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WHO IS RESPONSIBLE FOR FRATERNITY RELATED INJURIES ON AMERICAN COLLEGE CAMPUSES?

Kerri Mumford*

INTRODUCTION

The stereotypical image of a fraternity depicts a scene from Animal House: a group of men running around drinking and causing chaos. Although Animal House was filmed in the 1970s, this image of fraternities still exists today. Over the past two decades, as the concern over hazing, binge drinking, violence and sexual assault on college campuses has risen, fraternities have been the subject of increased litigation. Litigation against fraternities has resulted in enormous civil damages paid to injured plaintiffs, often involving multiple parties including the local chapter, the national chapter, the college and the individual defendant fraternity members who cause the injury.

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1. NATIONAL LAMPOON'S ANIMAL HOUSE (Universal 1978).


3. See Binge Drinking Still of Concern on Campus, ALLENTOWN MORNING CALL, October 4, 1998, at B01. Harvard School of Public Health Survey reported that binge drinking on college campuses had only decreased from 44.1% in 1993 to 42.7% in 1997. Id.

4. See Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 973-974 (Ind. 1999) “[T]he group most likely to commit gang rape on the college campus was the fraternity.” Id.

5. See Whitlock v. Univ. of Denver, 712 P.2d 1072 (Col. 1987), rev'd 744 P.2d 54 (Col. 1987). Jury awarded damages of $7,300,000 when a fraternity brother was injured because he failed to execute a flip on a trampoline owned by the fraternity and located on campus, rendering him a quadriplegic. Id. Bradshaw v. Rawlings, 612 F.2d 135, 137 (3d 1978). The jury returned verdict against defendants in amount of $1,108,067. Id.

6. For purposes of this paper, college and university are used interchangeably and mean any secondary educational institution.
It is time for both national and local fraternity chapters, as well as the colleges, to take a role in preventing these injuries. When these measures fail, all three of these institutions should bear the responsibility. The courts should recognize the current relationship between universities and students. Until now, universities have successfully avoided liability for fraternity-related injuries based on the "no duty" rule, following the demise of in loco parentis doctrine for universities.\(^7\) The "no duty" rule states that the relationship between the college and the student is simply one that provides education only. The university is under no obligation or duty to control or govern the students' behavior.\(^8\)

Today's college/student relationship is certainly unique. Although the purpose of college is primarily education, colleges take an active role in student life and activities. Today, colleges typically govern almost any aspect of a student's life.\(^9\) Once the college has taken this role, there is no reason why it should escape liability based on the fear that holding a university liable will place a college in a custodial relationship with its students for purposes of imposing a duty.\(^10\) In the words of the court in Furek, "university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties' relationship, particularly if such supervision advances the health and safety of at least some students."\(^11\)

There is no reason for courts to persist in allowing colleges to escape liability on the outdated notion that the relationship between the university is simply student/educator. Courts continually rely on this analysis of the relationship and the concern that holding the college liable will return it to the strict liability standard of in loco parentis as a basis for finding no liability. Rather, the common law liability theories that courts apply to the national fraternities should also be applied to colleges, which exercise equal, if not greater control over the fraternity members.

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8. Id.
10. Bradshaw v. Rawlings, 612 F.2d 135, 140 (3d Cir. 1979); MacLachlan, supra note 7, at 518.
This Comment examines fraternity-related litigation and the entities that should be held responsible.\textsuperscript{12} Parts I and II respectively address the background and significance of fraternity-related litigation. Specifically, Part II traces the history of university liability for student injuries. Part III examines differing applications of common law duties that courts and plaintiffs may apply to decide the issue of liability. These theories could be utilized to hold colleges liable for a fraternity member's tortious actions resulting in an injury.\textsuperscript{13} Courts increasingly find national and local fraternity chapters liable for such injuries, yet continue to hold universities immune even when they exercise control of the fraternity. Part IV examines the theories used to hold the national fraternity liable for fraternity-related injuries. This section compares the national fraternity and the university. Specifically, it provides the theories that are used to hold the national fraternity liable for fraternity-related injuries that are equally, if not more, applicable to the university.

I. BACKGROUND

A. The University

Until the mid 1960s, the university did not have a legal duty to protect the student's safety or rights.\textsuperscript{14} Courts found analogous immunities given to other institutions and applied them to the university creating a \textit{de facto} immunity.\textsuperscript{15} The courts applied a variety of theories including "[where appropriate, ... immunit[y] as a parent (\textit{in loco parentis}), a charity, or a government; or protected like a "social host" would be regarding alcohol use, or shielded by rules of proximate causation or by all-or-nothing affirmative defenses."

Until the late 1970s, the university remained in \textit{locus parentis} to its students,\textsuperscript{16} exercising "delegated parental authority with a concomitant

\textsuperscript{12} For purposes of this paper, the term fraternity also includes sororities.

\textsuperscript{13} This paper primarily relies on responses to motions for summary judgment. The theories of liability determine whether a legal duty exists. Whether or not the parties breached that duty is a question of fact for the jury.

\textsuperscript{14} Peter F. Lake, \textit{The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law}, 64 Mo. L. Rev. 1, 3 (1999).

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} Bradshaw v. Rawlings, 612 F.2d 135, 140 (3d Cir. 1979); MacLachlan, \textit{supra} note 7, at 518.
duty of broad protection.”\textsuperscript{18} The university controlled the physical and moral welfare of its students.\textsuperscript{19} The university could control any aspect of the student life as long as the regulations were “not inconsistent with the law.”\textsuperscript{20}

In 1979, the seminal case of \textit{Bradshaw v. Rawlings}\textsuperscript{21} put an end to \textit{in loco parentis} in this context.\textsuperscript{22} This decision came at a time when students were demanding rights and autonomy during the Civil Rights Movement.\textsuperscript{23} The often-quoted case of \textit{Bradshaw} illustrates the changing relationship between universities and students:

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. [T]he authoritarian role of today’s college administrators, and faculties have been required to yield to the expanding rights and privileges of their students . . . College students today are no longer minors; they are now regarded as adults in almost every phase of community life. As a result of [societal changes], eighteen year old students are now identified with an expansive bundle of individual and societal interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role in \textit{loco parentis}. Students were committed to their charge because students were considered minors . . . . Adult students now demand and receive expanded rights of privacy in their college life.\textsuperscript{24}

The court in \textit{Bradshaw} relied on social policy holding that the imposition

\textsuperscript{18} Furek v. Univ. of Del., 594 A.2d 506, 516 (Del. 1991).
\textsuperscript{19} Gott v. Berea Coll., 161 S.W. 204 (Ky. 1913).
\textsuperscript{20} \textit{Id.} at 206.
\textsuperscript{21} 612 F.2d. 135, 139 (3d Cir. 1979).
\textsuperscript{22} The legal scholar Blackstone articulated the term \textit{in loco parentis}, which means [t]he father may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then ‘in loco parentis’ and has such a portion of the power of the parent committed to his charge, viz. That of restraint and correction as may be necessary to answer the purposes for which he is employed.


24. \textit{Bradshaw}, 612 F.2d at 138.
of a duty to supervise student activities would be unrealistic and impossible to perform because it would return the university to a custodial relationship over adult students.\(^\text{25}\)

This shifted the tone of university liability from strict liability to no liability. Although it gave students autonomy and rights that were not previously recognized, this new “no duty” doctrine incidentally and unfortunately resulted in a trend of complete university absolution.

