

Confronting the Evolving Safety and Security Challenge at Colleges and Universities

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I. INTRODUCTION

Colleges and universities have long been scrutinized and confronted with lawsuits regarding safety and security measures designed and implemented to protect students and prevent dangerous incidents on campus.¹ Under the doctrine of *in loco parentis*, college administrators assume responsibility for the physical safety and well-being of students as they matriculate through their academic programs.² However, in recent decades, the realization that university communities are not immune to criminal activity has led to federal legislation and judicial opinions that have attempted to identify what legal duty colleges and universities have to prevent security breaches. Moreover, college and university administrators have looked to the courts and legal counsel to determine an institution's exposure to legal liability and strategies that might be used to minimize such exposure. This charge has been, and remains, a daunting challenge for the higher education community. This Article reviews recent cases regarding the legal duty American colleges and universities have to protect the student community from harm or injury resulting from safety or security breaches. Moreover, this Article identifies legal challenges colleges and universities may face in response to campus surveillance efforts and negligence hiring and retention allegations. Finally, the Article offers some insight intended to advance the legal community's efforts to counsel and advise college and university administrators regarding the issue of campus safety.

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1. *United States v. Sykes*, 58 F. 1000 (W.D.N.C. 1893) (university president's failure to protect the moral habits of students constitutes culpable negligence); *Stockwell v. Trs. of Stanford Univ.*, 148 P.2d 405 (Cal. Ct. App. 1944) (Stanford University liable for not taking adequate measures to ensure student safety from problem regarding use of BB guns on campus); *Howe v. Ohmart*, 33 N.E. 466 (Ind. Ct. App. 1893) (affirming jury verdict against church-affiliated college holding that college had a duty to protect visitor from dangerous pitfalls on campus premises); *Tennessee ex rel. Brown v. McCanless*, 195 S.W.2d 619 (Tenn. 1946) (affirming the denial of a liquor license that would permit the sale of intoxicating liquor 700 feet from the Fisk University entrance gate because it was a totally inappropriate place for such business).

2. Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991).

The principal federal legislation designed to address security and safety in higher education is the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act³ (Clery Act), a part of the Higher Education Act of 1965. The Clery Act requires colleges and universities to disclose annual information about campus crime statistics to students and parents.⁴ The crime statistics disclosure requirements have made a valuable contribution to campus security by bringing notable attention to issues of campus crime and security in the higher education community. Colleges and universities failing to comply with the Clery Act's requirements may be subject to certain penalties for not providing complete and accurate statistical information about criminal incidents. However, there are still important questions about the effectiveness of safety and security efforts on campuses across the country and about how the legal community can assist higher education administrators in this effort.

There are numerous tragic and troubling incidents that provide ample reason for colleges and universities to examine, and possibly reconsider, the existing campus safety paradigm or model. The August 1990 murders of five college students near the University of Florida serve as a grim reminder that college campuses can be the scene of heinous crimes.⁵ At Stony Brook University in New York, campus officials were compelled to increase day and night patrols around residence halls when students reported that three unidentified men—whose faces were covered by bandanas, and who were also armed with a handgun and a knife—stormed a dorm room and made off with cash and other property.⁶ Meanwhile, officials at Washington State University (WSU) were forced to respond to a decision by a local court prohibiting police from patrolling WSU's residence halls because the patrols violated student privacy rights.⁷

While the Clery Act and other legislative efforts have provided important information to students, parents, and faculties, many colleges and universities remain saddled with important questions regarding the scope and effectiveness of their campus safety efforts. How far should university administrators be prepared to intrude in an effort to prevent criminal activity on campus? What privacy compromises should students, faculties, and staff be expected to make in the interest of campus safety? Are campus security personnel properly trained and deployed to prevent criminal activ-

3. 20 U.S.C. § 1092 (f) (2006).

4. Bonnie S. Fisher et al., *Making Campuses Safer for Students: The Clery Act as a Symbolic Legal Reform*, 32 STETSON L. REV. 61 (2002).

5. Mary Shedden, *No Fame for a Killer*, TAMPA TRIB., Feb. 13, 2006, § Nation/World, at 1. Also, university campuses such as the University of Iowa, University of Arizona, and Duquesne University have been the scenes of numerous shootings.

6. Olivia Winslow, *Stony Brook University Beefs up Security*, NEWSDAY, May 11, 2006, at A40.

7. *Judge Rules Police Dorm Patrols Violate Privacy*, ASSOCIATED PRESS, May 10, 2006.

ity? Is there a one-size-fits-all approach to campus security? How can college administrators determine whether their approach to campus security is effective? What principles should guide security efforts to ensure that exposure to legal liability is minimized? These questions demand attention from policy development personnel and the legal community because the safety and security challenges that confront higher education are formidable, complex, and likely to grow in the coming years.

II. THE EVOLVING RELATIONSHIP BETWEEN THE INSTITUTION AND THE STUDENT COMMUNITY

Prior to the civil unrest experienced on college and university campuses across the country in the 1960s, the doctrine of *in loco parentis* extended to institutions of higher learning the authority to exercise parental control over students enrolled at colleges and universities.⁸ Today, the doctrine of *in loco parentis* has disappeared from college life, and students are considered adult consumers free to engage in various activities at their own discretion.⁹ Arguably, the dismissal of the *in loco parentis* doctrine led to two viewpoints that characterize the relationship between students and the modern-day college or university.

