conclusions from the study.
Major Findings and Conclusions

Conclusions on the Basis of Student Affairs Administrators Interviews

The first major finding revealed that a change catalyst was almost always a major influence in the creation of the contemporary alcohol use policies at their universities. Change catalysts as described by the interviewees included those individuals or events that provided the momentum necessary to create the new alcohol use policies. The change catalysts were the residential life advisors followed by the campus president, the Core alcohol use survey and major alcohol-related incidents. An additional catalyst identified through the interviews included a desire to consolidate policies for clarification. Although not a primary catalyst for the selected administrators, most of them stated tort liability was a consideration. Dr. Stump indicated the University of Colorado utilized a “hands off” approach to fraternities to avoid a finding of a custodial relationship between the university and the fraternities. Dr. Smith of the University of Delaware “wrapped its arms around” its fraternities to avoid Furek type liability.

After determining the primary influences that affected the decision to revise campus alcohol use policies, the study identified the primary local influences that affected the provisions incorporated into the contemporary campus alcohol use policies. Problems related to the consumption of alcohol rated the greatest influence on policy provisions. Student affairs administrators described three categories of problems that most influenced the specific provisions incorporated into their alcohol use policies. The first category involved physical injuries to self and others, property damage and fighting. The second category involved damage to social relations, while the third
involved impaired academic performance (inefficiency in homework, classroom or lab performance, late papers, missed classes or exams, failure to study for exams, inability to perform due to disruptions caused by students consuming or having consumed alcoholic beverages). Thus, the number one influence on the creation of new alcohol use policies was an attempt to improve the campus learning environment and campus security. This influence correlated to the number one reason for revising the alcohol use policies which was “complaints from residential housing advisors.”

The second most influential concern was the management or supervision of fraternities. Within this concern, the issue of tort liability for alcohol-related injuries was addressed. If fraternity members’ conduct remained out of control, several interviewees indicated they were concerned about lawsuits being filed as a result of alcohol-related injuries, including sexual assaults. For example, one participant told of a lawsuit the university was defending that involved a fraternity party and an alleged rape. Another participant stated “MIT let its Greek system go unchecked and look what happened to them.” The presidents’ belief that a new alcohol use policy was necessary was influential in institutional decisions to revise or review alcohol use policies, but not particularly influential in shaping the actual provisions. Town-gown influences which included a desire for quieter neighborhoods, were influential in deciding whether the campus alcohol use policy would be extended beyond the borders of the campus.

Finally, the potential for tort liability was an influence, but not particularly a primary one. Every administrator indicated a desire to comply with the law, but all believed their goal was a more positive learning environment, even if a more assertive alcohol use policy increased the university’s exposure to tort liability for alcohol-
related injuries by causing it to assume a duty that the university did not legally owe to its students.

Conclusions on the Basis of Legal Analysis

A major task of this study was determining the judicial decisions of the courts and how those decisions evolved into the concept of tort liability for alcohol-related injuries. The decisions were broken down into three groups of cases that illustrate the evolutionary process that occurred over time. Court cases reveal that universities have gradually, but not completely, emerged from an era of legal insularity into a duty of care era. The core to this evolution has been the courts’ efforts to balance university authority with student freedom to achieve a proper and fair allocation of legal rights and responsibilities that maximizes student safety while promoting the educational mission of the modern college. Over the past four decades society has been redefining the legal rights and responsibilities of individuals and institutions, including universities. Since World War II, and particularly the 1960s, colleges have experienced dramatic changes in their legal responsibilities and social obligations.

The evolution of tort liability for alcohol-related injuries has followed three general shifts in responsibility. First was the *in loco parentis* era, in which universities — like families, charitable organizations and governmental entities — were basically immune from liability. Although the law did not grant a specific immunity, universities were basically allowed to operate without much judicial scrutiny.

