Preparing Students for the Global Practice of Law While Managing Risk to the Institution: Law School Liability in the Context of International Externship Programs

Kathleen M Burch
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Abstract

The article fills a gap in the current scholarship by recognizing the need for international externship programs and by providing a legal framework for educational institutions, and law schools in particular, to assess the risks involved in the design and implementation of an international externship program. Section I of the article clarifies the current law on an institution’s duty to exercise reasonable care in minimizing reasonably foreseeable risks to its students and includes a discussion of the few cases where students have sued their educational institution for injuries received while participating in the institution’s study abroad program. Section II of the article discusses the educational institutions duty to the externship placement site to exercise reasonable care in the placement of students at the externship site and explores the actions an institution should take to fulfill that duty. Section III of the article utilizes the facilitator model first articulated by Robert Bickel and Peter Lake to illustrate how an educational institution can manage risk in the design and implementation of an international externship program. Section III also discusses whether a law school’s compliance with the ABA Standards for the Approval of Law Schools and the ABA Criteria for the Approval of Foreign Summer Programs is sufficient to establish that the law school has acted reasonably in the design and implementation of its international externship program and has thus satisfied its duty of care to both the student and the placement site. The article concludes that international externship programs are more cost effective, expose the law school to less risk, and provide the student with greater learning opportunities than do study abroad programs.

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

Introduction
I. The Educational Institution’s Duty to the Student
   A. The Educational Institution’s Own Acts
      1. The Existence of a Duty
         a. Characteristics of the Student
         b. The Amount of Control Exercised by the Educational Institution
   B. The Educational Institution’s Duty to Protect Against the Acts of Third Parties
      1. The “Special Relationship”
      2. Voluntary Assumption of Duty
   C. Litigation Arising Out of Study Abroad Programs
      1. Medical Treatment
         a. McNeil v. Wagner College
         b. Fay v. Thiel College
      2. Personal Injury – Student Housing
      3. Sexual Assault – The Duty to Warn
      4. Federal Civil Rights Statutes – Title IX, the Rehabilitation Act, and Title III of the Americans with Disabilities Act
         a. Title IX
         b. The Rehabilitation Act and Title III of the Americans with Disabilities Act
II. The Educational Institution’s Duty to the Externship Placement Site
III. Managing Risks and Defining Duties in a Law School’s International Externship Program
   A. The Facilitator Model
   B. Facilitating the International Externship Opportunity
      1. The Community – The Students and the Placement Site
      2. The Duty
      3. Foreseeability
      4. Special Problems
         a. Travel
         b. Housing
         c. Medical Treatment
         d. Extra-curricular Activities
         e. Acts by Employees of the Placement Site
f. Acts by the Student at the Placement Site

g. Cultural Competency

IV. Conclusion
Preparing Students for the Global Practice of Law While Managing Risk to the Institution: Law School Liability in the Context of International Externship Programs

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Law schools are under continuing pressure to graduate students who can competently practice law upon graduation. In today’s world, the competent practice of law includes the ability to operate within the global world market. The globalization of the practice of law is evident from the American Bar Association’s rule of law programs, as well as the trend by U.S. law firms to open offices in foreign countries. In 2007, the U.S. exported 1.25 billion dollars of legal work and imported 1.5 billion dollars of legal work. One hundred forty of the Global 500 companies are U.S. corporations. Law firms and their clients are operating in an international market. Students are increasingly including an international experience as part of their education. Future law school graduates will be expected to and will expect to be able to competently practice law.

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1 Associate Professor, Atlanta’s John Marshall Law School. BA, 1986, Rosary College; JD, 1989, Georgetown University Law Center. The idea for this article was a result of my development of the Micronesian Externship Program at Atlanta’s John Marshall Law School. I thank Dean Richardson Lynn for his encouragement during the creation of and continued support of the Micronesian Externship Program. I also thank my research assistant, Amelia Ragan, for her invaluable assistance.

2 A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS, 301(a) (2008-2009) (hereinafter A.B.A. STANDARDS) (“A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”), available at http://www.abanet.org/legaled/standards/standards.html; ROY STUCKEY ET AL., CLINICAL LEGAL EDUCATION, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 39 (2007) (“At its core, . . . legal education is a professional education, and part of the mission of every law school is to prepare its students to enter the legal profession. It is why law schools exist.”); GREGORY S. MUNRO, INSTITUTE FOR LAW SCHOOL TEACHING, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 88 (2000).


law in a global economy. Globalization is affecting the practice of law and law schools must respond.

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

A law school that already operates a campus in a foreign country and has appropriate facilities can, if allowed by the foreign country’s laws, open a clinic in a foreign country. Most law schools, however, do not operate facilities in foreign countries. And, the cost (and liability) to do so is likely prohibitive. Law schools are then left with the option of creating international externship opportunities. These opportunities can take two forms. The first is an externship that is operated as a

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8 Hines, supra note 5 (“The shrinking of the world through trade, travel and instant communications means that lawyers from county seats to regional cities to Wall Street have a common interest in the legal elements of international economic developments, whether the U.S./Australia Free Trade Agreement, the latest round of GATT negotiations or the continuing ABA debate about multi-jurisdictional practice.”).

9 Id. (“Law schools find themselves racing to keep up with the rapid pace of the changes wrought by advancing globalization.”); see also Jon Mills & Timothy McLendon, Law School as Agents of Change in Justice Reforms in the Americas, 20 Fla. J. Int’l L. *5, *6 (2008).

10 See WILLIAM M. SULLIVAN, ET AL. CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS FOR THE PROFESSION OF LAW (2007); STUCKEY, supra note 2.

11 SULLIVAN, supra note 10; STUCKEY, supra note 2.

12 A law school clinic is usually operated “in-house” as part of the law school and is directed and student work is supervised by full-time faculty. STUCKEY, supra note 2.

13 In an externship, a student is usually placed in a law office and her work is supervised by a supervising attorney who is employed by the externship site. STUCKEY, supra note 2; see also A.B.A. STANDARDS, supra note 2, at 305 (setting forth the minimum standards by which a law school’s externship program must operate).

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

component of a study abroad program. The second is an externship that is operated in the same manner as the law school’s domestic externship program.

The organizational design of a law school’s program determines both the ABA Standards which apply to the program and the types of risks, particularly the risk of tort liability, to which the law school will be exposed. While legal scholars have focused on the liabilities and risks of operating study abroad programs, on the general tort liability of colleges and universities, and on university liability for extra-curricular activities, only one scholar has focused on law school liability in domestic externship programs. None of these articles focus on the risks to law schools in providing international externship opportunities to law students.

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17 Atlanta’s John Marshall Law School’s Micronesian Externship Program operates in the same manner as its domestic externship program. MICRONESIAN EXTERNSHIP PROGRAM, supra note 15.
18 Study abroad programs must comply with A.B.A. CRITERIA, supra note 16. Externship programs must comply with A.B.A. STANDARDS, supra note 2, at 305.
22 See Kathleen Connolly Butler, Share Responsibility: The Duty to Legal Externs, 106 W. VA. L. REV. 51 (2003) (article does not discuss cases where students have sued educational institutions for events occurring in the institution’s study abroad program). The majority of scholarship on externship programs has focused on the design and/or pedagogy used in teaching in the externship program. See, e.g. Bernadette T. Feeley, Training Field Supervisors to be Efficient and Effective Critics of Student Writing, 15 Clinic Law Rev. 211 (2009); Anahid Gharakhanian, ABA Standard 305’s “Guided Reflections”: A Perfect Fit for Guided Fieldwork, 14 Clinical L. Rev. 61 (2007).
This article explores the risk of liability which can arise from the operation of a law school’s international externship program. Section I discusses the duty which courts have recognized that educational institutions owe their students, both on and off-campus, and in the operation of study abroad programs. Section II discusses the educational institution’s duty to the externship placement site to exercise reasonable care in placing students at the site. Section III discusses how to manage risk in a law school’s international externship program and whether compliance with ABA Standards can be used to establish that the law school acted reasonably and thus, did not breach its duty. Section III also provides some best practices for risk management within the context of international externship programs. The article concludes by recognizing that international externship programs are low cost and can be low risk to the law school, while providing law students a unique educational immersion experience as they live, work, and learn in a foreign country.