One viewpoint contends that the student and the university have an arms-length relationship that acknowledges that students have the same exclusive right to exercise independent judgment over their own affairs as reserved to any adult.¹⁰ The other viewpoint maintains that the university-student relationship is unique and imposes a duty on the university to exercise reasonable care to protect students from harm.¹¹

In *Furek*, the Delaware Supreme Court found that a university could be liable for physical injuries a student sustained during a fraternity hazing incident because the relationship between the university and the student was sufficiently close and direct to impose a duty to protect the student from foreseeable dangerous activities occurring on the premises.¹² The

8. Jackson, *supra* note 2.

9. See *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003) (recognizing that since the late 1970s, many legal scholars and jurisdictions have recognized that no special relationship exists between a college and its own students because the college is not an insurer of the safety of its students).

10. See *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979) (rejecting the notion that a university has a duty to protect students from injury caused by a third party under the *in loco parentis* doctrine or under sections 314A or 323 of the Restatement (Second) of Torts (1965)), *cert. denied*, 446 U.S. 909 (1980); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986) (same).

11. *Furek v. Univ. of Del.*, 594 A.2d 506, 516-19 (Del. 1991); see *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983) (university has a duty to exercise reasonable care to prevent injury to students due to the uniqueness of the student-university relationship, and existing social values and customs).

12. *Furek*, 594 A.2d at 522.

court in *Furek* rejected the reasoning in *Bradshaw* and *Beach*, noting that both cases applied flawed logic. Specifically, in *Bradshaw* and *Beach*, the university argued that it had no duty to supervise its students because they were responsible adults.¹³ However, both cases involved alcohol consumption by students below the legal drinking age, which undermined any contention that the students were responsible adults.

Contrary to the reasoning in *Bradshaw* and *Beach*, the *Furek* court recognized the “the unique situation created by the concentration of young people on a college campus and the ability of the university to protect its students.”¹⁴ The court did not resurrect the *in loco parentis* doctrine and agreed that the university’s duty was limited to the regulation and supervision of foreseeable dangerous activities occurring on its property, but rejected the university’s argument that it had no duty to protect its students from others.¹⁵

While the U.S. Supreme Court has not crafted a brightline rule that a university has a duty to protect its students, many jurisdictions continue to wrestle with the question of whether a special relationship exists between the university and its students that establishes that the university has a legal duty to protect students.¹⁶ Apart from the special relationship debate, at least one jurisdiction has questioned whether a student is an invitee to which a university would owe a legal duty to use reasonable and ordinary care to protect the student-invitee from harm. In *Rhaney v. University of Maryland Eastern Shore*,¹⁷ the Maryland Court of Appeals reversed a jury verdict entered by the circuit court in favor of Anthony Rhaney, a student at the University of Maryland Eastern Shore (UMES), who was assaulted by his dorm roommate.¹⁸

13. *Bradshaw*, 612 F.2d at 142; *Beach*, 726 P.2d at 419.

14. *Furek*, 594 A.2d at 519.

15. *Id.* at 521.

16. *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003). In *Webb v. University of Utah*, 125 P.3d 906 (Utah 2005), the Utah Supreme Court revisited the issue of whether a university had a legal duty to exercise ordinary and reasonable care when it directs students to engage in specific activities as part of its educational instruction. *Webb* involved a suit brought by a student who was injured during a science class field trip when the student was directed by his instructor to walk on an icy and snowy sidewalk. The class instructor required students to enter a dangerous area where the plaintiff and other students fell and were injured. Despite the court’s previous decision in *Beach*, it held that a special relationship could be created between the instructor and the student because, in the academic environment, students do relinquish a degree of behavioral autonomy out of deference to their instructors. Such a special relationship could establish that a university owed a legal duty of care to students and lay the foundation for a successful negligence claim. However, based on the pleadings presented by the plaintiff, the instructor’s directive for students to walk on the icy sidewalk did not create a special relationship because the students were not exposed to unreasonable risk of harm by the instructor’s conduct. Thus, the university’s rule 12(b) motion to dismiss was granted. *Id.* at 910-11.

17. 880 A.2d 357 (Md. 2005).

18. *Id.* at 368.

Rhaney was assaulted on October 29, 1998, while his roommate, Ennis Clark, was moving his belongings to another dorm room. As Clark was moving, Rhaney began to rearrange the dorm room and attempted to move Clark's fish tank. Clark returned to discover that the tank was cracked and leaking. After they exchanged words about the leaking fish tank, Clark punched Rhaney in the jaw. Rhaney argued that the university knew Clark had a history of violence because he had been involved in two prior fights on campus, but permitted Clark to return to UMES. The university argued, as Rhaney's landlord, that it violated no known duty to Rhaney as a business invitee and that no special relationship existed between UMES and Rhaney. Therefore, UMES submitted that Rhaney could not establish a negligence claim as a matter of law.¹⁹

After the trial court denied UMES's motion for summary judgment, the jury returned a verdict for Rhaney and awarded him \$74,385 in compensatory damages. The jury found that UMES breached a duty of reasonable care owed to Rhaney and that breach was the proximate cause of Rhaney's injuries. The Maryland Court of Special Appeals reversed the jury's verdict finding that there was insufficient evidence available to establish that the dormitory assault was foreseeable. The court refused to consider whether a special relationship existed because Rhaney failed to plead that theory.²⁰ The Maryland Court of Appeals affirmed the decision, recognizing that absent a special relationship the university had no duty to control the conduct of a third person to prevent her from causing physical harm by criminal acts or intentional torts.²¹ As Rhaney's landlord, UMES had a duty of reasonable care to protect against known, or reasonably foreseeable risks, but the court refused to characterize Rhaney's dormitory roommate as a dangerous condition.²²

More importantly, the court found that Rhaney was not a business invitee at the time of the assault. The court explained:

[b]eyond his matriculation generally as a student at UMES, Rhaney's specific contractual relationship with UMES as to his occupancy of the dormitory room was governed by a distinct "Residence Hall Agreement." Rhaney, while inside the dormitory building, was a tenant of a landlord, but not necessarily a business invitee. Business invitees are visitors invited to enter the premises in connection with some business dealings with the possessor.²³

19. *Id.* at 360.