In the 1960s, students at public universities began to protest against segregation and in many instances these students were expelled or suspended with little or no process. Courts reacted against these actions by imposing due process requirements on
university disciplinary actions, basically revoking the earlier protections afforded universities. In response to the changing cases of the 1960s, colleges began to re-fashion their relationships with students and sought to avoid liability by professing to have no control over students' actions. In a line of cases, (Bradshaw, Beach Baldwin and Rabel), the courts agreed with the universities and based on the purported lack of custodial control over students, universities were found to no longer manage student affairs or protect student safety. In cases involving alcohol use, universities were highly successful in casting students as uncontrollable. Courts in the 70s and 80s were particularly sympathetic to institutions of higher education in cases involving alcohol-related injuries, with the exception of instances where the university actually served or sold the alcohol.

In the 1990s and continuing today, a heighten judicial concern for student safety has raised the issue of campus liability for alcohol-related injuries. Courts are beginning to treat universities like other institutions and holding them to a higher standard. Recently, a new "duty of care" standard has been applied by some courts. These cases hold universities responsible for protecting students from known dangers, such as alcohol abuse, and the consequences that flow therefrom, particularly when the university has assumed a duty in a policy or regulation. Universities can no longer turn their eyes from violations and expect the courts to protect them.

Since the fall of in loco parentis, the message to universities has been ambiguous at best. The bystander era highlighted by the Bradshaw line of cases discouraged universities from assuming additional duties to students for fear of legal liability. The courts issued some decisions that colleges interpreted to mean the best
legal strategy to avoid tort liability for alcohol-related student injuries was distance and disengagement.

Recent decisions and events indicate the law of tort liability for alcohol-related injuries is still evolving. The increase in social host liability and the jurisprudence that suggests universities have a duty of care for student's alcohol-related injuries indicates universities are in danger of losing their legal insularity of the Bradshaw era. Student affairs administrators as well as the courts are beginning to find that a campus that fails to adequately address known dangers and disorder is both educationally unsound and a target for tort liability. Student affairs administrators believe it is better to avoid liability by demonstrating the university exercised reasonable care under the circumstances than to rely on the Bradshaw line of cases that the university has no duty to a student regarding his or her safety on campus, while at the same time being careful not to assume a Furek duty that cannot or will not be enforced or followed, thereby providing a false sense of security.

Integration of Two Analyses

An analysis of the influences in the creation of the contemporary alcohol use policies as reported by student affairs administrators identified a desire for a more positive learning environment and a safer campus as the driving forces that led to the contemporary alcohol use policies. An analysis of the evolution of campus tort liability for alcohol-related injuries shows that the no duty/bystander era for universities as illustrated by the Bradshaw line of cases may be evolving into a duty of care standard that also provides a responsibility to enforce or fulfill a duty that has been assumed by a university, if that duty is designed to protect students from known dangers and the
consequences that flow therefrom. These duties do not allow universities to create rules or regulations that cannot or will not be properly enforced.

In most of the cases reviewed, the plaintiffs asserted the university had a duty to (a) protect them from others who had consumed alcohol or (b) protect them from themselves if they were underage drinkers. Accordingly, throughout the evolution of tort liability for alcohol-related injuries, the individuals injured viewed their right of action based on the university’s duty to provide a safe place to attend college, well before the courts began to recognize such a duty existed for higher education institutions.

The theory that tort liability holds defendants accountable for conduct that is socially unreasonable appears to be present with regard to the evolution of tort liability for alcohol related injuries. Prior to the 1960s, it was socially reasonable for universities to act in loco parentis with regard to students and alcohol use and whatever action or inaction taken by the university was basically upheld by the courts. In the 1970s, 1980s and early 1990s drinking was still acceptable on campus and for many was a rite of passage. The courts and society did not perceive drinking as socially unacceptable. Thus the courts tended to follow Bradshaw and absolve universities of responsibility for student drinking since students were free to do as they pleased and the universities were thought to be powerless to control their conduct. In the late 1980s and early 1990s, society’s perception of alcohol use began to change and with the change came new jurisprudence. No longer was it acceptable for universities to ignore known dangers and hide behind the position that alcohol was a part of student culture and that universities did not have to enforce their own policies because they were “powerless” to

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control student conduct. When society determined alcohol abuse on campus was a problem and that ignoring the problem by universities was socially unreasonable conduct, the law of tort liability began to evolve. The case at MIT illustrates the direction in which tort liability for alcohol-related injuries is evolving. Universities will likely be held to a new duty of care, which can be loosely translated to mean they cannot ignore known dangers, and they cannot promulgate rules and regulations that will not or cannot be enforced, thereby establishing a false sense of security. It is still too early to determine if tort liability for alcohol-related injuries has actually evolved to a higher level of care or if the Knoll and MIT cases are merely mutations that will not progress.