With a few exceptions, most courts presently follow the somewhat outdated notions stated in Bradshaw. For example, in Beach v. University of Utah,\(^\text{26}\) the Supreme Court of Utah relied on Bradshaw stating that the University of Utah had no duty to protect an injured plaintiff. The plaintiff who became intoxicated on a school-sponsored trip fell down a cliff.\(^\text{27}\) The plaintiff sued the University alleging that it had an affirmative duty of protection based on the special relationship between the university and plaintiff.\(^\text{28}\) Beach testified that Cuellar, a faculty member who was chaperoning the trip, was aware of her propensity to become disoriented when drinking. He had previously witnessed when plaintiff fell asleep in the bushes after drinking.\(^\text{29}\) The Utah Supreme Court disagreed, holding as a matter of law that even though the trip was a school sponsored event and that Cuellar had knowledge of Beach’s behavior, Beach was an adult responsible for her own behavior.\(^\text{30}\) Relying on Bradshaw, the court in Beach stated “[a] realistic assessment of the relationship between the parties precludes our finding that a special relationship existed between the University and Beach or other adult students.”\(^\text{31}\)

Courts continually rely on Bradshaw for the basis that the universities have no duty to protect students. The social policy relied on by the court in Bradshaw is no longer applicable in today’s university/student relationship. Once the university takes an affirmative step to control student activity and knows that its efforts are failing, the university should be held liable for any resulting injuries.

\(^{25}\) \text{Id. at 138-39.}  
\(^{26}\) 726 P.2d. 413 (Utah 1986).  
\(^{27}\) \text{Id. at 415.}  
\(^{28}\) \text{Id.}  
\(^{29}\) \text{Id. at 416.}  
\(^{30}\) \text{Id.}  
\(^{31}\) \text{Id. at 419.}
B. The Fraternity

In the 1980s and the 1990s, fraternity membership increased dramatically. With this increase in membership came an increase in fraternity-related injuries resulting in the skyrocketing of litigation. The first fraternity-related injury civil case reported was in 1979. As a result of increased publicity of fraternity-related injuries and lawsuits, the Animal House type fraternity behavior came under close scrutiny. This led to large verdicts for plaintiffs injured in hazing and alcohol-related injuries. Although courts have held national fraternities liable for injuries in local chapters under theories of agency and general duty, courts have been reluctant to extend these theories to the colleges where the injuries took place.

32. Rutledge, supra note 2, at 365-66. Approximately one million students were members of the Greek system each decade. Id.; Michael Kuzmich, In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths, 31 McGeorge L. Rev. 1087 (2000); Lewis Lord, From Party Hearty to Party Hardly? The Greek System, Mired in a Rush Recession, Gives Grades and Good Deeds the College Try, U.S. News & World Report, Sept. 1, 1997 at 96-97; Susan Tifft, Waging War on the Greek: Fraternities and Sororities Are Being Forced to Clean Up Their Acts, TIME, Apr. 16, 1990. In the 1970s fraternity membership was at a low point with only 179,000 nationwide members but by 1990 the number had increased to 400,000 members. Id.


35. MacLachlan, supra note 7, at 518, 530-31.

36. See Whitlock v. Univ. of Denver, 712 P.2d 1072 (Col. 1987), rev'd 744 P.2d 54 (Col. 1987). Jury awarded damages of $7,300,000.00 when a fraternity brother was injured because he failed to execute a flip on a trampoline owned by the fraternity and located on campus, rendering him a quadriplegic. Id. Bradshaw v. Rawlings, 612 F.2d 135, 137 (3d 1978). Jury returned verdict against defendants in amount of $1,108,067. Id.

37. Ballou, 352 S.E.3d at 496.

II. WHY FRATERNITIES ARE OFTEN INVOLVED IN LITIGATION

Although fraternities are founded on the idea of brotherhood, they are stereotyped as a group of individuals whose main goal is to party. There are sixty-seven nationally recognized fraternities in the United States with over 400,000 active members and over 4.5 million alumni. The stereotypical image of fraternities includes students participating in binge drinking, partying, hazing, drug use and sexual freedom. Unfortunately, whether or not this behavior is typical when it does occur, it results in a number of alcohol-related deaths, sexual assaults and hazing-related injuries.

Fraternity behavior that results in injuries has succumbed to close public scrutiny. There has been a public outcry to decrease the excessive drinking, hazing and debauchery that occur on college campuses. Parents and college administrations are concerned about the injuries that result from this behavior. This outcry has led courts increasingly to hold fraternities liable for fraternity-related injuries. As one commentator has noted, "[S]ubpoenas and depositions may be replacing beer cans and

39. Michael Kuzmich, In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths, 31 McGeorge L. Rev. 1087, 1092 (2000). Dr. Weschler conducted a study that found that "more than eighty percent of fraternity members qualified as binge drinkers." Id.


43. Christopher Pierson, Liquor and Lawsuits: Forty Years of Litigation Over Alcohol On Campus, 142 Educ. L. Rep. 609 (2000). "The proportion of reported litigation arising from students' drinking at fraternities and sororities has increased greatly in recent decades." Id. at 615, 617; Rutledge, supra note 2, at 365. Rutledge states that there was an "explosion of litigation." Id.

44. Kuzmich, supra note 40, at 1089-92 (stating that the biggest concerns on college campuses today are binge drinking and hazing committed by fraternity members); Pierson, supra note 44, at 618 (Plaintiffs increasingly seek recovery for incidents sponsored by fraternities and sororities).


46. Id.
pledge paddles as icons on fraternity row.47 Although judgments against fraternities are becoming commonplace, courts continue to allow universities to escape liability for injuries caused by fraternity members based on the theories of Bradshaw. Universities avoid liability, despite the fact that they take an active role in regulating fraternity members including curbing alcohol abuse.48 This is part of an overall movement by colleges to stop alcohol abuse by students attending the university. However, universities are moving a step further by taking active involvement through the regulation of fraternities by forcing them to become co-ed, requiring them to be alcohol free49 or preventing the fraternities from associating on campus.50 Even though the universities take an active role in regulating fraternities and their members, the majority of the courts maintain that the universities' actions do not constitute an assumed duty to protect students from fraternity-related injuries.51

III. THEORIES OF LIABILITY TO HOLD THE UNIVERSITY LIABLE

Colleges and universities are recognized as educational institutions52 with the purpose of fostering the maturation of students.53 As stated in Part II, in the past, colleges stood in loco parentis to the students. This doctrine was put to rest with the decision of Bradshaw. Bradshaw's decision was based largely in part on the new student/college relationship. The Court believed that if the adult students were to receive autonomy and rights, the imposition of a duty to supervise student activities would

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50. For an interesting examination of fraternities constitutional right to freedom of association, See generally id.
52. See Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986).
53. See Univ. of Denver v. Whitlock, 744 P.2d 54 (Col. 1987).
be unrealistic and impossible to perform because it would subject the university to a custodial relationship over adult students.\footnote{54}{Bradshaw v. Rawlings, 612 F.2d 135, 138-39 (3d Cir. 1979).}

The Bradshaw reasoning no longer reflects the current university/student relationship. The university controls many aspects of the student's life. It is typical for the university to have policies and guidelines to prevent hazing and underage drinking.\footnote{55}{UGA Suspends Students, supra note 9; Steve Arney, supra note 9; Robert Kelly, supra note 9.} The university can normally discipline students who violate its policies including expulsion. This control includes controlling fraternities.\footnote{56}{See Marshall v. Univ. of Del., 1986 WL 11566 at *5 (Del. 1986) ("Most men would agree that fraternity members, because of the kinds of conduct they tend to engage in (hazing and holding large open parties for example) and because of their youth, need to be controlled."); UGA Students Kick out of Frat for Hazing, supra note 9; UGA Suspends Students, supra note 9; Steve Arney, supra note 9.} Once the university has taken active steps to exercise control, usually in the attempt to prevent injury, it should no longer be shielded from responsibility.

There are a number of theories that a plaintiff injured in a fraternity-related incident may utilize to hold the university liable. As this section will reflect, most jurisdictions reject these theories on the outdated belief that Bradshaw is still controlling.