20. *Id.* at 363.

21. *Id.* at 364.

22. *Id.*

23. *Id.* at 367.

The court further observed that Rhaney was a business invitee in common areas on the UMES campus, but upon entering the dormitory, his legal status was specifically regulated by the Residence Hall Agreement. Thus, according to the Maryland Court of Appeals, Rhaney was a tenant at the time of the assault, not a business invitee.²⁴

The difficulty with the analysis applied in *Rhaney* is that colleges and universities view dorms as not only shelter for students, but also as safe havens for students to explore learning and continue their development.²⁵ Extracurricular programs are held in dorms, which can make them just as important as any academic building on campus.²⁶ Given the vital role that dorms play in accomplishing the academic mission of a college or university, it is illogical that a student's legal status as an invitee would be diminished by choosing to live on-campus.²⁷

III. UNDERSTANDING THE ANALYSIS APPLIED TO DETERMINE WHETHER A COLLEGE OR UNIVERSITY OWES A DUTY OF CARE TO ITS STUDENT COMMUNITY

Whether an institution has proposed and implemented strategies and tactics that will be viewed by courts as appropriate measures to allow a college or university to avoid legal liability can never be certain, and likely will be determined on a case-by-case basis. However, recent tort cases suggest that the pivotal inquiry is whether an institution has a legal duty to protect its students from harm and, if so, what is the scope of such duty.

A negligence claim successfully defended by Wilmington College illustrates how courts may limit an institution's duty to protect students from harm when the student's activities are not under the college's exclusive control. In *Ingato v. Beisel*,²⁸ the Wilmington College aviation management-flight program required students to obtain FAA certifications in both the visual and the instrument operations of an aircraft to complete the degree program. Because the college did not offer flight-training instruction, students were left to contract with a flight-training school to acquire the

24. *Id.*

25. GREGORY S. BLIMLING & LAWRENCE J. MILTENBERGER, *THE RESIDENT ASSISTANT: WORKING WITH COLLEGE STUDENTS IN RESIDENCE HALLS* 21-25 (2d ed. 1981).

26. *Id.*

27. First year fulltime students at institutions such as Vanderbilt University, Duke University, West Virginia University, and a host of other institutions are required to live on campus in residence halls or dormitories. See Harlan Cohen, *The Importance of Being There: Commuter Students Risk Missing Out on Crucial Learning Experiences*, WALL ST. J.: CLASSROOM EDITION, Oct. 2002, available at www.wsjclassroom.com/archive/02oct/COLOG_OCT.htm.

28. No. Civ. A. 03C05087SCD, 2005 WL 578814 (Del. Super. Ct. Feb. 28, 2005).

required FAA certifications. Several flight-training schools were located near the college, but none of the flight-training schools, including the Sky Safety, Inc. (Sky Safety) flight-training school, were affiliated or under the control of Wilmington College. In spring 2001, John Ingato, a Wilmington College student in the Management-Flight Program, enrolled at Sky Safety to obtain his FAA certifications.²⁹

During an instructional flight, the student was injured when his plane crashed while attempting to land. Evidence presented established that the crash was caused by the negligence of the flight instructor, and Ingato sued Sky Safety for damages. The student-plaintiff also sued the college based on the contention that the college directed him to Sky Safety as part of its academic degree requirements.³⁰

The college denied that it directed Ingato to Sky Safety for flight training, and the court found no evidence that the college assumed any duty or exercised any control over Sky Safety. The training did not take place on the property of the college and there was no indication that the college attempted to become involved with flight training whatsoever. Moreover, the court held that no duty was created by the college's requirement that some degree program activities take place off-campus. Therefore, Wilmington College's motion for summary judgment was granted.³¹

While the court found that Wilmington College was not liable for negligence because the college had no duty to provide for the safety of students taking flight-instruction classes at Sky Safety, there can be little argument that the student was compelled to take the flight-instruction training to meet the college's degree requirements. Should a college or university have a responsibility to its students who are compelled to engage with outside entities to complete their degree requirements? Is a college's responsibility or duty to such students even more evident when the instructional subject matter involves dangerous or risky undertakings, like flight training or working with hazardous materials? Or, should colleges and universities refrain from becoming entangled in the affairs of students outside the campus to avoid assuming a responsibility for the students' safety that might not otherwise exist?³²

Arguably, Wilmington College's motion for summary judgment was successful because the college exercised no control over Sky Safety's

29. *Id.* at *2. Although not discussed in the court's decision, it appears that the college may have created a captive market for the flight training schools. *Id.*

30. *Id.* at *3.

31. *Id.*

32. See *Stephenson v. Coll. Misericordia*, 376 F. Supp. 1324 (M.D. Pa. 1974) (finding that the college was not vicariously liable for injuries sustained by a student taking a horseback riding class at an equestrian center that was not operated by the college to complete certain physical education requirements).

flight-instruction program. The outcome of this case, moreover, discourages institutional administrators from investigating third parties and vendors that target students for services needed to complete academic programs. This may be an effective risk avoidance strategy, but whether such an approach is in the best interest of higher education is uncertain.