An approach to understanding the evolution of tort liability for alcohol-related injuries was provided by the data collected from the student affairs administrators. The student affairs administrators all believed they owed a "duty" to provide a positive learning environment and a safe campus. Alcohol use and abuse left unchecked was creating a situation that they believed violated their duty to the students attending their university. It was a unanimous belief that the university should guide the students under their authority toward the appropriate use of alcohol and the respect of others when participating in the consumption of alcohol. The hands off approach to the misuse of alcohol was considered socially irresponsible by student affairs administrators. This belief was evident in the care in which they constructed their campus alcohol use policies and their efforts to craft rules and regulations that were legal, appropriate and enforceable.

In summary, the analyses of this study indicated that the theory of university tort liability for alcohol-related injuries is still evolving and that student affairs
administrators have reduced their universities' exposure to tort liability, perhaps unintentionally, by creating contemporary alcohol use policies that seek to enhance the learning environment for students and make the campus a safer place to study. The policies help reduce exposure to lawsuits based on legal theories involving the sale or use of alcohol on campus. The policies also demonstrated that the universities are trying to assist students in creating a safer campus. Additionally, student affairs administrators at institutions participating in the RWJF program have attempted to enact alcohol use policies that are both effective and enforceable and address the problems they believe are important in guiding students toward appropriate behavior.

Answers to Research Questions

The following answers were provided to the research questions of this study:

1. Universities created contemporary campus alcohol use policies as the result of complaints from residential housing advisors, the findings of CORE alcohol surveys administered on their campus and the promptings of university presidents. Each of these influences are related to society's changing attitude toward alcohol use and abuse and the shifting of the standard of socially unreasonable conduct.

2. Alcohol use policy provisions were primarily influenced by the desire of residential housing advisors to provide a positive learning environment and a safe campus. Additionally, the desire to improve management and supervision of fraternities was influential in the preparation of the policies. Other influences included improved town-gown relations and a desire for a more consistent policy that was seen as being more
enforceable. Finally, although not a separate influence, an underlying influence in all of the provisions was a desire to avoid potential tort liability for alcohol-related injuries.

3. The judicial reasoning analyzed in the higher education cases indicates tort liability for alcohol-related injuries is still evolving. There are two primary lines of cases that define the parameters of campus liability for alcohol-related injuries. The older, more established line of cases represented by Bradshaw tends to provide universities with insularity for alcohol related injuries and proceeds to find students responsible for their own alcohol-related actions and insinuating that universities cannot control students' conduct to the degree necessary for a custodial relationship to exist. The second and still evolving line of cases, illustrated by Furek, Knoll and MIT, indicate universities are responsible for protecting students from known dangers and failing to stop dangerous activities that impose unreasonable risks to students. This line of cases seems to impose a "duty of care" on universities that includes enforcing rules and regulations to avoid creating a false sense of security.

4. The contemporary alcohol use policies do increase a university's exposure to tort liability by assuming a number of duties not required by law. However, if the university appropriately and consistently enforces its policies, the danger of assuming new legal responsibilities that Furek illustrates should be minimized. Additionally, in light of Knoll and MIT, solid, caring alcohol use policies, if reasonable and enforceable, may
actually assist a university in establishing that it met its duty of care and did not foster socially unreasonable conduct.

Recommendations

A university’s legal liability for alcohol-related injuries is an evolving concept that has yet to be fully defined. The concept has evolved from the legal insularity of in loco parentis to the no duty/bystander of Bradshaw and its progeny to the Furek duty of care era. The relevant cases analyzed for this study have indicated a need for well thought out alcohol use policies that provide a safe campus, but do not extend the university’s duties beyond what it can reasonably accomplish.