Plaintiffs may try to hold universities liable under a number of negligence theories. The first theory holds or posits simply that a university has a general duty to its students based on their relationship. The second theory is the uncommon theory of social policy. The university may also be held liable on the basis of social host liability if the plaintiff's injury was caused by a fraternity member who became intoxicated on university property. Third, the plaintiff may recover based on the duty of the university as landowner to those on its premise, known as premises liability.

When analyzing university liability, courts are faced with the difficulty of defining the legal relationship between the student and the university. Courts must balance the tension between two distinct doctrines that surround the liability of universities. Courts grapple with balancing the demise of in loco parentis and a general notion of social policy and fairness, which requires more than de facto immunity. Courts are reluctant to reject the theory expounded in Bradshaw that colleges are for educational purposes and are not insurers of the students safety.

This theory does not reflect the current state of university/student


55. UGA Suspends Students, supra note 9; Steve Arney, supra note 9; Robert Kelly, supra note 9.

56. See Marshall v. Univ. of Del., 1986 WL 11566 at *5 (Del. 1986) ("Most men would agree that fraternity members, because of the kinds of conduct they tend to engage in (hazing and holding large open parties for example) and because of their youth, need to be controlled."); UGA Students Kick out of Frat for Hazing, supra note 9; UGA Suspends Students, supra note 9; Steve Arney, supra note 9.
relationships. Courts cannot be blind to the fact that there is more to the university/student relationship than education.\textsuperscript{57} Students both living on and off campus are subject to all the rules and regulations that the college imposes on its students.\textsuperscript{58} The university/student relationship is such that it should include a duty of reasonable care to protect the student from foreseeable, dangerous or negligent acts of third persons.

Although the doctrine of \textit{in loco parentis} has been rejected, there are a few instances where a court has found a special relationship between the university and its students.\textsuperscript{59} The landmark case in this area is \textit{Furek v. University of Delaware},\textsuperscript{60} which is examined in detail below. Unfortunately, courts are reluctant to follow the reasoning in \textit{Furek}. Other courts continually find that there is no duty for the college to protect students injured by fraternity members. Some courts rely on the theory that a university does not have a duty to supervise student activities\textsuperscript{61} even though it sanctions such activities.\textsuperscript{62} Fortunately, other courts have concluded that because of the special relationship between the student and the university, the university must use reasonable care to prevent foreseeable injury from third persons.\textsuperscript{63}

\begin{itemize}
\item\textsuperscript{57} See \textit{Furek} v. Univ. of Del., 594 A.2d 506, 516 (Del. 1991). The university-student relationship is certainly unique. While its primary function is to foster intellectual development through an academic curriculum, the institution is involved in all aspects of the student life. Through its providing of food, housing, security, and a range of extracurricular activities the modern university provides a setting in which every aspect of the student life is, to some degree, university guided. . . . Despite the recognition of adulthood, universities continue to make an effort to regulate student life and the courts have utilized diverse theories in attempting to fix the extent of the university's residual duty.
\item \textit{Id.}; see Mullins v. Pine Manor Coll., 449 N.E.2d 331 (Mass. 1983).
\item \textsuperscript{58} \textit{Furek}, 594 A.2d at 516.
\item \textsuperscript{59} See generally, Michael R. Flaherty, \textit{Tort Liability of College or University for Injury Suffered by Student As a Result of Own or Fellow Student's Intoxication}, 62 A.L.R.4th (1988).
\item 594 A.2d 506 (Del. 1991).
\item \textsuperscript{60} See \textit{id.; Beach} v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986); Univ. of Denver v. Whitlock, 744 P.2d 54 (1987).
\item \textsuperscript{61} Marshall v. Univ. of Del., 633 A.2d 370 (Del. 1993); Univ. of Denver, 744 P.2d at 54; Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552 (Ill. 1987); Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).
\item \textsuperscript{62} See Zavala v. Regents of the Univ., 125 Cal. App.3d 646; \textit{Furek}, 594 A.2d at 519.
\end{itemize}
Fraternity Related Injuries

A. Liability Under The Theory of Assumed Duty/Duty From Special Relationship

*Furek* is the first major case to hold a university liable for an injury to a student caused by a third party. The court in *Furek* focused on the liability theories found in the *Restatement (Second) of Torts* §323 and on common law clearly rejecting *Bradshaw* and its progeny. The *Restatement* addresses the duty owed by "one who assumes direct responsibility for the safety of another through the rendering of services in the area of protection." The university maintained that the "demise of the doctrine of *in loco parentis* had dispelled the notion that any special relationship exist between the university and its student body upon which to posit any duty to protect students from activities of their fellow students." The Delaware Supreme Court rejected this argument and recognized a legal duty for the university to use reasonable care to protect students against the dangerous acts of third parties.

During the fraternity initiation, Jeffrey Furek, a pledge of Sigma Phi Epsilon, was accidentally burned by oven cleaner. The University took active measures to prevent hazing, which included statements in the Student Guide advising students that they could be expelled for hazing. The Dean of Students also warned fraternities about the repercussions of hazing. Despite these public pronouncements and warnings concerning hazing, hazing still occurred and the University was aware of it. Furek sued the University alleging that it was negligent in failing to control the dangerous acts of its members. The jury returned a verdict against the

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64. *Furek*, 594 A.2d at 520; see *Restatement (Second) of Torts* § 323 (1964).
65. *Furek*, 594 A.2d at 517.
66. The National Chapter was also sued but the case was dismissed on jurisdictional grounds. *Furek*, 594 A.2d at 509.
67. Id. at 519.
68. See *The Estate of Hernadez v Flavio*, 930 P.2d 1309, 1311 (Ariz. 1997). "Pledging a fraternity means that the prospective member promises to enter into a semester-long pledge education program with the intent to join the fraternity's membership at the program's end." *Id.*
69. *Furek*, 594 A.2d at 510.
70. Id.
71. Id. at 511. Groups of Sig Ep pledges were seen marching around campus prior to the start of Hell Night. On a night prior to Hell Night, Furek and his fellow pledges were spotted "sneaking around campus but campus security let them go because it was just a pledging prank. *Id.*
72. Id. at 511.
University and Donchez, the fraternity member who hazed Furek. The trial court granted University of Delaware's motion for judgment n.o.v. 73

In granting the motion for judgment n.o.v., the trial judge concluded that there was no support for the argument that Restatement (Second) of Torts § 324(A), titled "Liability to Third Person for Negligent Performance of Undertaking," should be applied in this case. 74 The trial judge concluded that since the "evidence did not demonstrate that Furek or any fraternity pledge 'relied on the University for his own safety, nor believed that the University had undertaken a duty of protection in lieu of the [the fraternity]'," 75 the University should not be held liable for Furek's injuries.

The Delaware Supreme Court began its analysis by examining the student/university relationship. "The university-student relationship is certainly unique. While its primary function is to foster intellectual development through an academic curriculum, the institution is involved in all aspects of student life. . . . [T]he modern university provides a setting in which every aspect of student life is, to some degree, university guided." 76 The court then clearly rejected Bradshaw and its line of cases stating, that "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." 77 More importantly, the Furek court recognized the benefits of holding the University responsible in these situations. "It seems equally reasonable to conclude that university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties' relationship, particularly if such supervision advances the health and safety of at least some students." 78

73. Id. at 512.
74. RESTATEMENT (SECOND) OF TORTS § 323 (1964). It states:
One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.
Id.
75. Furek, 594 A.2d at 516.
76. Id.
77. Id. at 518.
78. Id.
The court concluded that there was sufficient evidence to hold the university liable under the common law negligence principle that the University had a duty of reasonable care to protect Furek from the foreseeable acts of dangerous third parties. The court went on to state "[when there is direct university involvement in, and knowledge of certain dangerous practices of its students, the university cannot abandon its residual duty of control."