I. The Educational Institution’s Duty to the Student

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

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23 The sections of this article which discuss the law school’s duty of care for its students are also applicable to the law school’s operation of domestic externship programs. Likewise, many of the suggested best practices to reduce risk are also applicable to the law school’s operation of domestic externship programs.

24 For readers interested in contract and other legal issues triggered for operation of overseas programs see Hoye, supra note 14; Johnson, supra note 7; and Hoye & Rhodes, supra note 19.

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

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


29 Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983); Stanton v. Univ. of Me., 773 A.2d 1045 (Me. 2001); Judson v Essex Agricultural and Technical Institute, 635 N.E.2d 1172, 1174 (Mass. 1994) (no “social values or customs demonstrating that vocational schools . . . have a duty to protect their students during their employment”).
citizens, against the burden of imposing a duty. Courts engage in a balance of public policy considerations, including whether the institution can in fact satisfy the duty if imposed and the cost of doing so, whether in fulfilling the duty the institution will need to infringe upon other rights of the student, and whether imposing the duty will alleviate the student of responsibility to consider the risks of their behavior, thus allowing students protection from their own bad choices which the law does not provide to their age peers who are not students.

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

A. The Educational Institution's Own Acts

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30 Beach v. Univ. of Utah, 726 P.2d 413, 419 (Utah 1986) (The purpose of educational institutions “is to educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol . . . .”)
31 See Bloss v. Univ. of Minn. Bd. of Regents, 590 N.W.2d 661 (Minn. Ct. App. 1999) (imposition of duty would have negated intended educational experience).
32 See Patterson v. Sacramento City Unified Sch. Dist., 155 Cal. App. 4th 821, 828 (Cal. Dist. Ct. App. 2007) (student injured while participating in an adult education program: “duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection”).
33 Beach, 726 P.2d at 418.
34 Whitlock, 744 P.2d at 60.
35 Beach, 726 P.2d at 418; Webb, 125 P.3d at 912-13.
38 See, e.g., Nova, 758 So. 2d 86.
40 See, e.g., Silvers, 1994 WL 879600.
41 Most states have enacted statutes waiving sovereign immunity, which allows public educational institutions to be sued and held liable for the same torts as would a private educational institution. See, e.g., Bloss, 590 N.W.2d at 663-64.
When a student sues their educational institution alleging that the institution itself acted negligently, the usual rules of tort law apply. In order for a student to prevail on a negligence claim against the educational institution, the student must establish that the educational institution owed the student a duty of care, that the educational institution breached this duty of care, that the educational institution’s breach of its duty of care was the proximate cause of the student’s injury, and that the student has suffered injury or damages. Because the threshold issue in a student’s negligence claim against an educational institution is duty, almost all of the reported cases focus on the educational institution’s duty to the student. Whether the educational institution has a duty of care is a question of law for the court to decide. Whether the educational institution breached its duty of care and whether the educational institution’s breach of its duty was the proximate cause of the student’s injury are questions of fact for the jury.

1. The Existence of a Duty

The mere fact that a harm is foreseeable is not sufficient to establish that a legal duty exists. When determining whether a legal duty exists, courts apply the following risk/utility analysis:

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

The first part of the test invokes the question of foreseeability, and the second part invokes questions of policy.

As early as 1941, courts have found that educational institutions have a duty to “exercise ordinary care.” The exercise of ordinary care requires that the educational

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42 See Hawkins, 2008 WL 2952888 (student sued college for injury received when operating an electric saw while building scenery as part of theater class requirement); see also Nova, 758 So. 2d at 89-90 (“There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.”).
43 See, e.g., Webb, 125 P.3d at 909.
44 See, e.g., Nova, 758 So. 2d 86.
46 Id.
47 The concept of “foreseeability” in determining whether a duty exists is often confused with the concept of foreeeability in determining whether there is proximate cause. See Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757, 763 (Neb. 1999).
49 Id. (citing Gazo v. Stamford, 765 A.2d 505 (Conn. 2001).
50 Brigham Young Univ., 118 F.2d at 840 (student injured in chemistry lab explosion while engaged in a class assignment).
institution furnish “instruction and supervision” at the same level and quality as similar institutions “would have furnished under the same or similar circumstances.” At a minimum, educational institutions must exercise ordinary care when they are designing and implementing curriculum.

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

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

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

a. The Characteristics of the Student

The court will take into consideration the characteristics of the student when determining whether the educational institution owes that student a duty of care. When students have special needs, the educational institution has been held to owe a higher standard of care. Educational institutions owe a lesser standard of care to students

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51 Id. at 841 (student injured in chemistry lab explosion allowed to introduce evidence of how other area educational institutions supervised their students when the students performed experiments in the lab).
53 See Bird v. Lewis & Clark Coll., 303 F.3d 1015 (9th Cir. 2002) (college had fiduciary duty to disabled student); see also Rydzynski v. N. Shore Univ. Hosp., 692 N.Y.S.2d 694 (N.Y. App. Div. 1999) (mentally handicapped adult owed duty of care akin to that of in loco parentis).
working on post-graduate degrees, than they do to undergraduate students. Nevertheless, when an instructor has knowledge of a risk and injury to the student from the risk is foreseeable, the instructor has a duty to minimize the risk to the student.

In *Brigham Young University v. Lillywhite*, the injured student was an undergraduate who “was inexperienced in chemistry and chemical reactions and of the materials required in performing the experiment” that exploded. Although the chemistry instructor had supervised the student’s first experiment, the instructor left the laboratory and returned to his office across the hall while the student conducted the second experiment. The University claimed that its instruction and supervision of the student was sufficient because the textbook contained a warning regarding the mixing of the chemicals involved in the experiment. The court held that the University owed a duty of care to the student to provide “instruction and supervision” at a level equivalent to that provided by other institutions in similar circumstances.

In *Niles v. Board of Regents of the University System of Georgia*, a doctoral student at Georgia Tech was severely injured in a laboratory explosion. The student had graduated summa cum laude from the University of the Virgin Islands with a degree in chemistry, had obtained a masters’ degree (with a 4.0) in physics from Clark Atlanta University, and had passed his oral comprehensive exams approximately ten months prior to the accident. The student was injured while he was cleaning a metal container he had used to mix chemicals which were known to be unstable and subject to explosion. The court found that the University had no duty to warn the student of the risk of mixing the chemicals because “[o]rdinarily, there is no duty to give warnings to the members of a profession against generally known risks. There need be no warning to one in a particular trade or profession against a danger generally known to that trade of profession.” Because the student already had a degree in chemistry, the student

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54 Compare *Fu v. State*, 643 N.W.2d 659, 867 (Neb. 2002) (lesser duty owed to graduate student injured in chemistry lab explosion; student should have acted as “reasonably prudent graduate student with (his) level of education and experience”), and *Niles*, 473 S.E.2d 173 (no duty to warn owed to graduate student), *with Brigham Young Univ.*, 118 F.2d 836 (duty owed to undergraduate student injured in chemistry lab explosion). *See also Regents of the Univ. of Cal. v. Roettgen*, 41 Cal. App. 4th 1040, 1046 (Cal. Dist. Ct. App. 1996) (duty is determined by the “facts surrounding (the student’s) levels of experience and/or (the student’s and instructor’s) relationships to one another in the activity resulting in the plaintiff’s injury”).