Higher education institutions and student affairs administrators should continue to monitor the development of this legal concept. In its present condition, universities would be prudent to follow the two “Ps” that appear important to the courts, “Presence and Preparation.” The literature seems to suggest and student affairs administrators confirmed that alcohol consumption by college students will continue. Even with the new policies, administrators reported alcohol-related incidents were down but no evidence suggested alcohol use was down. Accordingly, it appears safe to assume that alcohol related injuries will continue to occur in the future. Based on the reasoning of courts, universities can take steps to reduce their exposure to tort liability.

First, universities can be prepared by adopting and promulgating contemporary alcohol use policies that contain provisions designed to reduce underage drinking and foster a positive learning environment and a safe campus. The adoption of contemporary alcohol use policies should demonstrate to the court that the university is prepared to handle underage drinking and alcohol abuse. The existence of an anti-
hazing regulation saved the university in Furek from punitive damages because the court believed the university was trying to stop hazing. A university must also adopt reasonable alcohol use policies that can be properly enforced to avoid creating a false sense of security that leads parents and students into a belief that either alcohol abuse does not exist at the university or that it is always promptly addressed. Campus police must consistently enforce the policies and not turn their heads from obvious violations.

Once the university establishes it is prepared to handle alcohol use and abuse on campus, the second element, presence must be established. The courts’ reasoning in the Furek line of cases indicates a lack of presence or action on the part of the university led to a finding of liability. Although the MIT case did not go to trial, it appears that the lack of university supervision over the fraternity house, which was “approved university housing,” led to the settlement at MIT. It would be dangerous for universities to rely too heavily on the absence of university presence in the Bradshaw line of cases as a means of avoiding liability. These cases are older and based on society’s changing image of alcohol use it is uncertain that these cases would be decided the same way today.

Educators and administrators should be aware of the university’s potential for tort liability for alcohol-related injuries and not turn their heads from violations of university policy. The old days of “Animal House” parties may be coming to an end and burying one’s head in the sand is no longer a viable way to avoid liability nor is it the way student affairs administrators believe universities should conduct themselves.

A university should consider adopting alcohol-use provisions and procedures similar to the provisions and procedures set forth below when addressing the issues of
presence and preparation in avoiding tort liability for campus or student alcohol-related injuries:

(1) Locations and times where alcohol may be consumed should be restricted;

(2) Limitations should be placed on where alcohol can be sold;

(3) If alcoholic beverages are served or available, non-alcoholic beverages in addition to water, should be available at no cost;

(4) Certified and trained alcohol servers, capable of recognizing the signs of intoxication and empowered to stop service, should be required for all functions where alcoholic beverages are available;

(5) The use of beer kegs and other self-serving alcohol dispensers should be prohibited;

(6) The quantity of alcohol available at a function should be based on the anticipated attendance;

(7) Food should be available at all events where alcoholic beverages will be available and limits should be placed on foods with high sodium content;

(8) Drinking games should be prohibited;

(9) Security should be available at all functions where alcoholic beverages will be available;

(10) Methods for identifying and restricting alcohol service to underage individuals must be established and followed;

(11) Special permits should be required prior to serving alcohol at functions. The permits should only be issued after an organization establishes it has complied with all of the university’s requirements for service of alcohol;
(12) Advertising for alcohol should be restricted and functions with alcohol available should not be advertised as alcohol being the primary purpose of the function;

(13) Supervisors should be trained to monitor procedures and functions;

(14) Campus police should be trained and empowered to respond to alcohol-related problems;

(15) Alcohol-use policies should be realistic and enforceable;

(16) The adopted provisions should be enforced consistently and fairly;

(17) Supervisors and administrators should be trained and instructed not to ignore violations;

(18) Due to the ever-changing state and local laws regarding alcohol-use and tort liability, university counsel should be consulted to be sure local laws are being followed and not violated.