Even if a court accepts the analysis in *Furek*, a general allegation that a university owes a duty to its students due to the regulation of certain conduct will not suffice to establish liability. The university must have sought to control the activity that caused the alleged injury. General allegations will not give a student a reasonable expectation of protection. In addition, the university must be aware that the activity causing the injury occurred on campus.

*Rabel v. Illinois Wesleyan University,* provides an example when general allegations fail to establish liability and a reasonable expectation of protection. The University must have controlled the actual activity which caused the injury. Rabel alleged that the University voluntarily assumed a duty to protect her from injuries. Rabel was injured when a fraternity member who was carrying her from her residence hall dropped her on her head. She argued that the University's handbooks, regulations and policies created an assumed duty to protect her welfare from the negligent acts of other students. Relying on the theories expressed in *Beach* and *Bradshaw*, the court concluded that the policies and regulations did not impose a special relationship. The court stated that the University's role is to educate and not to insure student safety.

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79. *Id.* at 519.
80. *Id.* at 519-20. "The University's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became 'an indispensable part of the bundle of services which colleges . . . afford their students.'" *Id.*, citing *Mullins v. Pine Manor College*, 449 N.E.2d 331, 335 (Mass. 1983).
81. *See Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987). The court rejected Whitlock's allegations that the University had a duty to control the use of a trampoline because the student handbook contained certain regulations regarding student conduct.
82. 514 N.E.2d 552 (Ill. 1987).
83. *Id.* at 558.
84. *Id.* at 560.
85. *Id.* at 560-561. "It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others." *Id.*
court did not find any specific examples of assumed duty. In other words, the university did not actively try to control the potentially dangerous activities. There was no specific regulation that forbade students from carrying one another out of the residence hall.

In addition to controlling the activity that caused the fraternity-related injury, the university must also be aware that the fraternity members are engaging in the prohibited conduct. For example, in Furek, the court relied specifically on University of Delaware's knowledge that despite its policies and admonitions on hazing, hazing continued to occur on campus. Although the policy required that the fraternity certify that hazing did not occur, there were a number of incidents that indicated otherwise. Two incidents of injuries caused by hazing were reported to the Director of the University Health Services. The University was also aware that hazing occurred at Sig Ep. Pledges were seen marching around campus, lining up in front of the Sig Ep house. The night before Furek's injury, he and his pledge brothers were stopped by campus security when they were observed "sneaking around" but were permitted to continue when the pledges stated they were playing a prank. The court used this knowledge as a basis for holding the university liable.

At least one other court has applied Furek's assumed duty analysis. In Coghlan v. Beta Theta Pi Fraternity, Rejena Coghlan was an eighteen-year-old pledge of the Alpha Phi Sorority at the University of Idaho. At a sorority meeting, Coghlan was informed that the sorority had been invited to a number of fraternity parties to celebrate the recent membership. Although Coghlan was assigned a "guardian angel," a sorority sister who was supposed to look out for her, the sister did not attend the fraternity

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86. See Rothbard v. Colgate Univ., 652 N.Y.S.2d 146, 148 (1997). After becoming extremely intoxicated at a fraternity party, Rothbard fell from the second floor of the fraternity house. The court rejected the argument that the University assumed a duty of protection because its policies expressly forbade underage drinking and it was unaware that such activities occurred in the fraternity. Id.
88. Id.
89. Id. at 511.
90. Id.
91. Id. at 520. "[W]here there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control." Id.
92. 987 P.2d 300 (Idaho 1999).
93. Id. at 305.
Coghlan went to two fraternity parties. One was entitled “Jack Daniels’ Birthday” party, and the other was called “Fifty Ways to Lose Your Liver” party. Two of the University’s Greek advisors were in attendance at the party and even congratulated Coghlan on her admission into the sorority. After attending both parties, Coghlan became intoxicated and was escorted by a sorority sister to the third floor of the Alpha Phi Sorority house. Later in the night, Coghlan fell from the third floor fire escape and suffered serious permanent injuries.

The trial court relied on the reasoning in Bradshaw and dismissed Coghlan’s claim against the University because the University owed no duty of care to plaintiff. The Idaho Supreme Court reversed. The Supreme Court agreed with Bradshaw that “the modern American college is not an insurer of the safety of its students.” The court stated that this was not the end of the analysis. The court acknowledged that the university could be held liable because “it is possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner.” The court concluded that there was sufficient evidence to establish a claim against the University to overcome a motion to dismiss for failure to state a claim but was unwilling to conclude as a matter of law an assumed a duty existed.

Courts have been reluctant to apply the Furek analysis. Even though universities have taken active steps to enforce their drinking or hazing policies, courts have continually held that a social policy prohibiting underage drinking does not create a special relationship and a duty for the university to protect students.

For instance, in Booker v. Lehigh University, an underage student became intoxicated at the Alpha Sigma Phi fraternity. While walking home from the fraternity party, the student fell and suffered serious head injuries. Lehigh had published a booklet entitled “A Guide to the Social

94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id. at 312 (relying on Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979)).
100. Coghlan, 987 P.2d at 312.
101. Id.
Policy" which prohibited the distribution of alcohol to minors. There was no security guard on duty at the fraternity party, which was also a violation of the social policy. Nonetheless, in the court's opinion, the booklet and the absence of the security guard did not amount to a duty on behalf of Lehigh to protect the plaintiff from getting voluntarily intoxicated. The court stated that if the policies created a special relationship, there would be an unwarranted return to the in loco parentis standard. Lehigh did not plan, approve or control the party, nor did it supply the alcohol that caused plaintiff's intoxication. The court concluded that the purpose of the drinking policy was to instruct students to behave like adults and to drink responsibly. Therefore, the university had not assumed a duty to protect the student.

The court in Lehigh based its decision on the fear that holding the university liable would return the relationship between students and the university to in loco parentis. The court reasoned that although university control of a student's behavior may have been possible in the past, the university could no longer exercise such pervasive control. This reasoning is misplaced. Typically, today's colleges control most aspects of a student's life. These regulations include prohibitions on underage drinking, hazing and injuring fellow students.

103. Id. at 236.
104. Id.
105. Id. at 238.
106. Id.
107. Id. at 241.
108. Id. at 239.
109. See Phelps v. President and Trs. of Colby Coll., 595 A.2d 403 (Me. 1991). Colby College had jurisdiction over students of the underground Lamda Chi fraternity whether the activities prohibited by the college were committed on campus or not. See also, Anthony v. Syracuse Univ., 231 N.Y.S. 435 (N.Y. App. Div. 1928) (sorority sister could be expelled from school for "inappropriate" behavior in an off-campus sorority house); Kusnir v. Leach, 439 A.2d (Pa. Commw. Ct. 1982) (student could be suspended for assault of another student in an off-campus house).


111. Estate of Hernandez v. Delta Tau Delta Fraternity, Inc., 838 P.2d 1283,
The court in *Lehigh* turned a blind eye to the purpose of the Lehigh regulations. The court stated that the purpose of the alcohol policy was to allow those of legal drinking age to drink on campus.\textsuperscript{112} Although the record in the case did not state the entire alcohol policy, it is likely that the policy was also intended to control underage drinking. More importantly, the purpose of this policy was to prevent injuries caused by underage drinking.