In *McClure v. Fairfield University*,³³ the plaintiff, a freshman at Fairfield University, was struck by a car driven by another student returning from a nearby beach party who had been drinking just before 2:00 a.m. on September 12, 1998.³⁴ The plaintiff, along with other students, left the university hours earlier to attend a party held off-campus near a popular residential beach area. The university knew that the off-campus residential beach community was frequently the site of parties attended by university students and that alcohol was often available to students.³⁵ For several years prior to this incident, Student Government Association volunteers were allowed to use university-owned vehicles as part of the group's "Safe Rides" program.³⁶ The Safe Rides program provided students transportation from the beach area to campus on Thursday, Friday, and Saturday nights.³⁷

Relying on the Restatement (Second) of Torts (1965),³⁸ the court reasoned that the university assumed responsibility for the safety of the plaintiff by providing the transportation services for students between the beach area and campus.³⁹

While the Safe Rides program may have been a well-intentioned alternative for students returning to campus from parties at the Fairfield town beach area, in this case, the shuttle services formed the basis for finding that the university had a legal duty to protect students returning from the beach area for parties. Hence, institutions that implement safety measures may be assuming far greater responsibility than intended. *McClure* arguably indicates that certain disincentives extend to colleges and universities that apply innovative safety measures or partner with student groups in the interest of safety.

33. 2004 WL 203001, No. CV000159028S (Conn. Super. Ct. Jan. 14, 2004).

34. *Id.* at *2.

35. *Id.* at *10-12.

36. *Id.*

37. The evidence indicated that the Safe Rides program was made available in the best interest of student safety. However, the service was offered on a limited basis and only when student volunteers were available to drive the vans. *Id.* at *12.

38. Section 323 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.

39. *McClure v. Fairfield Univ.*, No. CV000159028S, 2004 WL 203001, at *22-24 (Conn. Super. Ct. Jan. 14, 2004).

The Superior Court of Connecticut may have denied the university's motion for summary judgment, but the university's willingness to embrace the Student Government Association's volunteer effort and make vans available to transport students from beach area parties was prudent and responsible. The unfortunate reality is that the court's opinion in this case may discourage the implementation of an innovative and collaborative security measure at colleges and universities due to the tort-liability threat.

In *Rogers v. Delaware State University*,⁴⁰ the court granted a motion for summary judgment filed by Delaware State University (DSU) in a lawsuit brought by a student to recover damages for injuries the student sustained as a result of a targeted attack. The court found, *inter alia*, that the student was the victim of an unforeseeable ambush and that the university had no duty to protect the student from such an incident.⁴¹ The events leading to the student's injuries began when a female student fleeing her ex-boyfriend asked the plaintiff-student to drive her to the police station. Later that same evening, the plaintiff was shot in the face by the ex-boyfriend who suspected that the plaintiff-student and the female student had a personal relationship.⁴²

The plaintiff's initial encounter with the female student and the subsequent shooting happened at a motel the university was using as overflow student housing.⁴³ The plaintiff had applied for on-campus student housing, but because of excessive demand, numerous students, including the plaintiff, were placed in supplemental housing at off-campus locations. There was no dispute that the university maintained an obligation to provide reasonable safety measures at the motel location, which housed students.⁴⁴ However, the facts in this case led the court to find that the plaintiff's injuries were caused by an unforeseeable targeted attack, and as such, the university had no duty to protect the plaintiff.⁴⁵

In its analysis of the negligence issue, the court opined that whether the university had a legal duty to protect the plaintiff was dependent on the relationship between the university and the student, and the foreseeable consequences implicated by the relationship question. "[T]here can be no duty to prevent an unforeseeable harm even where there may be a general duty to protect."⁴⁶ Hence, the court found that the key factor in the case was the foreseeability of the harm.⁴⁷

40. No. Civ. A. 03C-03-218-PLA, 2005 WL 2462271 (Del. Super. Ct. Dec. 5, 2005).

41. *Id.* at *6.

42. *Id.* at *1.

43. *Id.*

44. *Id.* at *6.

45. *Id.* at *7.

46. *Id.* at *4.

47. *Id.* at *5.

Relying on *Furek*, the court reasoned that the university did not stand *in loco parentis* to its students, but the university did owe its student a limited duty of care.⁴⁸ For instance, it would be reasonable to expect that the university provide security services to students living in on-campus housing and those students temporarily housed in off-campus locations. However, this expectation does not mean that the university assumed an absolute duty to ensure a student's safety. The university was not notified that the plaintiff was involved in a confrontation earlier in the day, nor did the plaintiff inform the campus police department of the incident. Thus, the university had no duty to protect the plaintiff because it was unforeseeable that he would be attacked later that same evening.⁴⁹

The *Rogers* decision invites an examination of the level of protection that the college or university community should expect from the campus police department. What is the function of the police and security personnel deployed on college and university campuses? Is it to relieve local law enforcement officials from patrolling campus grounds and facilities and place all policing responsibilities within the institution's jurisdiction? Or, is it to provide a heightened level of security to members of the campus community not routinely available to the general public?

While the decision in *Rogers* may be correct because security patrols may not have stopped a jealous ex-boyfriend, there is reason to speculate as to whether on-campus housing might have provided a safer haven for the student in comparison to a motel. Students choose, and some are required, to live on-campus to minimize their exposure to harm and/or avail themselves of the purportedly safe campus environment. For these students and their parents, the Clery Act requires colleges and universities to disclose information regarding campus crime statistics, which may allow for a more informed assessment as to the relative safety of a college campus.⁵⁰ Whether DSU is liable for the student's injuries can be debated, but the tragedy is that a student was shot, and despite a prior confrontation and even the student's concerns that trouble could result, the campus police department was not involved until it was too late.