55 *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293 (M.D. Al. 2004) (veterinary student injured by cow while performing required surgical procedure during class; instructor was aware that cow was non-cooperative).

56 *Brigham Young Univ.*, 118 F.2d 836.

57 Id. at 838.

58 Id. at 839.

59 Id.

60 Id. at 841.

61 *Niles*, 473 S.E.2d 173.

62 Id. at 174.

63 Id. at 175.

64 Id.

65 Id.
should have already known of the danger. The court refused to impose a duty on the University to stand at the doctoral student’s “shoulder, overseeing every action [taken] in the lab.”

The mere fact that the injured student is a graduate or doctoral student is not sufficient to relieve the educational institution of its duty of care. In Molinari v. Tuskegee University, a graduate student in the University’s College of Veterinary Medicine was injured when a cow, owned by the University, kicked her. The event occurred during class while the student was performing a surgical procedure on the cow. Prior to the event, the course instructor was aware that although the cow had been sedated, the cow was resisting the medical procedure. The University had equipment which would have restrained the cow during the surgical procedure, but there was not sufficient equipment available for all students to use. Instead of restraining the cow, the instructor informed the student to perform a modified surgical procedure and went to observe other students. The student, who was injured while attempting to perform the modified surgical procedure, claimed that the University negligently supervised and instructed students performing the surgical procedure. The court found that the University had a duty to protect the student, through adequate instruction and supervision, from the dangerous propensity of the cow during the student’s performance of the surgical procedure.

When the injured student is a graduate student, the focus is on whether the student is already deemed to be a professional. When a graduate student has already earned a degree which provides the basic training required to practice within the profession, there is no duty to supervise the student or warn the student of dangerous situations which should be obvious to an individual with their training. Where, however, the graduate student has not yet received the basic training required to practice within the profession, the educational institution has a duty to supervise the graduate student. The amount and type of supervision and instruction owed the graduate student is dependent on the risks posed by the specific type of graduate program. An educational institution must exercise its duty of ordinary care in designing curriculum to insure that

66 Niles, 473 S.E.2d at 176 (for doctoral student, risk of mixing chemicals was an obvious risk similar to an average citizen being aware of an icy road).
67 Id.
68 See Mizutani v. Cal. State Univ. Long Beach, 2002 WL 31117258 (Cal. Dist. Ct. App. Sept. 25, 2002) (graduate student who was assaulted by professor during class was owed a duty of care by the University).
70 Id. at 1296.
71 Id.
72 Id.
73 Id. (The court stated that “(p)reserving one’s economic interests is not necessarily a defense to otherwise tortuous conduct; Tuskegee is not absolved of its duty to provide adequate cattle restraints merely because, given its large class enrollment, doing so would have required the purchase of additional equipment.”).
74 Molinari, 339 F. Supp. 2d at 1301 (the student also brought claims under Alabama’s domestic animal act).
75 Id. at 1297-98.
graduate students receive the degree of supervision and instruction that is appropriate based on the graduate student’s level of knowledge and training in the area and to insure that the amount of supervision and instruction given is equivalent to that given by other institutions to their students in similar programs.

When the court’s duty analysis centers on the characteristics of the student, the court is usually looking at who has the most knowledge and training to be able to identify the risk involved. Thus, courts have required an educational institution to provide more supervision and instruction to undergraduate students than they have usually required institutions to provide to doctoral candidates, especially when the doctoral candidate has the specialized knowledge and training to identify the risks for himself; under such circumstances the graduate student is required to act with prudence and care.  

b. The Amount of Control Exercised by the Educational Institution

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

The more control the educational institution has over the student and the activity at the time of the injury the more likely a court will find that the educational institution owed the student a duty of care. If a student is acting for their own benefit and making their own choices, the less likely a court will find that the educational institution owed the student a duty.  

An educational institution can be in control even when the injury occurs off-campus.  

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

A nice bright-line rule would be that if the event occurs while the student is participating in a class activity, then the educational institution has a duty of care. Courts, however, have not developed such a bright-line rule. Part of the problem with

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76 Fu, 643 N.W.2d at 867.
78 See Patterson, 155 Cal. App. 4th 821.
79 See Ochoa, 72 Cal. App. 4th 1300.
80 See Nova, 758 So. 2d 86; see also Webb, 125 P.2d 906.
81 See Nova, 758 So. 2d 86; see also Webb, 125 P.2d 906.
82 Webb, 125 P.3d at 911.
83 Molinari, 339 F. Supp. 2d at 1301-02 (university should have had sufficient cow restraining equipment for all students to use).
84 See Nova, 758 So. 2d 86; see also Slivers, 1994 WL 879600.
such a bright-line rule is that it would have the tendency to blur the distinction between acts of the educational institution and acts of third parties, particularly the acts of other students. Educational institutions cannot always foresee when one student will act to injure another.

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

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

The Webb Court analyzed the facts under the “special relationship” doctrine, which was applicable because the student’s injuries were caused by the act of a third party, another student. As part of its “special relationship” analysis, the Court addressed the issue of control. The Webb Court stated that despite the relative developmental maturity of a college student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience. This is a phenomenon that should,

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85 Webb, 125 P.3d 906.
86 Id. at 908.
87 Id.
88 Id.
89 Id.
90 Cf. Nero, 861 P.2d 768 (University, who controlled the placement of a known sex offender in a co-ed dormitory, breached duty of care owed to other students in dormitory).
91 There was no discussion in the case of the liability of the premises owner for snow and ice removal. If such liability exists under Utah law, than the person injured is in the same position with regard to the law regardless of whether or not they were a student at the time of injury.
92 Beach, 726 P.2d at 418.
93 See “special relationship” discussion infra Part I.B.1.
and certainly does, at least unconsciously guide all decisions made by instructors relating to the selection of an environment for learning.\(^{94}\)

The *Webb* Court refused to find that "every college student is responsible for his own protection in any school-related activity, regardless of the risk."\(^{95}\) The *Webb* Court went on to analyze whether the student was engaged in an activity directly related "to the academic enterprise of the class" at the time of the injury.\(^{96}\) The court concluded that the instructor’s directive to walk on the ice and snow was "tangential", because "it is not reasonable to believe that any student" would believe that obtaining a good grade requires them to ignore the open and obvious risk of walking across ice.\(^{97}\) The *Webb* court held that the instructor had not created a "special relationship", because the instructor did not exercise control over the student’s common sense\(^{98}\) at the time of the injury.

In *Nova Southeastern University, Inc. v. Gross*,\(^{99}\) although the University raised as a defense that it had "no special relationship" to the student because the doctrine of *in loco parentis*\(^{100}\) did not apply,\(^{101}\) the court held that the University’s duty was not predicated on the doctrine of "in loco parentis", but on the “amount of control the school has over the student’s conduct.”\(^{102}\) The student, a doctoral student in the University’s psychology program, was injured while participating in a mandatory off-campus internship.\(^{103}\) The University provided the student with a list of internship sites, which included a description of each site.\(^{104}\) The student chose six preferred sites from the list, and the University placed the student at one of the sites.\(^{105}\) The student was attacked in the parking lot of the placement site.\(^{106}\) “There was evidence that prior to the [attack on the student], Nova was aware of a number of other criminal incidents which had occurred at or near the [intership’s] parking lot.”\(^{107}\) The Florida Court of Appeals, applying a “special relationship” analysis, found that “*Nova* had a duty, in this

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\(^{94}\) *Webb*, 125 P.3d at 911-12.

\(^{95}\) Id. at 912.

\(^{96}\) Id.

\(^{97}\) Id. at 912-13.

\(^{98}\) Courts have limited an educational institution’s liability to a student based upon the affirmative defenses of the assumption of the risk and inherent dangerousness of the activity. See Patterson v. Sacramento City Unified School District, 155 Cal. App. 4th 821 (2007); Molinari v. Tuskegee Univ., 339 F. Supp. 2d 1293 (M.D. Al. 2004). These issues are not addressed in this article.