Most universities have policies that regulate student life and that respect state laws prohibiting drinking for persons under the age of twenty-one.\textsuperscript{113} Universities also provide penalties for such infractions, which may include attendance at alcohol abuse classes, fines or suspension. The court in *Lehigh* ignored the fact that the purpose of the policy was to prevent injuries based solely on alcohol abuse. This was because of the court’s unfounded fear of the return of the standard of *in loco parentis*. Once the University took an active step to control underage drinking and was aware that students and fraternities were ignoring these policies, the University had a duty to enforce its regulations.\textsuperscript{114}

While I do not argue that a university’s enforcement of regulations and policies should subject it to the strict liability days of *in loco parentis*, such active involvement should subject them to liability. Presumably the purpose of the university’s regulations and policies is to protect the student from injury. Once the university seeks to protect the student from hazing or drinking, the university should not be able to escape liability on the outdated notion that the university is merely an educator.\textsuperscript{115}

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A Greek Relationship Statement... approved by the University... notes that the university employs a professional staff member who is responsible for the administration of university policies relating to fraternity/sorority activities. The statement also requires all chapters to comply with all "federal, state and local laws, and University of Arizona regulations, guidelines and procedures concerning student and student organizations conduct."

*Id.*

112. *See Booker*, 800 F. Supp. at 239.


114. Admittedly, in *Lehigh*, the plaintiff’s injuries where mainly the result of her own voluntary intoxication and unwise choice of taking a dangerous path while in an intoxicated state. The argument becomes more persuasive when the college has actual knowledge of violations of school policy and does nothing to prevent foreseeable injuries. *See discussion infra Part III C.*

115. *See Coghlan v. Beta Theta Fraternity*, 987 P.2d 300 (Idaho 1999). The court held that the university did not have a duty to aid or protect adult students
B. Liability under the Theory of Social Policy

As noted in Part I, universities continue to escape liability for fraternity-related injuries. At least one court has held a university liable on social policy grounds. In *Morrison v. Kappa Alpha Psi Fraternity,*\(^\text{116}\) Morrison was assaulted and hazed by the president of the fraternity. The plaintiff brought suit against the local fraternity, the national fraternity, the president of the local fraternity and the state of Louisiana through the Board of Trustees for State Colleges and Universities.\(^\text{117}\) The court noted that the evidence showed the university exercised some control over the fraternity and was aware of prior incidents of hazing. The court stated, "social policy justifies a special relationship between the University and its students in this particular instance."\(^\text{118}\) However, this social policy was limited to incidents involving hazing.\(^\text{119}\)

There has been great concern over liability from hazing. At least one commentator has suggested that schools may become increasingly liable for failure to take active measures to prevent hazing.\(^\text{120}\) Potential plaintiffs subjected to hazing may claim that the school has violated their constitutional right to bodily integrity.\(^\text{121}\) If the school has been "deliberately indifferent" to the due process rights of students, it may face liability under 42 U.S.C. § 1983.\(^\text{122}\)

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\(^\text{117}\) The incident occurred at Louisiana Tech University.

\(^\text{118}\) *Morrison,* 738 So. 2d at 1115.

\(^\text{119}\) See *Booker v. Lehigh Univ.,* 800 F.Supp 234 (1992). Court rejects plaintiff's argument that social policy amounts to a duty for the university to control on campus parties.

\(^\text{120}\) David S. Doty, *Enough is Enough: The Legal Responsibility of Public Schools and Universities to Prohibit Hazing,* 134 ED. L. REP. 423 (1999).

\(^\text{121}\) See *Alton v. Hopgood,* 994 F. Supp. 827 (S.D. Tex. 1998). The court held in favor of the college because it had a duty to take reasonable measures to prevent the hazing. *Id.*

\(^\text{122}\) See Doty, *supra* note 121; *see also,* Gosk, *supra* note 50, at 174. "In order for a § 1983 to be triggered, the plaintiff in a civil rights action must show that the defendant acted under color of law." *Id.*
C. Liability under Social Host/Dram Shop Acts

Although there is no case law that has held a university liable under dram shop or social host liability, courts frequently examine the acts of the local fraternity chapter under this theory. In a number of cases, the university that owns the property where alcohol was served resulted in an injured plaintiff. Therefore, if the basis of the social host liability is the ownership and control of the premise, it is reasonable to extend this liability to universities.

Social host liability has become an increasingly popular theory of litigation in the past few years. Although cases involving social host liability have expanded, there is no uniform acceptance of these theories. There are two main issues that must be addressed when discussing social host liability. The first issue is the presence or absence of a statute that limits the liability of social hosts. The statute will often determine the extent of the liability. The central question in analyzing the statute is whether the statute limiting social host liability protects social hosts who serve minors. The second issue is whether the person who is suing for damages was the intoxicated party or a third party who was injured by the intoxicated individual.

The Estate of Hernandez v. Arizona Board of Regents illustrates the applicability of these two concerns. Rayner, a member of Epsilon Epsilon Chapter of Delta Tau Delta, attended a bid party on the night of the accident. Rayner was under the age of twenty-one but was allowed to drink at the party. All members of the fraternity were allowed to drink at the party regardless of their age, as long as they contributed to the drinking fund. This included Rayner, whose blood alcohol level at the

123. Nina J. Emerson and Sarah B. Stroevel, Another Look at Dram Shop Liability, 73 Wis. L. 14, 16-17 (2000); Richard Smith, A Comparative Analysis of Dramshop Liability and a Proposal For Uniform Legislation, 25 J. CORP. L. 553 (2000);
128. Id. at 1333.
time of the accident was .15. Ruben Hernandez was killed in an automobile accident with Rayner. The Estate of Hernandez sued the national and local fraternity chapter and the Arizona Board of Regents who leased the fraternity house.

The fraternity unsuccessfully argued that it was protected under Arizona's social host liability statute. This statute grants civil immunity to a non-licensee who serves alcohol to a person over the legal drinking age. The court examined the legislative intent of this statute and held that the social host liability statute only protected non-licensees who furnished alcohol to persons over the legal drinking age. In other words, the fraternity does not escape liability under the social host liability statute because it knowingly serves alcohol to minors.

The court also examined the social duty under common law principles. It noted that most state courts recognized a claim against a social host who served alcohol to a minor while a minority deferred the social host policy issue to the state legislature. Although the common law does not recognize liability for serving alcohol to those of legal age, it does recognize an action in negligence for furnishing a minor with a dangerous instrument. The Arizona Supreme Court noted that its opinion in this case was not to be interpreted as a rule of absolute liability for serving alcohol to minors. The plaintiff must still prove all elements of his or her negligence claim.

In contrast, Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v.
Sullivan \(^{138}\) illustrated that a local chapter will not be held liable under a social liability theory for serving alcohol to minors.\(^{139}\) Todd Prince, the son of the appellees, was invited to a Pi Kappa Alpha fraternity hayride.\(^{140}\) On the way back from the hayride, the driver of the truck stopped to let some passengers relieve themselves. Todd Prince, one of these passengers, was struck and killed by a vehicle as he crossed the road.\(^{141}\) Pi Kappa Alpha appealed the jury's verdict in favor of appellees arguing that the jury should not have been instructed on "dramshop"\(^{142}\) liability, which imposes liability on the seller of intoxicating liquors when a third person has been injured as a result of the buyers' intoxication.\(^{143}\) The appellate court agreed. The court held that absent a Dram Shop Act, the court would not impose liability in these circumstances.\(^{144}\)

[T]he instruction runs counter to that group of cases wherein we have held that one who furnishes alcohol to a minor or to someone who is inebriated is not liable by so doing. We have embraced that principle even where the violation of a statute accompanied the furnishing of alcohol.\(^{145}\)

\(^{138}\) 740 S.W.2d 127 (Ark. 1987).

\(^{139}\) For a companion case, see Andres v. Alpha Kappa Lamda Fraternity, 730 S.W.2d 547 (Miss. 1987). Because neither statute holding commercial vendors liable for serving alcohol to minors nor common law principles of duty not to furnish minors with alcohol, plaintiff did not state a claim for relief upon social hosts. The court reasoned that social hosts, unlike commercial vendors, did not recognize any pecuniary gain from serving alcohol beverages and have no incentive in promoting alcohol consumption. Therefore, fraternity had no duty to prevent intoxication of member, which resulted in death. \textit{Id.}

\(^{140}\) \textit{Sullivan}, 740 S.W.2d at 129.