In *Johnson v. Alcorn State University*,⁵¹ the mother of a deceased student and another student who sustained gunshot injuries in an altercation

48. *Id.* at *5.

49. *Id.* at *6-7. In response to the plaintiff's argument that the university did not provide adequate security patrols at the off-campus housing location, the court again found against the student. The court held that even if the university had a duty to protect the student from harm, the university's failure to provide police patrols at the Dover Inn motel was not the proximate cause of the plaintiff's injuries. The court found that the attack upon the plaintiff came without warning and could not have been deterred by security patrols. *Id.* at *7.

50. 20 U.S.C. § 1092(f) (2006).

51. 929 So. 2d 398 (Miss. Ct. App. 2006).

on the Alcorn State University campus sued the university for wrongful death and negligence. The shooting came after Demetrice Williams and three of his friends, all non-students, visited the campus on October 8, 2001. That evening, a “non-Greek” step show was taking place on campus. Williams did not log-in at the university’s Welcome Center pursuant to campus police department procedures. Once on campus, Williams and his friends had a confrontation with several female students that resulted in a fight. After this altercation, a student memorized Williams’ license plate number and gave it to Larry King, Dean of the Men’s Dormitory. One of the female students—who was struck by a beer bottle while attempting to break up the fight—told her boyfriend about the fight with Williams. Minutes later, the boyfriend, Roddell Devoual, and his friend Jekeley Johnson returned to the scene of the fight looking for Williams. Williams was recognized by one of the female students, and, in response, he immediately drew a pistol, shooting Devoual in the chest and fatally shooting Johnson in the head. Williams was sentenced to a total of forty-three years in prison.⁵²

The circuit court found that the campus police department acted with reckless disregard as to the safety of the students because the police department did not follow the log-in procedures governing the admission of vehicles through the university’s Welcome Center.⁵³ However, on appeal the court focused on causation and found that the plaintiffs could not establish the necessary causal connection. Specifically, the court of appeals determined that there was no evidence that had an officer complied with the log-in procedure, the officer would have searched for a weapon or discovered the weapon that was eventually used in the shooting.⁵⁴ The plaintiffs also failed to show that the shooting was foreseeable, and the shooting represented a criminal act that served as a superceding cause that relieved the institution of liability.⁵⁵ On appeal, the court affirmed the lower court and explained that the non-student’s decision to draw a pistol and shoot two students was the proximate cause of Johnson’s death and Devoual’s injuries.⁵⁶

52. *Id.* at 401-03.

53. *Id.* at 404.

54. *Id.* at 409.

55. *Id.* at 412-13.

56. *Id.* at 414.

IV. A SELECT REVIEW OF LIABILITY THEORIES THAT MAY INFLUENCE SECURITY EFFORTS ON CAMPUS: INVASION OF PRIVACY AND NEGLIGENT HIRING, SUPERVISION, AND RETENTION

It is difficult to identify each cause of action that may confront a college or university as a result of a breach in security or shortcomings of the institution's public safety protocols. However, this Article shall address two areas that are likely to confront higher education administrators and legal counsel involved in managing campus security systems: privacy and negligent hiring, supervision, and retention. Legal claims in these areas have the potential to impact the entire university community, especially students and faculty. Therefore, an institution should be prepared to scrutinize its tactics and strategies to ensure that exposure to these claims is kept to a minimum.

A. *Invasion of Privacy*

While federal and state law enforcement agencies are expanding their efforts to combat terrorism, college and university administrators are seeking to improve on-campus monitoring techniques to enhance campus security. Among the tools campus police and those administrators responsible for maintaining campus security are using with increasing frequency are video surveillance cameras, close circuit television (CCTV), and other technological monitoring strategies. Administrators and legal counsel must be aware of the potential legal challenges that might result from the use of these surveillance devices. For purposes of this Article, our discussion regarding the invasion of privacy will focus on the use of surveillance cameras as a crime prevention and security method.

The use of surveillance cameras can be subject to a constitutional challenge under the Fourth Amendment of the U.S. Constitution. To do so, a plaintiff alleges that the use of such cameras constitutes an illegal search or invasion of privacy. The Fourth Amendment of the U.S. Constitution provides in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."⁵⁷ However, the Fourth Amendment pro-

57. U.S. CONST. amend. IV. The U.S. Constitution prohibits not only unreasonable physical searches but also unreasonable technological searches. *See Katz v. United States*, 389 U.S. 347 (1967) (listening and recording devices attached to the outside of public telephone booth to intercept telephone calls constitutes an unreasonable search prohibited by the Fourth Amendment); *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 1991). However, the framers of the Fourth Amendment obviously had in mind physical objects such as books, papers, letters, and other kinds of documents which they felt should not be seized by police officers except on the basis of limited search warrants issued by magistrates. As early as 1928, the U.S. Supreme Court commented that the Constitution should be kept

hibition against an unreasonable search does not mean that the use of a video surveillance camera or other forms of technological monitoring automatically violates an individual's constitutional rights. First, there must be a determination that a person has a reasonable expectation of privacy. Absent a reasonable expectation of privacy, there can be no Fourth Amendment violation, regardless of the nature of the search.