\(^{99}\) *Nova*, 758 So. 2d at 86.

\(^{100}\) The doctrine of *in loco parentis* means that the school stands in the position of the parent. BLACK’S LAW DICTIONARY 803 (8th ed. 2004). For a complete discussion of the doctrine of *in loco parentis* in the educational institution context see BICKEL & LAKE, supra note 20, at 17-33.

\(^{101}\) *Nova*, 758 So. 2d at 89.

\(^{102}\) Id.

\(^{103}\) Id. at 87.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) *Nova*, 758 So. 2d at 87-88.

\(^{107}\) Id. at 88.
limited context, to use ordinary care in providing educational services and programs to one of its adult students.”

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

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

108 Id.
109 Id.
110 Id. at 89.
111 Nova, 758 So. 2d at 89.
112 Id.
113 Id. at 90.
114 Id.
115 Id.
116 Based upon the same theory of duty of supervision, an educational institution owes a duty to the placement site to assign students who are not a risk to others working at the placement site, particularly if the institution controls the assignment of the student and has superior knowledge concerning the student. See Fitzpatrick v. Universal Technical Inst., 2008 WL 3843078 (E.D. Pa. Aug. 14, 2008); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976). See discussion infra Part II.
117 Webb, 125 P.3d at 911-12.
When the University controls the actors or the facilities which cause the injury, the University has been held to have a duty to the student. In *Mizutani v. California State University Long Beach*, a graduate student alleged a claim against the university for negligent supervision of a faculty member who allegedly inflicted injuries on the student in the classroom during class time. The court found that “[i]mposing liability on a college that fails to discipline a professor who repeatedly batters innocent students in the classroom is not incompatible with a college’s purpose or the freedom of its students or faculty.” In *Hawkins v. Waynesburg College*, the court, applying “ordinary negligence principles,” found that the College owed the student a duty of care because the student was using the College’s workshop and the College’s power tools in order to fulfill a theater class requirement at the time of the injury. The Court was unwilling to find that the College had no duty to the student because the student could have fulfilled the course requirement through a different activity or because the student may have had prior experience with the use of power tools. The College owed the student a duty to “act with reasonable care in training [the student] and supervising his use of . . . equipment.” In *Patterson v. Sacramento City Unified School District*, the student was enrolled in an adult education program, the California Heavy Duty Truck Driving Program, which provided students with training and hands-on experience to become professional truck drivers. At the time of the injury, the student was loading a flat bed truck with bleachers as part of a required community service project that was intended to provide the student with practical experience. The student sued the District for failure to supervise. The student had received information in the classroom on freight loading, but no training on how to load flat bed trucks; and at the time of the injury, there were no teachers present. The court found that even though no teachers were present at the time of the injury, the education institution was in control because the event was required of students, the institution chose the location and type of event, and the institution choose and provided the equipment, i.e. the flat bed truck.

Where the educational institution does not have control, the court is unlikely to find that the institution has a duty to the student. In *Mintz v. State*, two students were killed participating in a canoe trip sponsored by one of the University’s student

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119 Id. at *5.
120 Id.
122 Id. at *6.
123 Id.
124 Id.
125 Id.
126 *Patterson*, 155 Cal. App. 4th 821.
127 Id. at 825
128 Id.
129 Id. at 824.
130 Id. at 825.
131 *Patterson*, 155 Cal. App. 4th at 825.
132 Id. at 832-833 (applying the factors enumerated in *Rowland*, 443 P.2d 561).
organizations. The deaths occurred during a sudden and intense squall which arose without warning. Because the students were “assumedly cognizant of perilous situations and able to care for themselves” and because the risk of the squall was not foreseeable, the University did not have a duty. In Judson v. Essex Agricultural and Technical Institute, the student was injured when she fell from a barn loft while working at a local farm. As part of its required curriculum, the educational institution required the student to “participate in some type of employment related to their course work.” The student was responsible for finding the employment and having the employer contact the educational institution. Although the educational institution had entered into a written agreement with the employer, the court found that the employer, and not educational institution, owed the student a duty of care. The educational institution had no control over the employer’s premises. And, unlike the internship program in Nova Southeastern, the student, and not the educational institution, controlled the location of the employment.

When there is an off-campus event which includes times when the education institution is in control and times when the student is acting in their own interests, the court will look to see whether the event occurred as part of the educational enterprise or during the student’s recreational activities. Educational enterprise does not include homework. In Stockinger v. Feather River Community College, the student was injured off-campus when she was thrown from the back of a pick-up truck driven by another student, while working on a group homework assignment, which required students to map a route for a horse-packing trip. The student claimed that because the assignment was required as part of her grade, the school owed her a duty.

According to the instructor, the purpose of the assignment “was to provide students an opportunity to develop the requisite leadership and practical skills for planning, implementing, and/or guiding a pack trip of their own. . . . [A]dults in this field must be

134 Id. at 620.
135 Id.
136 Id. (The court’s holding could also be interpreted as finding that the University acted reasonably and thus, did not breach its duty.).
137 Judson, 635 N.E.2d at 1172.
138 Id. at 1173.
139 Id.
140 Id. Compare Judson, 635 N.E.2d 1172; with Silvers, 194 WL 879600 (Silvers was decided three months after Judson. The court found a duty where the school’s placement office had forwarded the student’s resume to an employer).
141 The two relevant provisions of the agreement were that the employer obtain worker’s compensation insurance and the student’s project instructor “will visit or call the student on the job . . . to ensure that both the employer and the student get the most out of this situation.” Judson, 635 N.E.2d at 1173.
142 Id. at 1174-75. See also Marshall v. Univ. of S. Cal., 2007 WL 602984 (Cal. Dist. Ct. App. Feb. 28, 2007) (University owed no duty to student who was at work at the time of the injury and who recovered under employer’s worker’s compensation policy.).
143 Nova, 758 So. 2d 86.
144 Stockinger, 111 Cal. App. 4th 1014.
145 Id. at 1017.
146 Id. at 1018.
given responsibilities in order to learn responsibility.”¹⁴⁷ The instructor was not involved in selecting the members of the groups, planning the outing, providing transportation, or supervising or controlling the group.¹⁴⁸ The court held that “[a]s a general rule, a college may require college students to complete an off-campus assignment without specifying how the students are to transport themselves, and without assuming a duty of care with respect to the mode of transportation selected by the students.”¹⁴⁹ In *Beach v. University of Utah*,¹⁵⁰ the student was injured when she fell from a cliff during a field trip that was part of a freshman-level field biology class.¹⁵¹ The field trips were a required component of the course.¹⁵² The professor informed the students prior to the field trip “that they must follow his directions during class time, but were free to pursue personal interests when the day’s work was completed.”¹⁵³ The student’s injury occurred at night, after the academic portion of the field trip had concluded for the day, after the professor and the student had attended a lamb roast at a local ranch, and after the student had consumed alcohol.¹⁵⁴ The student claimed that the professor and University breached their “duty to supervise and protect her.”¹⁵⁵ Even though the professor designed the field trip, chose the location of the campsite near the cliff, and had observed underage students consuming alcohol, the court held that the University did not have a duty “to look after the safety of another who [had] become voluntarily intoxicated and thus [had] limited his ability to protect himself.”¹⁵⁶ Because the student was not engaged in the academic enterprise at the time of her injury, the court was loathe to provide protection to the student which was not available to non-students.¹⁵⁷

The mere fact that a student is completing a required assignment at the time of the injury is not sufficient for the educational institution to be deemed “in control” for the purposes of finding a duty. In exercising its duty of care in designing and implementing the curriculum, an educational institution can design assignments which require a student to accept responsibility and take on leadership roles because assisting students