\(^{141}\) \textit{Id.}

\(^{142}\) "Dram-shop" is "a drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon." \textit{BLACKS LAW DICTIONARY} 494 (6th ed. 1990).

\(^{143}\) Emerson, \textit{supra} note 25; \textit{BLACKS LAW DICTIONARY} 494 (6th ed. 1990) explains Dram Shop Acts:

Many states have Dram Shop or Civil Liability Acts which imposes liability on the seller of intoxicating liquors (which may or may not include beer), when a third party is injured as a result of the intoxication of the buyer where the sale has caused or contributed to such intoxication. Some acts apply to gifts as well as sales. Such acts protect the third party not only against personal injuries and property damages resulting directly from affirmative acts of the intoxicated man.

\textit{Id.}

\(^{144}\) \textit{Sullivan}, 740 S.W.2d at 130.

\(^{145}\) \textit{Id.}
Therefore, the fraternity was not liable for furnishing alcohol to Prince even though he was a minor. Until the state legislature enacted a dram shop liability statute which would establish liability for furnishing alcohol to minors, the court would not find a duty under existing law.

Determining whether social host liability exists does not end the analysis. Even if a court will allow a common law or statutory prima facie negligence claim, the plaintiff must still show that the underage drinker was likely to have acted in a manner that caused plaintiff's injuries. In \textit{Sparks v. Warren}, the plaintiff was assaulted by an underage fraternity member who obtained alcohol at the fraternity house. Even though the fraternity knew that Warren was not twenty-one years old, this was not enough to state a claim of negligence under social host liability. The court found that the plaintiff had to prove that it was foreseeable that Warren was likely to become violent while intoxicated. The court stated: "[t]he fact that someone is visibly intoxicated or underage standing alone, does not make it foreseeable that serving alcohol to the person creates an unreasonable risk that the person will become violent."

Some courts refuse to allow recovery for damages suffered by the intoxicated individual. In \textit{Coghlan v. Beta Theta Pi Fraternity}, the court held that the language of the Idaho Dram Shop statute was clear and that no action could be brought by an intoxicated person who suffered injuries due to his/her intoxication even if he/she was not of legal drinking age. Additionally, some courts strictly construe the Dram Shop Acts and require actual knowledge by the person furnishing the alcohol that the person to whom he furnished the alcohol was visibly intoxicated. The furnishers' knowledge is therefore judged by a subjective standard.

It is also important to note that most statutes impose liability for the furnishers of alcohol, not merely for having alcohol on the premises.

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146. Prima facie means that the plaintiff has shown a duty owed to plaintiff, a breach of that duty, the breach proximate caused the injury, and the injury caused recompensable damages.
147. 856 P.2d 337 (Or. 1993).
148. \textit{Id.} at 338.
149. \textit{Id.}
150. \textit{Id.} at 339
151. \textit{Id.} (citing Moore v. Willis, 767 P.2d 62 (Or. 1988)).
154. \textit{Id.}
Furnishers may include adults and minors. Furnishing does not mean allowing a party on one’s premises or the purchase or transporting of the alcohol. Some courts limit the definition of furnishing to those who physically hand the person the intoxicating beverage.

The doctrine of social host liability continues to be a subject of debate. While there is no single rule for social host liability, the applicable statute will control the courts’ decision. Although proving that a university should be held liable under social host liability would be difficult, an injured plaintiff may utilize this theory. If the university was the owner of the premise where the alcohol was furnished, had knowledge that the alcohol was being consumed, and the premise is located in a jurisdiction with an applicable statute or common law approach, the plaintiff may pursue a cause of action based on social host liability.

D. Liability under the Theory of Premises Liability

Universities often own the fraternity house or the property where the
fraternity-related injury occurs. Injured plaintiffs may also seek to hold the university responsible on the theory of premises liability.\textsuperscript{164} Under common law, a landowner is under a duty of reasonable care to protect its invitees\textsuperscript{165} from injuries which are not open or obvious.\textsuperscript{166}

In addition to relying on assumed duty, the court in Furek recognized that as a landowner the university had a duty to protect Furek as an invitee from dangerous conditions known or easily discoverable to the landowner.\textsuperscript{167} The court noted that the duty to protect students\textsuperscript{168} only extended to the foreseeable acts of third persons who are under university control.\textsuperscript{169} Evidence of the university's knowledge included university security guards witnessing the pledges marching with paddles and the university's common knowledge that hazing occurred.\textsuperscript{170} Since the court found that the university knew of a dangerous condition, there was sufficient evidence for a jury to determine the foreseeability of Furek's injury.\textsuperscript{171} Even though the university did not own the house itself, it was situated on university property. The court held that the university exercised some control over the fraternity through its ability to enforce

\textsuperscript{164} Restatement (Second) of Torts § 344 states:
A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect against them.

\textit{Id.} It seems equally reasonable to conclude that university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties' relationship, particularly if such supervision advances the health and safety of at least some students.

\textsuperscript{165} A person is an "invitee" on the land of another if (1) he enters by invitation, express or implied, (2) his entry is connected with the owner conducts or permits to be conducted on his land and (3) there is mutuality of benefit or benefit to the owner. BLACK'S LAW DICTIONARY 827 (6th ed. 1990).

\textsuperscript{166} For discussion of the general principles of premises liability, see CARLTON D. FISHER, PREMISE LIABILITY IN A NUTSHELL (1999).

\textsuperscript{167} See Restatement (Second) of Torts § 343 (1964)

\textsuperscript{168} See Marshall v. Univ. of Del., 633 A.2d 370 (Del. 1993). The court held that a university's duty to protect against foreseeable acts of third parties only extends to students of the university. \textit{Id.}

\textsuperscript{169} Furek v. Univ. of Del., 594 A.2d 506, 521 (Del. 1991).

\textsuperscript{170} \textit{Id.} at 511.

\textsuperscript{171} \textit{Id.} at 522.
security and anti-hazing regulations, even if they occurred in the fraternity house.  

The duty of landowners to protect invitees or tenants from criminal or intentional acts of third parties has been the subject of many debates over the past years. A majority of jurisdictions hold that landowners have a duty to protect invitees from foreseeable attacks. A university owes student tenants the same duty to exercise reasonable care as a private landowner. Courts utilize four tests to determine whether or not the conduct was foreseeable: (1) the specific harm test, (2) the prior similar incidents tests, (3) the totality of the circumstances test and (4) the balancing test. In contrast, other courts have rejected the notion that a landlord has a duty to protect a tenant from harm caused by intentional or criminal acts of third persons.

Premises liability has been used to hold the university liable for non-fraternity-related injuries. For example, in *Nero v. Kan. State Univ.*, the court held that the university owed its students the same duty to exercise due care for their protection as private landowners. A student named Ramon Davenport sexually assaulted Shana Nero. Davenport was accused of raping another student thirty-five days before Nero’s attack. Following the rape accusation, the University assigned Davenport to an all-male dorm and instructed him that he was not to enter the female dorm. At the end of the calendar school year, all students who attended summer school lived in the same dorm. This included both Davenport and Nero. Davenport attacked Nero while doing laundry in the dorm.

172. Id.

173. *See Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968, 971-3 (Ind. 1999). The court held that a prior sexual assault and the evidence the fraternity knew that fraternity members were most likely to commit sexual assaults on college campuses made it foreseeable that such sexual assault of plaintiff would occur and the landowner owed plaintiff a duty to take reasonable care to protect plaintiff. *Id.*


175. *See Delta Tau Delta*, 712 N.E.2d at 971.