The general test used to determine whether a reasonable expectation of privacy exists requires a plaintiff to show: (1) that she had a subjective expectation of privacy; and if so, (2) that the expectation is one that society is prepared to recognize as reasonable.⁵⁸ In *Thompson v. Johnson County Community College*,⁵⁹ security officers employed at the Community College filed a lawsuit in response to a decision by a supervisor to install video recorders in a locker room that also served as a storage room. The court held that the security officers had no expectation of privacy in the locker/storage room because the room was not enclosed, and their activities could have been viewed by anyone walking through the storage area.⁶⁰ Relying on the decision in *United States v. Taketa*,⁶¹ the court noted that video surveillance "in public places . . . does not violate the fourth amendment; police may record what they normally may view with the naked eye."⁶²

The plaintiffs in *Thompson* could not satisfy part one of the test, nor could they have met part two. The second part requires the court to balance the individual's expectation of privacy against the need for "supervision, control, and the efficient operation of the workplace."⁶³ Put another way, part two of the test is a value judgment: "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."⁶⁴ Therefore, surveillance cameras used on college campuses for security purposes are not likely to violate the Fourth Amendment if: (1) the cameras are focused on public areas that would be in plain view and not in areas exclusively understood to be private, such as

abreast of modern times and that wiretapping produced the same evil result that the framers had in mind when they adopted the Fourth Amendment. *Olmstead v. United States*, 277 U.S. 438 (1928); see EDWARD S. CORWIN & JACK W. PELTASON, UNDERSTANDING THE CONSTITUTION (7th ed. 1976).

58. *California v. Ciraolo*, 476 U.S. 207 (1986); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

59. 930 F. Supp. 501 (D. Kan. 1996).

60. *Id.* at 507. This is not to suggest that employees cannot have a reasonable expectation of privacy in areas such as restrooms, locker rooms, or closed offices. See *O'Connor v. Ortega*, 480 U.S. 709, 718 (1987) (finding that an employee had a reasonable expectation of privacy in his desk and file cabinets).

61. 923 F.2d 665 (9th Cir. 1991).

62. *Thompson*, 930 F. Supp. at 507 (quoting *Taketa*, 923 F.2d at 667).

63. *Id.* at 508.

64. *Cowles v. State*, 23 P.3d 1168, 1171 (Alaska 1991) (quotation omitted).

restrooms or changing areas; and (2) colleges and universities take prudent steps to notify students, faculty, and staff in advance about the cameras and their field of view.⁶⁵

For colleges and universities with unionized workforces, it is important to acknowledge that the use of surveillance cameras to monitor employees may be a mandatory subject of bargaining. The National Labor Relations Board has held that the installation of surveillance cameras is germane to the working environment and outside the scope of managerial decisions lying at the core of entrepreneurial control.⁶⁶ Thus, the installation of surveillance cameras is a mandatory subject of bargaining under the test established by the U.S. Supreme Court in *Ford Motor Co. v. National Labor Relations Board*.⁶⁷

B. *Negligent Hiring, Supervision, and Retention*

The cause of action for negligent hiring, supervision, and retention of an employee has long been adopted by numerous jurisdictions based on the Restatement (Second) of Torts section 317. The thrust of the tort is designed to hold employers responsible for hiring decisions and failing to control the conduct of employees under the institution's supervision. The particular concerns for colleges and universities stem from the reality that these institutions employ a diverse workforce, from distinguished faculty to groundskeepers, and these employees are routinely placed at decentralized locations across numerous buildings and facilities. As a result, it is often difficult to effectively monitor and implement corrective action to prevent harm to others. Hence, it is likely that colleges and universities have significant exposure to claims for negligent hiring, supervision, and retention.

In *Zimmer v. Ashland University*,⁶⁸ the court divided its ruling as to a student's claim for negligent hiring and retention. The plaintiff began her college education at Ashland University (AU), where she earned an athletic scholarship as a member of the women's swim team.⁶⁹ The scholar-

65. It is important to note that the first major electronic surveillance law was Title III of the Omnibus Crime Control and Safe Streets Act passed in 1968. However, the 1968 Act did not address video surveillance. The Electronic Communication Privacy Act of 1986 allowed law enforcement to use video surveillance. Other technological monitoring advances that may be used as security measures include CCTV systems and webcams. The downside to these new technologies is that the law has not kept pace with the technology, which may create serious questions regarding the use of these devices as security measures on campus.

66. See *Colgate Palmolive Co.*, 323 N.L.R.B. 515 (1997).

67. 441 U.S. 488 (1979); see also *Nat'l Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003).

68. No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075 (N.D. Ohio Sept. 5, 2001).

69. *Id.* at *4.

ship provided the plaintiff with \$9,000 of financial support.⁷⁰ The plaintiff was initially coached by Coach Verge, who left after plaintiff's freshman year. Thereafter, AU interviewed and hired Seeman Baugh to coach the women's swim team.⁷¹

Almost from the outset of Coach Baugh's tenure as the AU women's swim coach, the plaintiff alleged that Coach Baugh repeatedly made sexual comments to her and inappropriately touched her.⁷² Following the 1998–1999 season, the plaintiff and other members of the swimming team confronted Coach Baugh about his conduct. Members of the women's swim team also held multiple meetings with the university's athletics director.⁷³ In response, the athletics director sent a letter to Coach Baugh and held two meetings with the coach regarding the conduct reported by the plaintiff and the other student athletes.⁷⁴ Despite these discussions and meetings, Coach Baugh continued to make inappropriate comments to the plaintiff. At no time was Coach Baugh relieved of his coaching duties or responsibilities, and he remained at AU despite the complaints raised by the student athletes.⁷⁵ Based on the plaintiff's dissatisfaction with the situation at AU, she left for another university in 1999 and filed a lawsuit in 2001 for harassment, negligent hiring, and negligent retention, among other claims. Subsequently, a motion for summary judgment was filed on behalf of the university, its athletics director, and Coach Baugh.⁷⁶

Addressing plaintiff's negligent hiring claim, the court noted that the plaintiff had to show: "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing plaintiff's injury; (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries."⁷⁷ The court held that the defendants were entitled to summary judgment as to the negligent hiring claim because there was no evidence that the university or its athletics director should have known of Coach Baugh's tortious propensity. The hiring process used to hire Coach Baugh was sound. A committee of faculty, students, and staff reviewed several applicants for the position and received positive references from two former employers regarding Coach

70. *Id.* at *9.