¹⁴⁷ Id. at 1020.
¹⁴⁸ Id.
¹⁴⁹ Stockinger, 111 Cal. App. 4th at 1018.
¹⁵⁰ Beach, 726 P.2d 413. Beach is the first in a line of cases in which courts were unwilling to hold educational institutions liable when the student’s injuries were due in part to their own voluntary intoxication. See, e.g. Bradshaw, 612 F.2d 135; Baldwin, 176 Cal. Rptr. 809; Beach, 726 P.2d 413; Whittlock, 744 P.2d 54; Rabel, 514 N.E.2d 552.
¹⁵¹ Beach, 726 P.2d at 414.
¹⁵² Id.
¹⁵³ Id.
¹⁵⁴ Id. at 414-15 (there was some evidence that the student, who was underage, consumed alcohol in the presence of the professor).
¹⁵⁵ Id. at 415.
¹⁵⁶ Id.
¹⁵⁷ Id. at 418 (“Had she not been a college student, but an employee in industry, she could not argue realistically that her employer would be responsible for compensating her for injuries occurred by her voluntary intoxication if she violated state liquor laws during her off-hours while traveling on company business. We do not believe that (the student) should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education.”)
to develop into mature, responsible citizens who will be future leaders in the community is one of the goals of the educational institution. Even when participating in the required assignment, students are not deemed to have relinquished all of their autonomy to the institution, but are deemed to have retained sufficient autonomy to exercise common sense and avoid those risks which an average citizen would recognize and avoid. Nevertheless, when the educational institution removes all choice from the student in determining how the curricular requirement will be satisfied or when the educational institution has the ability to remove the risk of harm, the educational institution is in control and owes the student a duty of care.

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

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

1. The “Special Relationship”

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158 For a discussion of the evolution of higher education law from no duty and application of in loco parentis to duty see BICKEL & LAKE, supra note 20.
159 Webb, 125 P.3d at 911.
160 Id.
161 RESTATEMENT (SECOND) OF TORTS § 315 (1965)
162 Voluntary assumption can be the basis of finding a duty both when the student’s cause of action is based on the acts of the educational institution and when the student’s cause of action is based on the acts of third parties. See Nova, 758 So. 2d 86.
163 RESTATEMENT (SECOND) OF TORTS § 323 (1965)
164 See Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1369 (3d Cir. 1993) (“The determination that the College owes a duty of care to its intercollegiate athletes could merely define the class of persons to whom duty extends, without determining the nature of the duty or demands it makes on the College.”) (Circuit Judge Samuel Alito dissented on the grounds that the facts alleged were insufficient to establish that the College had breached its duty to the student).
Where students have sued their educational institutions for injuries caused by the act of a third party, courts have consistently applied, Section 315 of the Restatement (Second) of Torts,\textsuperscript{165} which provides:

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

(a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or
(b) a special relationship exists between the actor and the other which gives to the other a right to protection.\textsuperscript{166}

The determination of whether a “special relationship” exists is a question of law for the court to decide.\textsuperscript{167} The scope of the duty owed when a “special relationship” exists is limited to the risks which “arise within the confines of the relationship” and are usually

\textsuperscript{165}Reference is to the Restatement (Second) of Torts because that is the provision the courts relied upon in deciding the cases discussed in this section. \textit{See, e.g.}, \textit{Webb}, 125 P.3d 906; \textit{Nova}, 758 So. 2d 86; \textit{Mizutani}, 2002 WL 31117258; \textit{Hawkins}, 2008 WL 2952888; \textit{Patterson}, 155 Cal. App. 4th 821; \textit{Mintz}, 362 N.Y.S.2d 619; \textit{Judson}, 635 N.E.2d 1172; \textit{Stockinger}, 111 Cal. App. 4th 1014; \textit{Beach}, 726 P.2d at 414; \textit{Knoll}, 601 N.W.2d 757. The \textit{Restatement (Third) of Torts} §40 (2005) provides:

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

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

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

Subsection (b)(5) is a new addition. Comment I primarily focuses on the duty owed to elementary and secondary schools to their students. \textit{Restatement (Third) of Torts} §40 cmt. I (2005). Comment I leaves open the possibility of Section (b)(5) applies to college students when it states “because of the wide range of students to which it is applicable, what constitutes reasonable care is contextual – the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students.” \textit{Id.}

\textsuperscript{166} \textit{Restatement (Second) of Torts} §315 (1965).

\textsuperscript{167} \textit{Restatement (Third) of Torts} §40 cmt. e (2005).
limited by "geography and time." The duty applies regardless of whether the source of the risk is the educational institution or a third party.

When determining whether a special relationship exists, courts have consistently held that the student/university relationship is not sufficient in itself to create a special relationship. Those courts which have found that a special relationship exists have determined that at the time of the student’s injury the educational institution’s relationship with the student was the same as that of the business invitee, property owner, or landlord/tenant. Because the educational institution was providing the same type of services to the students that any business would provide an invitee, any property owner would provide one legally on their property, or any landlord would provide a tenant, the educational institution was held to the same duty of care as that owed by non-educational institutions in similar situations. The courts provided students with the same protection of the law on-campus as they had off-campus. Thus, courts have been consistent in treating students and non-students alike in the eyes of the law.

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

168 Id. at cmt. f.
169 Id. at cmt. g.
170 See, e.g., Nero, 861 P.2d at 778 (“the university-student relationship does not in and of itself impose a duty upon universities to protect students from actions of fellow students or third parties.”).
171 See Leonard, 625 N.E.2d at 435 (“While we might agree with plaintiff that a student can be a business invitee of a university while engaged in various activities conducted by the university, such as attending classes or participating in university-sponsored activities, we cannot agree that a special relationship exists” when student is attending a fraternity party and is sexually assaulted.)
173 See Furek, 594 A.2d at 520 (finding an alternative ground for recovery was the student’s status as an invitee on University property).
174 See Nova, 758 So. 2d 86.
175 Baldwin, 176 Cal. Rptr. At 815.
176 Id. at 815-16.
177 Id. at 816.
acted negligently.\textsuperscript{178} Courts have consistently refused to impose a duty on educational institutions that would result in impossible or impractical standards.\textsuperscript{179}

When student injuries occur on the educational institution’s property, particularly in student housing, courts will impose the same duty on the educational institution as has been imposed on other landlords.\textsuperscript{180} An educational institution has “a duty to exercise reasonable care in taking such measures as were reasonably necessary for [the student’s] safety in light of all then existing circumstances.”\textsuperscript{181} In determining the measures reasonably necessary, most jurisdictions apply a totality of the circumstances test,\textsuperscript{182} while a minority of jurisdictions require that a similar prior criminal act have occurred on the premises.\textsuperscript{183} Reasonable care requires that the educational institution maintain the premises in good order, including locks on doors and windows,\textsuperscript{184} provide warnings to students of criminal activity in the area and advise students on safety measures,\textsuperscript{185} and provide adequate security.\textsuperscript{186}

\textsuperscript{178} Id. (“the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.”). Courts have also described the test as a “risk-utility test”, which takes into account “(1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.” Sharkey v. Bd. of Regents of the Univ. of Neb., 615 N.W.2d 889, 900 (Neb. 2000).

\textsuperscript{179} Christiansen v. Univ. of Minn. Bd. of Regents, 2006 WL 6191767, at *12 (Minn. Dist. Ct. Mar. 22, 2006) (University was not in a position to protect student); Beach, 726 P.2d at 418 (the duty would have been “realistically incapable of performance”).

\textsuperscript{180} But see Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 562 (Ill. App. Ct. 1987) (under Illinois law, the “landlord-tenant relationship has not been considered a special relationship which could create the existence of a duty”).

\textsuperscript{181} Stanton, 773 A.2d at 1048.