177. 861 P.2d 768 (Kan. 1993)

178. *Id.* at 769.

179. *Id.* at 771

180. *Id.*

181. *Id.*

182. *Id.* at 772.

183. *Id.*
basement of the dorm. Following the incident, Nero filed suit against the University alleging that it had a duty to protect her against Davenport.

The court began its analysis with Bradshaw and stated that the University was the insurer of a student's safety. The court also looked at the Furek analysis. The court rejected Furek's reasoning that the university had an assumed duty to protect but accepted the landowner-invitee argument. The court stated:

[w]e emphasize that a university is not an insurer of the safety of its students. Nonetheless, a university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control.

The University knew of the allegations against Davenport and had told him where he had to live in the past. The University could have exercised control over Davenport and refused to allow him to stay on campus. Finding a duty to protect, the court remanded for trial to determine whether Davenport's attack was foreseeable.

Applying these common law principles, courts should be willing to apply the analysis illustrated in Furek and Nero, which merely applies the common law duties of landowners. Since universities typically own the property where the fraternity-related injuries occur, they should be held to the same duties as any other landowner. However, these cases are

184. Id.
185. Id.
186. Id.
187. Id. at 579.
188. Id. at 780.
189. Id. at 772.
190. Id.
191. Id.
192. Id.
193. It is important to note that the court in Nero was looking at the criminal propensity of Davenport. Much of fraternity activity is also criminal. For example, serving alcohol to a minor. In addition, at least forty states currently have anti-hazing statutes. See ALA CODE § 16-1-23 (1975); ARK. CODE ANN. § 6-5-201 (LEXIS 1987); CAL EDUC. CODE § 32050 (West 1977); COLO. REV. STAT. § 18-9-124 (2000); CONN. GEN. STAT. ANN. § 53-23A (WEST 1958); DEL. CODE ANN., TIT. 14, § 9301 (1979); FLA. STAT. ANN. § 230.23005 (West 2000); GA. CODE ANN. § 16-5-61 (Lexis 1999); IDAHO CODE § 18-917 (Michie 1997); ILL. COMP. STAT. 120/0.01 (West 1993); IND. CODE § 34-30-2-150 (1998); IOWA CODE § 708.10
always fact-sensitive; the plaintiff must demonstrate that the university had knowledge of the dangerous condition but failed to warn the plaintiff.

IV. COMPARISON OF THE NATIONAL FRATERNITY LIABILITY AND THE UNIVERSITY'S IMMUNITY

The national fraternity is frequently held liable for fraternity-related injuries. Courts apply the same liability theories unequally and often immunize the university from liability. Some courts go to great lengths to hold the national fraternity liable even when they allow the university that also exercised control over the fraternity members to escape liability.

The National Fraternity is normally an incorporated entity. The purpose of the National Fraternity is to guide and promote unity in its local fraternity chapters. Generally, the National Fraternity supervises the local chapters and its members to ensure that they are carrying out the fraternity’s purpose and quasi-religious functions of the national organization. The National Fraternity has rules, regulations and requirements that each local chapter must abide by in order to remain in good standing. That National Fraternity controls the local chapter by enforcing the National Chapter’s policies and by-laws, supervising local chapters’ day-to-day activities, punishing or revoking the local chapter’s charter and generally the scope of authority the National Fraternity holds over the local chapter.

(1992); KAN. STAT. ANN. § 21-3434 (1995); KY. REV. STAT. ANN. § 164.375 (Michie 1999); LA. REV. STAT. ANN. § 17:1801 (West 1997); ME. REV. STAT. ANN. TIT.20-A § 6553 (West 1999); MD. ANN. CODE ART 27, § 269H (Michie 1957); MASS. GEN. LAWS. ANN. CH. 269, § 17 (West 1992); MINN. STAT. ANN. § 121A.69 (West 1999); MISS. CODE. ANN. § 97-3-105 (West 1972); MO. REV. STAT. § 578.363 (1994); MONT. CODE. ANN. § 81-2-120 (West 1999); NEB. REV. STAT. § 28-311.07 (1999); N.H. REV. STAT. ANN. § 631:7 (Michie 1996); N.J. STAT. ANN. § 2C-40-3 (West 1993); N.Y. PENAL § 120.16 (2000); N.C. GEN. STAT. § 14-35 (2000); N.D. CENT. CODE § 12.0-17-10 (1997); OHIO REV. CODE ANN. § 2307.44 (Anderson 1994); OKLA. STAT. TIT. 21 § 1190 (West 1983); OR. REV. STAT. § 163.197 (1998); 24 PA. CONS. STAT § 5351 (Purdens 1973); R.I. GEN. LAWS § 11-21-1 (1956); S.C. CODE ANN. § 16-3-510 (Law Co. 1976); TENN. CODE ANN § 49-7-123 (Michie 1996); TEX. EDUC CODE. ANN. § 37.152 (Purdens 1977); UTAH CODE ANN. § 53A-11-908 (1953); WASH. REV. CODE § 28B.10.900 (1995); W.VA. CODE § 18-2-33 (1992); WIS. STAT. ANN. § 948.51 (West 1997).

194. See Rutledge, supra note 2.
In *Marshall v. Univ. of Del.*, the Superior Court of Delaware applied two theories to hold the national chapter liable while granting the University's Motion for Summary Judgment. Marshall, who was neither a fraternity member nor a student, was injured at a Kappa Alpha party when Sigma Nu fraternity members attempted to enter the party without paying the cover charge. The court reasoned that the national organization of Sigma Nu would only be liable if the local chapter acted within the scope of the agency relationship and if the national chapter had a right of control over the local chapter's day-to-day activities. The local chapter's failure to control its members in a "responsible fashion" fell within the scope of agency because one of the national chapter's purposes was to "provide an opportunity for the members of the organization to associate in a responsible fashion." The fight did not fall into the realm of associating in a responsible fashion. The court found that the national chapter's control over day-to-day activities included the duty to inspect and supervise local chapters, the right to remove local officers, and to right to suspend the fraternity.

Therefore, the national fraternity, through its policies and guidelines to promote brotherhood, was held liable for fraternity-related injuries. If the university policy is to prevent hazing or underage drinking, should not they also be subject to the same liability? When there is evidence that the national fraternity exercised sufficient actual control, the national chapter should be held liable but this liability should also extend to the University.

The Superior Court of Delaware in *Marshall v. University of Delaware*
also applied custodial theory of liability to hold the national fraternity liable but not the University. The court defined custodial liability as:

(1) the defendant had a duty to control the conduct of the acting (or non-acting party); (2) the defendant knew of or had reason to foresee the acting (or non-acting) party's conduct; (3) the plaintiff was within the sphere of foreseeable risk created by the acting (or non-acting) party's conduct; (4) the defendant breached his duty to control the acting (or non-acting) party; (5) the defendant's breach of duty actually and proximately caused the plaintiff's injuries; and (6) there are no affirmative defenses precluding liability.

The national chapter will be held liable only where it has a duty to control the local chapter. A duty to control normally is found when there is a special relationship between the party with the duty to control (i.e. the national chapter) and the party to be controlled (i.e. the local chapter) or the party for whose protection the duty to control is imposed (i.e. the plaintiff). This duty of reasonable care can be found if one "takes charge" of another "whom he knows or should know to be likely to cause bodily harm." The relationship between the parties should be of such a nature that "social policy justifies the imposition of a duty to act."