Future Research

The theoretical development of the concept of campus liability for alcohol-related injuries suggests further areas of research. If pursued, other research issues raised in the course of this study could increase the theoretical understanding of campus liability for alcohol-related injuries in light of the tort theory that liability attaches for conduct that is socially unreasonable. The following areas of research are recommended:

1. Fraternities are a source of many alcohol-related injuries. Some universities refuse to recognize fraternities or grant them university status based on a belief they will expose the university to liability for whatever
duties the fraternities violate. Other universities wrap their arms around
the fraternities and closely supervise and monitor the fraternities under
the belief they should do everything they can to provide a safe
environment. What should universities do to protect against tort liability
for acts committed by fraternities and their members?

2. Some students live on-campus while others live off-campus. What are
the legal implications for promulgating policies that either apply to
students off-campus or that do not apply to students off-campus.

3. The MIT settlement and the Nebraska Supreme Court decision in *Knoll*
are very recent court cases. In the years to come, research should be
conducted to determine whether these two cases represent the next step
in the evolution of campus liability for alcohol-related injuries or if they
are minor aberrations in the evolution of the law regarding university
liability for students’ alcohol-related injuries.

4. Research involving colleges and universities not associated with the
RWJF program may provide data to determine if tort liability concerns
play a greater role in the alcohol use policy changes at institutions not
involved in the RWJF program.
REFERENCES

Primary References

DiSabatino, Gail (December 8, 2000). Telephone interview by author from Lafayette, Louisiana.

Nestor, David (December 20, 2000). Telephone interview by author from Lafayette, Louisiana.

Scott, Winston (December 18, 2000). Telephone interview by author from Lafayette, Louisiana.

Smith, Ronald (December 12, 2000). Telephone interview by author from Lafayette, Louisiana.

Student Affairs Administrator (December 7, 2000). Telephone interview by author from Lafayette, Louisiana.

Student Affairs Administrator (December 11, 2000). Telephone interview by author from Lafayette, Louisiana.

Student Affairs Administrator (January 17, 2001). Telephone interview by author from Lafayette, Louisiana.

Student affairs Administrator (January 20, 2001). Telephone interview by author from Lafayette, Louisiana.

Stump, Ron (December 12, 2000). Telephone interview by author from Lafayette, Louisiana.

Secondary References


Leatherman, C. (1990, January 3). College officials are split on alcohol policies: some seek to end underage drinking; others try to encourage "responsible" use. *The Chronicle of Higher Education*.

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______, (1999, August 8). Recent deaths on campus. *USA Today*.


APPENDIX A:
LIST OF CASES


Beach v. University of Utah, 726 P.2d 413 (Utah 1986).


Bourgeois v. Puglisi, 615 So. 2d 1047 (La. App. 1st Cir. 1993).


Dixon V. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961).

Ellis v. N. G. N. of Tampa, Inc., 586 So. 2d 1042 (Fla. 1991).


Knoll v. Board of Regents of the University of Nebraska, 258 Neb. 1, 601 N.W.2d 757 (1999).

Largo Corp. v. Crespin, 727 P.2d 1098 (Colo. 1986, en banc.)


Nehring v. LaCounte, 712 P.2d 1329 (Mont. 1986).


People v. Wheaton College, 40 Ill. 186 (1866).


State v. Pendergrass, 19 N. C. (2 Dev. & B.) 365 (1837).


Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334 (1976).


APPENDIX B:
LEGAL DEFINITIONS

Affirm. A legal disposition pursuant to which a reviewing (appeals) court agrees with a lower court, and validates that ruling on appeal. (Compare with reverse.)

Affirmative defense. Various legal arguments raised by a defendant to a claim, the common purpose of which is to avoid liability.

Appellate court. A court that sits as a reviewing court of a legal disposition made at a lower level, typically a trial court. Generally, the appellate court does not consider new evidence, but merely looks at the trial court’s decision to determine whether the legal result at which the court arrived is correct.