\textsuperscript{182} Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999) (applying totality of circumstances with focus on knowledge landowner had or should have had with regard to foreseeability of the injury).

\textsuperscript{183} See L.W. v. W. Golf Ass’n, 712 N.E.2d 983 (Ind. 1999) (no similar events had occurred on premises); Agnes Scott Coll., v. Clark, 616 S.E.2d 468 (Ga. Ct. App. 2005) (no similar criminal activity had occurred on premises or in the area).

\textsuperscript{184} See Delaney v. The Univ. of Houston, 835 S.W.2d 56 (Tex. 1992) (university had duty to repair locks on doors to prevent criminal acts of third persons).

\textsuperscript{185} See Nero, 861 P.2d 768 (university had duty to warn student that fellow student had been charged with sexual assault when university placed charged student in co-ed housing); see also Stanton, 773 A.2d at 1050 (“University owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety.”).

\textsuperscript{186} Delta Tau Delta, 712 N.E.2d at 973 (fraternity owed duty to protect from foreseeable sexual assault); see Mullins, 449 N.E.2d 331 (student abducted from room and sexually assaulted on campus); see also Sharkey, 615 N.W.2d 889 (husband of wife sexual harassed by fellow student attacked by student).
Courts have also found a special relationship between the educational institution and the student when the educational institution has exerted control. Control focuses on the amount of autonomy retained by the student in relation to the actions taken by the educational institution. As discussed in detail above, the more control the educational institution exercises, the more likely a special relationship will be found. Courts have found a special relationship between the educational institution and students participating in intercollegiate sports, but not for students participating in intramural sports. Courts are split over whether a special relationship exists between an educational institution and a student who has committed suicide.

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

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187 See Webb, 125 P.3d at 911; see discussion supra pp. 10-11.
188 See Webb, 125 P.3d at 911; see discussion supra pp. 10-11.
189 See discussion supra Part I.A.1.b.
190 Compare Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. App. 2001) (duty to junior varsity cheerleader injured during warm-up for game), and Kleinknecht, 989 F.2d 1360 (duty to lacrosse player injured at practice), with Ochoa, 72 Cal. App. 4th 1300 (no duty to student playing intramural soccer).
191 Compare Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 610 (W.D. Va. 2002) (finding “special relationship” and imposing duty because “parents, students, and the general community still have a reasonable expectation fostered in part by colleges themselves, that reasonable care will be exercised to protect students from foreseeable harm”; harm was foreseeable where college believed student likely to harm himself based on college’s interventions), with Jain v. State of Iowa, 617 N.W.2d 293, 298 (Iowa 2000) (applying RESTATEMENT (SECOND) OF TORTS § 323 (1965) and finding no duty because no affirmative act of University “increased the risk of harm” to the student).
193 Baldwin, 176 Cal. Rptr. at 816.
194 Christiansen, 2006 WL 6191767 at *12 (University was not in a position to protect student); Beach, 726 P.2d at 418 (the duty would have been “realistically incapable of performance”).
195 Pawlowski, 2009 WL 415667 at *5 (imposition of duty against public policy because would require acts by University which were against public policy); Whitlock, 744 P.2d at 60 (imposing duty would encourage University to limit student choice creating a “repressive and inhospitable
not on the educational institution, but on the student who had voluntary consumed alcohol to excess.\textsuperscript{196}

Where alcohol consumption appears to be involuntary, at least one court has found that a special relationship exists between the educational institution and the student. In \textit{Knoll v. Board of Regent of the University of Nebraska},\textsuperscript{197} the court applied a landowner liability theory\textsuperscript{198} and found that the University owed the student a duty of care. The student was seriously injured while participating in a fraternity hazing event which included excessive consumption of alcohol.\textsuperscript{199} Although located off campus, the fraternity house was considered to be student housing and subject to the University’s Student Code of Conduct, which prohibited consumption of alcohol in student housing, hazing, and unreasonably dangerous conduct.\textsuperscript{200} Prior to the student’s injury, the University had knowledge of at least two hazing events by other fraternities and was aware of criminal conduct involving members of the student’s fraternity.\textsuperscript{201} The court held that because the fraternity’s acts of abducting and handcuffing the student were “reasonably foreseeable,”\textsuperscript{202} and because the University knew of the risk, the University owed [the student] a duty to protect.\textsuperscript{203}

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

2. Voluntary Assumption of Duty

environment, largely inconsistent with the objectives of a modern college education.”); \textit{Booker}, 800 F. Supp. at 241 (such a duty would infringe on other rights of students); \textit{Beach}, 726 P.2d at 418 (the duty would have been “fundamentally at odds with the nature of the parties’ relationship”).\textsuperscript{196} \textit{Robertson}, 747 So.2d at 1284 (court refused to protect student from “his deliberate act of recklessness”); \textit{Baldwin}, 176 Cal. Rptr. at 816.

\textsuperscript{197} \textit{Knoll}, 601 N.W.2d 757.

\textsuperscript{198} At least one other court has found a duty of care by applying a theory of voluntary assumption of duty. \textit{See Furek}, 594 A.2d 506; \textit{see also} discussion infra pp. 23-24.

\textsuperscript{199} \textit{Knoll}, 601 N.W. 2d at 760 (It is unclear whether the student’s consumption of alcohol was voluntary. According to the student he was abducted by fraternity members on campus and handcuffed.).\textsuperscript{199} \textit{Id.} at 760.

\textsuperscript{200} \textit{Id.} at 761.

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} Reasonable foreseeability in the context of duty is a question of law for the court to decide. \textit{Id.} at 763 ("Foreseeability as it impacts duty determinations refers to “the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.” ")

\textsuperscript{203} \textit{Id.} At 762.
Where students have sued their educational institutions for injuries caused by the act of a third party, courts have consistently applied, Section 323 of the Restatement (Second) of Torts, which provides:

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

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

Educational institutions can voluntarily assume a duty either by contract or by the actions they take. Courts have split on whether the adoption of a policy or a provision of a student handbook or code of conduct is evidence of a voluntary assumption of duty. The first question for the court is whether the educational institution had knowledge that its “undertaking will reduce the risk of harm to another.” The second question is whether the educational institution’s act increased the risk of harm “beyond that which existed in absence of the actor’s undertaking.” Reliance by the student on the educational institution is just one way that risk of harm can be increased.

In Silvers v. Associated Technical Institute, Inc., the student was enrolled in “a state-licensed post-secondary vocational school, whose placement office provides students and graduates with ‘placement support services,’ including referrals to

\[\text{Silvers, 1994 WL 9786000.}\]
employers with openings in the students’ fields of study.” The placement office received a job order for a “[f]emale tech for Communications switching complex-a lot of travel-part-time.” Without notifying the student, the placement office forwarded the student’s resume to the employer, who then contacted the student. “Assuming that the [school] would only refer [her] name to legitimate employers which it had screened,” the student accepted the job offer. During her employment, the student was sexually assaulted and harassed by the employer. The court stated that when “one undertakes an obligation contractually . . . or voluntarily . . ., the actor must perform with due care.” The court found that the school had voluntarily committed itself to provide students with job placement services and was thus required to exercise due care in providing the placement services. Due care required the school to make some effort “to avoid placing students with an employer likely to harm them.” Applying “existing social values and customs, and . . . appropriate social policy,” the court held that the school had a duty to investigate a job order which requested only female applicants.

Likewise, in *Nova Southeastern v. Goss*, the University could be viewed as having voluntarily assumed a duty when it designed a required internship program, choose the placement sites, and assigned students to the placement sites. Once the University exerted control, the University assumed the duty to exercise due care in choosing placement sites and placing students in those placement sites. The duty to exercise due care includes protecting students from foreseeable dangers. Foreseeable dangers include those dangers the University had actual knowledge of; in this case, other criminal activity near the placement site which made the risk of harm to the student reasonably foreseeable. Because of the amount of control exerted by the University in the implementation of its internship program, the student “relied” upon the University to only place her at sites deemed safe, and the student suffered injuries due to her reliance on the University. In addition, the University’s failure to warn the student of the known dangers of the placement site was a failure to exercise due care which failure increased the risk that the student would be injured at the placement site, because the student did not have the knowledge she needed to take precautions to protect herself.