71. *Id.* at *4-5.

72. *Id.* at *5.

73. *Id.* at *7.

74. *Id.* at *7-8, *22.

75. *Id.* at *22.

76. *Id.* at *9-10.

77. *Id.* at *39.

Baugh's abilities.⁷⁸ Hence, the motion for summary judgment was granted as to the negligent hiring claim.

However, the court denied the motion for summary judgment with regard to the plaintiff's negligent retention claim. The court found that AU and the athletics director were aware of Coach Baugh's harassing behavior prior to the plaintiff's decision to leave AU.⁷⁹ More specifically, the court found that the athletics director failed to follow university policy and neglected to report the complaints—or the findings of his own investigation—to the proper university officials.⁸⁰ Under these facts, the motion for summary judgment was properly denied because a jury could find that AU was negligent in retaining Coach Baugh. Given the access that coaches, faculty, and staff have to students, it is apparent that failing to promptly respond to threatening conduct can easily expose colleges and universities to negligent retention claims. In *Zimmer*, the university had sufficient reason to know that the swim coach was likely to harm students on the women's swim team. In cases where the university has no actual or constructive knowledge of alleged wrongdoing, a negligent hiring and retention claim may not prevail.

In *Blavackas v. Worcester State College*,⁸¹ a student filed a lawsuit against the college after he was injured in an auto accident caused by another student, Hefferman, who was driving under the influence of alcohol.⁸² The plaintiff alleged, *inter alia*, that the college was liable for negligent hiring and negligent supervision of its resident assistants and college police officers.⁸³ Specifically, the plaintiff claimed that Hefferman became intoxicated at a party held in a dorm room at the college, and the resident assistant did not intervene to dismiss the party or prevent the drinking. After becoming intoxicated, the college police were called to the scene and arrived as Hefferman attempted to drive away from the campus in his car. The college police did not stop Hefferman from leaving the scene.⁸⁴

Massachusetts law provides that “[a]n employer whose employees are brought into contact with the public has a duty to exercise care in the selection and retention of employees or the employer may be liable to an injured third party under a theory of negligent hiring or negligent retention.”⁸⁵ The court dismissed the plaintiff's motion for summary judgment because

78. *Id.* at *37-38.

79. *Id.* at *39.

80. *Id.* at *23.

81. No. 95-02333, 1996 LEXIS 295 (Mass Super. Ct. Aug. 2, 1996).

82. *Id.* at *1-2.

83. *Id.* at *7.

84. *Id.* at *2.

85. *Id.* at *7.

there was no evidence to support the plaintiff's contention that the college was negligent in hiring or training its housing staff or campus police. While an unauthorized party did take place in the dorm room, that fact alone was insufficient to support a claim that a resident assistant was negligently hired because the students voluntarily became intoxicated and the resident assistant was not present at the party. Further, the campus police arrived on the scene as Hefferman was leaving the parking lot, which the court also found provided no support for the plaintiff's negligent hiring claim. Hence, the court found no evidence to confirm that the college was negligent in hiring or supervising its resident assistants or campus police.⁸⁶

In contrast, the South Carolina Supreme Court affirmed a jury verdict for an employee who successfully alleged that a university was negligent in supervising and retaining its campus police chief, Paul White. In *Sabb v. South Carolina State University*,⁸⁷ a jury returned a verdict for \$200,000 in actual damages for a plaintiff against the university for claims of negligent supervision and negligent retention of the university's campus police chief.⁸⁸ The evidence presented to the jury indicated that the plaintiff and other employees in the campus police department raised numerous concerns and complaints regarding the police chief's conduct. A petition was signed by members of the police department explaining their concerns, and the university appointed a committee to investigate the matter.⁸⁹ The plaintiff claimed that the campus police chief removed her job duties and denied her promotional opportunities. Moreover, witnesses testified as to problems with the police chief's personnel practices. The witnesses also testified that the police chief told the plaintiff that she would not get a raise or promotion because she was unfit to be a police officer.⁹⁰

The court found that the trial court properly denied the defendant's motions for a directed verdict and a JNOV. The court indicated that the university was on notice about Chief White's activities through the petition submitted by members of the department, grievances filed by the plaintiff, and the committee appointed to investigate Chief White's conduct.⁹¹ "Despite these . . . actions and behavior, University allowed him to continue serving as chief of the department without any real effort to rectify the hostile conditions within the department."⁹² Thus, consistent with the court's holding in *Zimmer*, the plaintiff's negligent retention claim was

86. *Id.* at *8.

87. 567 S.E.2d 231 (S.C. 2002).

88. *Id.* at 233.

89. *Id.* at 235.

90. *Id.* at 236.

91. *Id.* at 237.

92. *Id.* at 238.

successful because the university had actual knowledge as to the employee's incompetence and failed to take adequate corrective action.