Burden of proof. A legal doctrine that refers to the evidentiary proof that is necessary to arrive at a legal determination in favor of a particular party. The burden of proof may fall upon either party to the lawsuit, depending upon the governing law in the area.

Certiorari. The process by which the United States Supreme Court accepts or rejects a case for its review.

Common law. The body of law derived from judicial decisions, rather than from statutes or constitutions.

Contributory negligence. The principle that completely bars a plaintiff’s recovery if the damage suffered is partly the plaintiff’s own fault. Most states have abolished this doctrine and have adopted instead a comparative-negligence scheme.

Defendant. The individual in a lawsuit who is being sued; the person who defends the claim. (Compare with plaintiff.)

Dicta. Commentary in a court’s opinion expressing its views on issues that are related to the ones that are presented, but not brought directly before the court for its review. Dicta is not legally binding, but is an important vehicle used by courts to say what is on their minds and can foreshadow future legal trends.

Digest. An index of legal propositions showing which cases support each proposition; a collection of summaries of reported cases, arranged by subject and subdivided by jurisdiction and court. The chief purpose of a digest is to make the contents of reports available and to separate, from the great mass of case law, those cases bearing on some specific point. The American Digest System covers the decisions of all American courts of last resort, state and federal, from 1858 to present.

Dismiss (Motion to). A legal disposition in which a court turns away a claim, finding it has no merit, and the case terminates. A dismissal may be appropriate for many reasons.
such as no valid issue in the case or lack of timeliness for filing the claim. Note that such a motion may be granted with or without prejudice. (See prejudice.)

**Dissenting opinion.** A legal opinion filed by one or more judges that disagrees with the views expressed by the court in its majority opinion. (See majority opinion.)

**First impression (Case of).** Generally, a reference to the first time an issue of law is heard, and deliberated upon, whether in a particular legal jurisdiction or on a larger scale throughout the nation.

**Foreseeability.** The quality of being reasonably anticipated. Foreseeability, along with actual causation, is an element of proximate cause in tort law.

**Holdings.** Legal disposition of the case by a court of law that decides issues presented before it and is binding on parties before it and throughout the jurisdiction.

**Immunity.** An affirmative defense alleging that the defendant cannot be sued, and is therefore “immune” from liability. There are various types of immunity, such as sovereign immunity and qualified immunity.

**Judicial review.** The general process whereby a court considers legal issues and rules upon them. Judicial review is limited in scope to the issues which are raised by the parties who come before the tribunal. (See scope of review.)

**Jurisdiction.** The power of a court to hear a case; whether a court possesses jurisdiction over a claim depends upon several factors. Pendent jurisdiction allows a federal court to hear a claim that otherwise would belong in a state court due to common federal and state law issues.

**Majority view.** A judicial opinion that reflects the views of the majority of courts in the nation who have ruled on the legal issue. (Compare with minority view.)

**Minority view.** A judicial opinion that reflects the views of the minority of courts in the nation who have ruled on the legal issue. (Compare with majority view.)

**Money damages.** A award of financial relief issued by a court to a party who has suffered some injury in the eyes of the law. Money damages can be compensatory—intended to compensate a victim for his or her harm, or punitive—intended to punish the wrongdoer.

**Moot.** A legal determination made by a court where there is no longer any case or controversy at issue for its review. In such situations, if the court where to enter a ruling, it would have no effect upon the parties before the court as the legal issue is no longer in dispute. A claim can be deemed moot for a number of different reasons, and will be dismissed on that basis.
Overrule. Refers to the status of a case when its decision has been invalidated as a result of a contrary ruling by another court whose decisions are controlling. As distinguished from a reversal of a case where a higher court overturns the decision of a lower court in the same case, a legal outcome is overruled when a subsequent decision in a different case renders the result null and void. (Compare with reverse.)

Panel ruling. A judicial decision issued by a group of judges on the court. For example, federal circuit court judges typically sit in panels of three to hear a case, although each circuit court is comprised of a larger body of nine judges.

Per curiam. A legal opinion that represents the views of a court and does not specify the name of a judge who authored that opinion.