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212 *Id.* at *1.
213 *Id.*
214 *Id.* at *1-2.
215 *Id.* at *2.
217 *Id.* at *3 (internal citations omitted).
218 *Id.*
219 *Id.*
220 *Id.* at *4.
221 *Nova*, 758 So. 2d 86; see discussion supra pp. 11-12.
222 *Nova*, 758 So. 2d at 87-88.
223 *Id.* at 88.
224 RESTATEMENT (SECOND) OF TORTS § 323(b) (1965).
225 RESTATEMENT (SECOND) OF TORTS § 323(a) (1965).
In alcohol consumption and fraternity cases, courts that have refused to find the existence of a special relationship may find that the educational institution has voluntarily assumed a duty.\textsuperscript{226} In \textit{Furek v. The University of Delaware},\textsuperscript{227} the student was injured during a fraternity hazing event,\textsuperscript{228} which was held at the fraternity house located on University property, but leased to the fraternity.\textsuperscript{229} The University’s Student Guide to Policies stated that “[h]azing, the subjection of an individual to any form of humiliating treatment and the violation of the rights of other students, have no place in the University community.”\textsuperscript{230} Despite the University’s policy, hazing continued on campus, and campus officials had knowledge that hazing was occurring.\textsuperscript{231} When notified of the student’s injuries due to hazing, the University instituted its own investigation, but was unable to initiate disciplinary proceedings due to lack of cooperation.\textsuperscript{232} The court found that even though the doctrine of in loco parentis did not apply to the University-student relationship, the University still maintained a residual duty of control and stated that “where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control.”\textsuperscript{233} Applying Section 323 of the Restatement, the court held that the “University’s policy against hazing, like its overall commitment to provide security on its campus, . . . constituted an assumed duty which became ‘an indispensable part of the bundle of services which colleges . . . afford their students.”\textsuperscript{234} In coming to its conclusion, the court relied upon the expectations of students, parents, and the community to protect students from these types of dangerous activities.\textsuperscript{235}

The \textit{Silvers, Nova Southeastern}, and \textit{Furek} cases indicate the courts willingness to expand an educational institution’s duty to its students under a voluntary assumption of duty analysis. The problem for educational institutions under a voluntary assumption of duty analysis is that if the institution is fulfilling its duty of care in designing and implementing its curriculum, then the institution has already taken into account how it can reduce the risk of harm to its students while still creating opportunities for the students to take on responsibility and leadership roles. Under a \textit{Furek} type analysis, almost any action taken by an educational institution can be deemed to be a voluntary

\begin{footnotesize}
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\item \textsuperscript{226} \textit{Coghlan v. Beta Theta Pi Fraternity}, 987 P.2d 300, 310-12 (2000) (court declined to find special relationship, but left open the possibility that the University had voluntarily assumed a duty of care because it had provided supervision at the fraternity party where the underage student voluntarily became intoxicated); \textit{McClure}, 2003 WL 21524786, at *8 (the court found that because the University had advertised and offered a shuttle service, the University had voluntarily assumed a duty to protect students “who traveled to and from parties at the beach area.”).
\item \textsuperscript{227} \textit{Furek}, 594 A.2d 506.
\item \textsuperscript{228} There is no mention that alcohol was involved in the hazing event. \textit{See id. at} 506.
\item \textsuperscript{229} \textit{id. at} 509.
\item \textsuperscript{230} \textit{id. at} 510.
\item \textsuperscript{231} \textit{id. at} 510-11.
\item \textsuperscript{232} \textit{Furek}, 594 A.2d at 511.
\item \textsuperscript{233} \textit{id. at} 520.
\item \textsuperscript{234} \textit{id. at} 520 (citing \textit{Mullins}, 449 N.E.2d at 336).
\item \textsuperscript{235} \textit{id.}
\end{itemize}
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assumption of duty. The exception then becomes the rule and provides students with more legal protections than non-students, which is against public policy.

In determining whether an educational institution has voluntarily assumed a duty, the court should only find that the educational institution assumed a duty when there is an increased level of risk, the educational institution knows or should know of the increased level of risk, and the educational institution can control the risk. These three factors were present in all three cases. In Silvers, the placement office should have known of the increased risk of sexual harassment because of the request was only for female applicants and the placement office could have refused to accept the placement request. In Nova Southeastern, the University had knowledge of recent criminal activity near the placement site and the University controlled the selection of sites and placement of students at sites. In Furek, the University knew or should have known that hazing was occurring on campus and the University, as evident by its actions after the events, had the authority to punish students and student organizations participating in hazing. Again, it is the educational institution’s knowledge and control of the risk which creates the duty to the student.

C. Litigation Arising Out Of Study Abroad Programs

Although the primary focus of this article is on international externship programs, the author could find no reported cases regarding international externship programs. In fact, there are very few reported cases where students have sued their college or university for events which occurred during their study abroad.\(^{236}\) While injuries to students abroad have often made headline news,\(^{237}\) few of these events appear in reported cases. The reason for this phenomenon is unknown. The lack of reported cases cannot be because U.S. students are in a safer environment when studying abroad.\(^{238}\) In Rights and Responsibilities,\(^{239}\) Peter Lake surmises that the dearth of reported cases addressing university tort liability and the fact that most reported cases are resolved in the university’s favor has occurred because university policy makers and university counsel settle cases which would make bad law for the university and only


\(^{239}\) See BICKEL & LAKE, supra note 20.
litigate those cases where there is an opportunity to develop law favorable to the university.\textsuperscript{240} Perhaps, because international incidents result in bad publicity and universities want and need good publicity in order to continue to attract students, universities are settling these cases. Or, perhaps because the events occurred in a foreign country, U.S. courts are perceived as not having jurisdiction over all the necessary parties.\textsuperscript{241}

Regardless of why there are so few reported cases arising out of study abroad programs, the reported cases show a trend that U.S. courts are willing to hear such claims and are not willing to allow educational institutions to shield bad behavior behind waivers and exculpatory clauses\textsuperscript{242} or behind claims that the court does not have jurisdiction because the events occurred outside of the U.S.\textsuperscript{243} These cases are a wake-up call. Educational institutions, including law schools, need to assess the risks of their study abroad programs and take measures to reduce the risk of foreseeable injury from events the institution can control and thus, be held to have had a duty to exercise reasonable care to protect the student. To the extent that a law school’s international externship program includes similar risks, a court is likely to find that the law school had a duty to exercise reasonable care to protect the student.

1. Medical Treatment

The courts of New York and Pennsylvania have taken opposing positions regarding whether an educational institution has a duty to supervise the medical treatment provided a student participating in a study abroad program.\textsuperscript{244} The New York Court of Appeals found that because New York did not apply the doctrine of in loco parentis to universities, the university had no obligation to supervise the medical treatment received by the student.\textsuperscript{245} The Court of Common Pleas of Pennsylvania found as a matter of law that because Theil College required all of the students participating in the study abroad program to execute a consent for medical treatment, the College owed the student a special duty of care.\textsuperscript{246} These cases are distinguishable both on their facts and on the arguments made by the students’ lawyers.