It is important to point out, however, that the *Sabb* decision also included a vigorous dissent, which indicated that actions for negligent supervision and retention should require the plaintiff to prove that the offending employee committed an actionable tort. Finding that Chief White's conduct was not sufficiently egregious, the dissent warned that allowing recovery in this case would have grave consequences for the employer-employee relationship going forward. Employers would be faced with two options: "(1) fire the supervisor when a subordinate employee complains, or (2) retain the supervisor, and become liable for money damages if the complaining employee prevails on a negligent retention and supervision claim."⁹³

As colleges and universities seek to hire and retain productive employees and separate the institution from those employees who are incompetent or have counter-productive motives, the negligent hiring, supervision, and retention tort will remain a viable threat. The first line of defense will be to ensure that the institution has thorough, probing hiring procedures and practices that allow for a complete evaluation of candidates in the pre-employment process before personnel enter the college or university community. Next, the institution must be prepared to take action that adequately responds to persons who represent a legitimate threat to the campus community. Otherwise, the negligent retention claim may be particularly difficult for colleges and universities to avoid and would require administrators to be proactive when one's conduct poses a threat to the larger university community.⁹⁴ This can be particularly important for employees who have access to sensitive and/or confidential information.⁹⁵ Nevertheless, whether the situation involves students, faculty, staff, or visitors, the

93. *Id.* at 239 (Pleicones, J. dissenting).

94. Negligence claims may be brought by parties only remotely related to the employers. In *Doe v. XYZ Corp.*, 887 A.2d 1156 (N.J. Super. Ct. 2005), the court held that an employer had a duty to make sure that its employees did not operate as a risk to others. Although this case involved an employee's use of a workplace computer to distribute child pornography, the case gives some insight as to how an employer with access to its employee's activities may be held liable when an employee engages in acts that violate public policy and the employer does nothing to prevent the misconduct.

95. While an employee terminated for poor conduct or job performance that may support a negligent retention claim can subsequently file a lawsuit for wrongful discharge, an institution that can demonstrate that the employee's conduct involved a clear breach of policy will be capable of successfully defending such lawsuits. In *Swigart v. Kent State University*, No. 2004-P-0037, 2005 LEXIS 2139 (Ohio Ct. App. May 6, 2005), the plaintiff was terminated after she released information regarding a student's academic record to the campus newspaper. The plaintiff understood the university's policy that required the protection of confidential information contained in student records. The court affirmed plaintiff's termination because of the intentional nature of her misconduct and because the consequences outweighed any mitigating factors. *Id.* at *9.

institution should be prepared to identify the threat and respond with appropriate counter-measures.

V. OPTIONS FOR HIGHER EDUCATION ADMINISTRATORS AND LEGAL COUNSEL TO CONSIDER IN THE BEST INTEREST OF THE CAMPUS SECURITY EFFORT

(1) Colleges and universities should give careful consideration to the development of a systematic approach to campus safety and security. Such an approach would advocate that campus safety and security is a pervasive responsibility that cuts across institutional departments and divisions campus-wide. Campus safety and security can no longer be considered the parochial responsibility of the campus police department. College campuses are simply too vast in terms of facilities, programs, and personnel to expect a single unit to monitor any modern-day institution of higher learning. Therefore, what is required is a pervasive mindset that all members of the college or university community have a responsibility to act in the best interest of the institution's safety and security concerns. Of course, campus police departments should be prepared to provide leadership in campus security efforts, but in cooperation with the larger campus community.

(2) Institutions should conduct internal audits regarding the defense mechanisms and tactics that are currently applied for safety and security purposes. Colleges and universities should evaluate the methods used across campus to reduce an institution's exposure to security breaches to determine whether existing approaches are effective. Such internal examinations may encourage cooperation throughout the campus and create opportunities to strengthen safety and security practices. However, to the extent an institution discovers severe safety and security shortcomings, the college or university should be prepared to take prompt and immediate corrective action; failure to do so would expose the institution to increased liability because it would have had notice of the security concern.

(3) University executive, managerial, and other decision-making personnel should be well versed in the array of legal challenges that may be triggered by their actions, comments, and/or conduct. In *Johnson*, for example, prior to the fatal shooting of the student, the Dean of the Men's Dormitory learned that the shooter was involved in a fight on campus earlier the same evening and was given the license plate information of the shooter's car. Although the court found that the dean's actions did not amount to a conscious indifference, the case demonstrates the opportunities an administrator may miss to prevent a tragedy. The *Johnson* case illustrates the types of opportunities that college and university administrators may encounter to intervene in incidents that threaten campus safety. Ad-

ministrators familiar with elements of various tort claims, First Amendment violations, and criminal violations are better prepared to make intelligent decisions that may be required under time constraints or duress.

(4) The competition among colleges and universities for top students, talented faculty, financial gifts from donors, and corporate sponsorships is demanding and will probably become more intense in the years to come. In response, institutions have become increasingly sophisticated in their marketing strategies and promotional materials. Colleges market their campuses as safe, inviting, pedestrian communities where students, faculty, parents, and guests are welcome and free to explore the institution's academic, cultural, and artistic offerings. These materials and documents should be reviewed to determine what obligations or duties they may create for the college. In *Rhaney*, the court pointed to a student's Residence Hall Agreement as the controlling document to determine what duty the university owed to the student assaulted in his dormitory room.⁹⁶ Hence, documents generated by the institution can serve important evidentiary purposes in litigation. Therefore, legal counsel and administrators should at least jointly prepare guidelines to limit the institution's exposure to legal liability.

Arguably, a hallmark of institutions of higher education is that they provide an open, non-threatening environment for students and faculty to pursue important educational aims. Unfortunately, colleges and universities have been—and probably will continue to be—targeted by elements of our society that do not cherish the aims of higher education, but view college campuses as an opportunity for wrongdoing. In response, institutions must understand what legal duty is owed to the student community and aggressively address safety and security threats through sound administrative policies and practices that comport with state and federal laws.

96. 880 A.2d 357, 367 (Md. 2005).