Persuasive authority. A pre-existing legal outcome that may be of value to another court in deciding a case, and that serves to influence its views in a similar direction. Importantly, cases designated as persuasive authority are not decisions that other courts are obligated to follow. There are varying degrees of persuasive authority which a particular case may have. (Compare with precedent.)

Plaintiff. The individual who is bringing the lawsuit; the person who is asserting legal rights (Compare with defendant.)

Precedent. A pre-existing legal outcome that a court is bound to follow. Whether a case holds precedential value or is merely of persuasive authority depends upon the party’s relationship to the court. (Compare with persuasive authority.)

Prima facie case. A complaint or lawsuit that, on its face, sets forth a legally sufficient basis for bringing the claim.

Proximate cause. 1. A cause that is legally sufficient to result in a liability. 2. A cause that directly produces an event and without which the event would not have occurred.

Rehearing. The same court hears a case a second time for the possible purpose of arriving at a different outcome. Rehearing can either be at the request of parties to the case, or the court’s own initiative.

Remand. A legal disposition in which a higher court sends a case back to a lower court where it originated to follow a specific course of legal action as enumerated in the court’s opinion or order.

Res judicata. Legal doctrine that refers to the finality of a court’s disposition of a legal issue, and particularly, its conclusiveness in terms of deciding the rights of parties who come before it. (Closely related to collateral estoppel.)
**Reverse.** A legal disposition pursuant to which a reviewing (appeals) court disagrees with a lower court, invalidates its ruling on appeal, and arrives at a new legal outcome in the same case. (Compare with **affirm** and **overrule**.)

**Stare decisis et non quieta movere.** To stand by things decided, and not to disturb settle points.

**Sua sponte.** A ruling issued by a court on its own initiative, as opposed to a ruling that is prompted by a request made by a party to the case.

**Summary judgment.** A legal disposition that is granted on a motion before trial and eliminates the need for further action in a situation where there is no genuine dispute as to the material facts in the case. A summary judgment disposes of the need for a jury to decide factual issues and provides a vehicle for fast and efficient resolution where it is not necessary to decide legal issues in the case. Note that summary judgments can be granted in favor of either party, plaintiff or defendant. The party who receives a summary judgment has, for all intents and purposes, prevailed as a matter of law in the case.

**Trial court.** A court of first instance where the claim is initially heard and evidence is presented for consideration. (Compare with **appeilate court**.)
APPENDIX C:
INTERVIEW OUTLINE AND RELEASE FORM

Name
Title

Re: Dissertation Telephone Interview Request

Dear Dr

I am currently a doctoral candidate in higher education administration at Louisiana State University. My dissertation proposal entitled “Campus Responsibility for Alcohol Related Injuries - A Law and policy dissertation” involves legal research and a qualitative study utilizing interviews of administrative leaders from a contingency of student affairs officers to assist in determining what campus student affairs officers perceived as the important aspects, legally and socially, of the alcohol use policies implemented on their campuses. The first portion of my dissertation has focused on court cases that have addressed campus liability for alcohol related injuries. The second portion will address the information obtained from the administrative interviews. It is my contention that the qualitative research mixed with the legal research will provide a richer and more robust description and understanding of how campus alcohol policies affect the operations of college campuses. Through this letter I am requesting your assistance with my research by granting me permission to interview you by telephone to attempt to establish the current and future problems confronted by student affairs administrators as they relate to alcohol use and abuse on and off campus.

The focus of the interview will be to determine the areas of conflict currently confronted by you as a student affairs administrator and to obtain your impression of the legal concerns that exist today and what legal concerns you have with your alcohol use policies.

If you consent to an interview, I will contact you by telephone at a time convenient for you and obtain background information from you such as your education and work experience and tenure at your university. Additionally, I will attempt to obtain information that will help me understand the operations of your office. After I obtain sufficient background information to understand your position and office, I will pose the following general questions:

1. How did the potential for legal (tort) liability for student injuries for alcohol use influence or affect your campus’ alcohol use policy drafting and enforcement?