Applying these principles, the Marshall court held that the national fraternity had a duty to protect the plaintiff and control the local chapter. The court stated that although the national fraternity was removed geographically from the local chapter, it had the ability to supervise all of its chapters, to supervise trends and to take corrective action. The court also relied on the national fraternity's power to revoke the local chapter's charter. The national chapter knew of the local chapter's apparent disregard for the safety of others. Marshall was a

205. Id. at *1.
207. RESTATEMENT (SECOND) OF TORTS § 315 (1965).
209. The court previously held that fraternity members needed to be controlled because they tend to engage in conduct such as hazing and holding large open parties. Marshall, 1986 WL 11566 at *8.
210. Id.
211. This evidence was based on a letter to from Sigma Nu's Executive Director to the Commander of Sigma Nu stating that Sigma Nu members had been involved in removing fire extinguishers and lighting fireworks in residence
foreseeable plaintiff, and the national chapter's failure to control was a proximate cause of plaintiff's injuries. Therefore, the national chapter had a duty to control the local chapter of Sigma Nu.

This analysis is equally applicable to the university. Once the university recognizes the need to control fraternity members to prevent hazing or underage drinking, it has assumed a duty to protect foreseeable persons who are injured by hazing and underage drinking. I believe that the university is in an even better position to control these behaviors because the university has a more direct relationship with the fraternity members than the national fraternity has. The national fraternity may be far removed geographically from the local chapter, whereas the university is not. Furthermore, the university is in a better position to learn whether the fraternity is following its policies because of its proximity to the fraternity.

A good example of the analysis that should be applied to both the university and the national fraternity is found in *Morrison v. Kappa Alpha Psi Fraternity*. The court in *Morrison* held that the national chapter did have a duty to prevent hazing based on the evidence that the national chapter had the power to control, expel and suspend members for hazing. In addition, the national chapter knew of prior hazing incidents of the local chapter. Therefore, the national chapter had a duty to prevent injuries caused by hazing. The court in *Morrison* emphasized halls. *Id.*

212. *Id.* at *9*. Zone of danger included anywhere a Sigma Nu member would go acting as a Sigma Nu member.

213. *Id.*

214. *Id.*; See Furek v. Univ. of Del., 594 A.2d 506, 514 (1990). The court upheld a jury finding that the national fraternity was not liable for injuries. The court held that even though the national chapter was aware that hazing had occurred in the past, prior to the incident the national chapter believed the local chapter was free of hazing. Therefore, it was reasonable to conclude that the national fraternity had dispelled its duty of reasonable care. *Id.* For another case discussing the national chapters duty to control see Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547 (Mo. 1987). There the court rejected the claim that national fraternity breached a duty to control by failing to implement and enforce policies prohibiting underage drinking. *Id.*


216. *Id.* at 1105, 1113, 1118.

217. *Id.* at 1118.

218. See *Morrison*, 1999 WL 286002. The National Fraternity assumed a duty to protect against and prevent hazing when they implemented policies prohibiting
the knowledge requirement.\textsuperscript{219}

These theories are equally applicable to the university. It is unfair to allow universities to control the behavior of members in local fraternities and escape liability on the ground that the university is solely an educator and does not provide for students' safety.\textsuperscript{220} Common law principles of tort litigation followed in \textit{Furek} should apply to the universities. Specifically, once a university has exercised control over a fraternity and its members, and has knowledge that the university's policies have not been followed, the university should be held liable.

\textbf{V. WHAT FRATERNITY-RELATED LITIGATION HAS MEANT FOR FRATERNITIES AND COLLEGES}

The tragedies and litigation resulting from fraternity related injuries have heightened awareness of the problems associated with fraternity practices. Colleges\textsuperscript{221} and fraternities\textsuperscript{222} have been pushed into creating and enforcing stiffer policies against alcohol consumption and hazing in order to reduce the injuries resulting from these activities.\textsuperscript{223} Colleges will

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\textsuperscript{219} 738 So. 2d at 1118-1119.
\textsuperscript{220} See \textit{Lloyd v. Alpha Phi Alpha Fraternity}, 1999 WL 47153 (N.D.N.Y. 1999), The United States District Court for the Northern District of New York held that the university had no duty to protect plaintiff who was sexually assaulted at the fraternity based on the fact that the national chapter distributed posters stating that the fraternity was a fighter against date rape.
\textsuperscript{221} See \textit{Alcohol Crackdown Moves Party IU's Tougher Stance in Wake of Recent Death Students Going Off Campus to Drink}, \textit{The Indianapolis Star}, available at 1999 WL 3828819. Indiana University, after Pi Kappa Alpha fraternity pledge died from choking on his own vomit, has stepped up spot checks of fraternities and is notifying parents of repeat offenders. \textit{Id.}
\textsuperscript{222} See \textit{Bullard Charles, Frats Going Dry at U of I}, \textit{Des Moines Reg. 1}, Aug. 25, 1998, available in 1998 WL 3222245. The eighteen fraternities at University of Iowa voted unanimously to outlaw alcoholic beverages at their parties. \textit{Id.}
\textsuperscript{223} See generally, Leo Reisberg, \textit{Colleges Step Up Efforts to Combat Alcohol
only permit alcoholic beverages on fraternity premises for students of legal drinking age and third parties (non-fraternity members) must provide the alcoholic beverages. 224 Some colleges notify parents of high-risk behavior, 225 while other colleges have simply banned alcohol from fraternity premises. 226

Fraternities have expressed concern over their public image as a group of binge drinkers and have tried to restore the original purpose of the fraternity—to promote brotherhood, scholarship and ethical citizenship. 227 Fraternities are trying to rebuild their image. Two of the nation’s largest fraternities have become alcohol free. 228 In addition, fraternities have implemented alcohol awareness programs to combat binge drinking. 229 States have implemented anti-hazing statutes and have demonstrated that they will use these statutes to hold students criminally liable. 230

Abuse, CHRON. HIGHER EDUC., UF Suspends Delta Chi Over Charges, ST. PETERSBURG TIMES, March 3, 1999 at IB, available in 1999 WL 3307542. (University of Florida suspends Delta Chi fraternity for sexual assault, violation of alcohol beverage rule, and violation of hazing guidelines.) Id.

224. Id.


228. See Kathleen Parker, Don’t Let Your Sons Grow Up to Be Frat Boys, Some Fraternities and Sororities are Trying to Tackle Binge Drinking and Related Issues, GREENSBORO NEWS & REC. (N.C.) January 11, 1999, at A7. Sigma Nu, with 204 chapters, and Phi Delta Theta, with 180 chapters. Id.; UF Suspends Delta Chi Over Charges, ST. PETERSBURG TIMES, March 3, 1999 at IB. Report states that sixty-three national fraternities have asked their chapters to be substance free by the year 2000. Id.


230. See Gary Spencer, Private Action Allowed by Anti-Hazing Statute, N.Y.L.J., Feb. 2, 1999 at 1, col. 3. Twelve students and alumni members of Theta Chi Fraternity were charged with first-degree hazing after Oja, a seventeen-year old student choked to death on his own vomit after being hazed.
CONCLUSION

Fraternity-related litigation has minimized the days where all fraternities were defined by toga parties and drinking. Fraternities have been the objects of public scorn and million dollar lawsuits. As a result, national fraternities and colleges have worked together to implement educational programs that promote responsible drinking and denounce hazing.

Colleges have taken an active role in supervising and controlling the fraternities and students on their campus. The notion in Bradshaw that student autonomy and privacy meant that the university could not exercise control over the student is no longer applicable in today’s university/student relationship. Colleges have implemented policies and procedures which govern fraternity members and their behavior, especially in the arena of hazing and drinking. Furthermore, colleges, rather than National Fraternities, are in the better position to govern and implement these policies to prevent the tragedies that have occurred too often on American campuses. Presumably the purpose of these policies is to protect students from fraternity-related injuries. Therefore, when the university fails to enforce its policies and is aware that the policies are not being followed, the university should be subject to the same standard the courts have applied to the National Fraternity when Ruben Hernandez was killed in an automobile accident with Rayner.