2. How did or does community beliefs influence or affect your campus’ policy and what do you perceive as the community’s belief regarding student alcohol use?
3. What was the primary motive or objective that directed the formation of your campus' alcohol use policy?

4. What other concerns influenced the formation of your campus' policy?

5. What do you perceive as the biggest challenges for the future of campus administrators regarding alcohol use by students?

6. What do you foresee for the future of fraternities on your campus and alcohol use and why?

7. What is your opinion of the move toward alcohol free housing advocated by some fraternities?

I may ask follow-up questions as needed to clarify points, elaborate on details and verify comments. Enclosed you should find an original and one copy of this informed consent letter including a self-addressed stamped envelope for return service. If you agree to be interviewed please sign the original and return it to me with dates and times you are available for a telephone interview or a name and telephone number of someone I can contact to arrange a convenient time as I know your schedule is very busy. Once I receive your consent letter I will confirm a date and time with your office. In addition to your consent, I would also like to obtain your preference regarding my use of your name in my dissertation or if you would prefer to remain anonymous. For your information, I have selected student administrators from university sites that currently or recently received grant funds from the Robert Wood Johnson Foundation "A Matter of Degree: Reducing High-Risk Drinking Among College Students" program.

It is my belief that student affairs administrators are intimately involved in both the policy aspects of adopting a campus alcohol use policy and the manner and method of its implementation once adopted. I anticipate that you will have keen insight into the potential legal problems as well as the societal impact of the policies.

In addition to granting me an interview, it will be a tremendous benefit to me, if your office could forward me written information regarding your campus alcohol use including alcohol policies, alcohol abuse programs and other programs or services offered to students. Information regarding enforcement provisions for campus alcohol policies including campus police procedures and the student judicial process would also be very helpful.

Finally, I would like to obtain your permission to tape the interview to assist me in reviewing your responses and sorting them into major themes.

I certainly understand the time requests placed on student affairs administrators and appreciate your efforts to assist me with my research. If I have your permission to conduct an interview with you, please complete the consent information below and return it to me
in the enclosed self-addressed envelope. I will contact your office to arrange a convenient time to call and thank you for your assistance. I have enclosed my business card in case you have any questions prior to the interview.

Sincerely,

Nathan M. Roberts  
Ph. D. Candidate  
Higher Education Administration  
Educational Leadership, Research & Counseling  
Louisiana State University

I consent / decline to be interviewed by Nathan M. Roberts regarding alcohol use policies at my university.

The best days to schedule a telephone interview are _______________________________ and the best times are _______________________________.

I consent / decline to have my name used in Nathan M. Roberts’ dissertation described above.

I consent/decline to have the interview with Nathan M. Roberts tape recorded.

____________________________________________________________________________

Name of Administrator
VITA

The author’s name is Nathan McCain Roberts. He received his bachelor of science degree in education in 1984 from Louisiana State University in Baton Rouge, Louisiana. In 1987, Nathan Roberts earned his Juris Doctor from the Paul M. Hebert Law Center, Louisiana State University in Baton Rouge, Louisiana.

In 1987, he served as a judicial law clerk to United States District Judge John M. Duhe’, Jr. and later practiced law with the firm of Gordon, Arata, McCollam & Duplantis. In 1996, he became an assistant district attorney for the 15th Judicial District and general counsel to the Lafayette Parish School Board. Nathan Roberts is an adjunct professor at the University of Louisiana at Lafayette in the Department of Educational Foundations and Leadership and is a certified special education mediator for the State of Louisiana. He currently serves on the South Louisiana Community College Advisory Board. He has presented at numerous conferences on a variety of education law topics. He will receive the degree of Doctor of Philosophy from Louisiana State University at May Commencement 2001.
DOCTORAL EXAMINATION AND DISSERTATION REPORT

Candidate:  Nathan M. Roberts

Major Field:  Educational Administration and Supervision

Title of Dissertation:  Campus Responsibility for Alcohol-Related Injuries: A Law and Policy Analysis

Approved:

[Signatures]

EXAMINING COMMITTEE:

[Signatures]

Date of Examination:  April 2, 2001

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