\textsuperscript{240} \textit{Id.} \textit{See also} Lake, supra note 20.
\textsuperscript{242} For a discussion of the types of documents which an institution of higher learning should consider, including waivers, assumption of risk, and exculpatory language, see Johnson, supra note 7, at 312-13; Hoye & Rhodes, supra note 19; and Hoye, supra note 14.
\textsuperscript{243} \textit{See} King, 221 F. Supp. 2d 783.
\textsuperscript{245} McNeil, 667 N.Y.S.2d at 398.
\textsuperscript{246} Fay, 55 Pa. D. & C.4th at 363.
a. McNeil v. Wagner College

The student was participating in Wagner College’s study abroad program in Austria when she slipped on ice and broke her ankle.\(^\text{247}\) The recitation of the facts contains no information regarding whether, at the time of the injury, the student was actively participating in a curricular component of the study abroad program or whether the student was pursuing her own interests.\(^\text{248}\) The student claimed that the administrator of the study abroad program “assumed the duty to act as an interpreter for [the student] in the Austrian hospital” and that “she suffered nerve damage due to the [administrator’s] failure to inform her of the treating physician’s recommendation that she undergo immediate surgery.”\(^\text{249}\)

The student’s theory of liability was based on Section 323 Restatement (Second) of Torts\(^\text{250}\) that the administrator had “voluntarily assumed a duty of care by acting as her interpreter at the hospital and that his breach of that duty placed [the student] in a more vulnerable position than she would have been otherwise.”\(^\text{251}\) The court refused to find that the administrator had assumed such a duty when the evidence submitted by the College established that the treating physician could speak English.\(^\text{252}\) Moreover, the student failed to offer any evidence that the administrator had been “told of the recommendation of immediate surgery and negligently withheld that information from [the student].”\(^\text{253}\)

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

\(^{247}\) McNeil, 667 N.Y.S.2d at 398.

\(^{248}\) Id. When addressing the issue of duty for injuries occurring in the U.S., courts have distinguished between those events which are curricular or which are done in furtherance of the institution’s interests and those events which are done for the student’s own recreation. Compare Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920 (N.C. App. 2001) (duty to junior varsity cheerleader injured during warm-up for game), and Kleinknecht, 989 F. 2d 1360 (duty to lacrosse player injured at practice), with Ochoa, 72 Cal. App. 4th 1300 (no duty to student playing intramural soccer).

\(^{249}\) McNeil, 667 N.Y.S.3d at 398.

\(^{250}\) RESTATEMENT (SECOND) OF TORTS §323 (1965).

\(^{251}\) McNeil, 667 N.Y.S.2d at 398.

\(^{252}\) Id.

\(^{253}\) Id.
duty in its study abroad program as the College has in operating its domestic programs. Moreover, the court was providing the student the same protection of the law as is provided to non-students.

b. Fay v. Thiel College

The student was participating in Thiel College’s study abroad program in Peru,254 under the supervision of three of the College’s faculty members.255 In order to participate in the trip, all students were required to execute a “Waiver of Liability” and a “Thiel College Consent Form”.256 While on the trip, the student became ill and was admitted to a medical clinic in the city of Cuzco.257 After the student was admitted, the faculty members and the other students left on a prescheduled trip.258 The student, who was not fluent in Spanish, was left alone at the clinic.259 A missionary, whom the student had not met until her admission to the clinic, acted as the student’s translator.260

While at the clinic, the student was “subjected to the unnecessary surgical removal of her appendix.”261 When the student was informed through the missionary/translator that surgery was going to be performed, the student requested to be transferred to a hospital in Lima, to fly home, and to talk to her parents.262 All of the student’s requests were denied.263 The missionary/translator authorized the surgery and also requested to observe the surgery.264 The request to observe the surgery was denied.265 As the student was only given a local anesthetic, the student was conscious during the surgery and was conscious when the surgeon and anesthesiologist (both of whom were men) sexually assaulted her.266

As its first defense, the College claimed that the exculpatory clause of the waiver of liability agreement signed by the student required that judgment be entered in the College’s favor.267 The exculpatory clause provided:

As a condition of my participation in the study or project, I understand and agree that I am hereby waiving any and all claims arising out of or in connection with my travel to and from and/or my participation in this project or study that I, my

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255 Id. at 355.
256 Id.
257 Id.
258 Id.
260 Id. at 355-56.
261 Id. at 356.
262 Id.
263 Id.
265 Id.
266 Id.
267 Id. at 357.
Because the waiver of liability agreement was a requirement of participation in the study abroad program, because the terms of the agreement were not bargained for between the student and the College, and because the student could not alter the form, the court found that the waiver of liability agreement was “a contract of adhesion” and was, therefore, not valid.269

As its second defense, the College claimed that it had no special relationship with the student, owed the student “no special duty beyond that of a reasonable standard of care”, and did not violate the reasonable standard of care when it left the student in the Peruvian medical clinic.270 The student countered by claiming that the consent form271 that all the students were required to sign created a special relationship and that “pursuant to the special relationship, [the College] owed a duty to [the student] to secure, in the event of her sickness of injury, ‘whatever treatment is deemed necessary, including the administration of an anesthetic and surgery.’”272 The student claimed that at least one of the faculty members should have stayed with her at the medical clinic and that by not doing so, the College breached its “duty to act reasonably under the circumstances.”273

The court recognized that under Pennsylvania law, duty “is predicated on the relationship existing between the parties at the relevant time.”274 The court also recognized that while “a college does not owe its students an in loco parentis duty simply because of the college/student relationship... it is also true that a college can owe a particular student a special duty as a result of a special relationship that exists between the college and that particular student.”275 Relying upon both Pennsylvania

268 Id. at 357-58.
270 Id. at 361.
271 The language of the consent form was: "On rare occasions, an emergency requiring hospitalization and/or surgery develops. Laws and regulations vary in foreign countries regarding those instances in which the consent of a parent/guardian/spouse is required in order for a student to be administered an anesthetized or have surgery. Therefore, we request that parent/guardian/spouse sign the following statement to prevent a dangerous delay, if an emergency should occur, and we are unable to contact the parent/guardian/spouse. Such emergencies are rare; however, we want to observe the utmost precautions for the welfare of each participant. Circumstances permitting, students will also be asked to sign a standard consent to surgery form should surgery be required. In the event of sickness or injury of my/our/daughter/son/ward/spouse/myself, (name of student) who is (insert age) years of age, birthday (insert date), I/we herby authorize the representative abroad of Thiel College to secure whatever treatment is deemed necessary, including the administration of an anesthetic and surgery.” Id. at 368.
272 Id. at 361-62.
273 Id. at 362.
275 Id. at 362-63 (citing Alumni Ass’n v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (university had no duty where underage student consumed and served alcohol at fraternity party); and
Supreme Court and Third Circuit precedent, the court explained that liability will not be imposed upon an institution of higher learning for the negligent acts of its students, particularly when the negligence is caused by excessive alcohol consumption. The court distinguished the facts before it, by articulating the College’s position as asking the court “to absolve them of liability for their own allegedly negligent acts – not for the allegedly negligent acts of their students.” Based upon this distinction, the court found “as a matter of law” that the College owed the student “a special duty of care as a result of the special relationship that arose between Thiel College and [the student] pursuant to the consent form that she was required to execute prior to participating in the Thiel-sponsored trip to Peru.”

Relying upon Section 448 of Restatement (Second) of Torts, the College also claimed that it could not be “liable for the unforeseeable sexual assault and/or medical malpractice of the Peruvian medical staff.” Because the surgical room was in a restricted portion of the clinic, the presence of a faculty member at the clinic would not have prevented the surgery or sexual assault. The doctors’ acts were a superseding cause of the student’s injuries for which the College cannot be held liable. Relying on Section 323 of the Restatement (Second) of Torts, the student responded that by requiring the student to execute the consent form, the College “undertook an obligation to see to the welfare of the student”. The Court found that the purpose of Section 323 was “to relax the degree of certainty required of a plaintiff’s evidence to provide a basis upon which a jury may find causation.” The Court held that student need only prove that the College’s negligence increased the risk of harm to the student and that

Kleinknecht, 989 F.2d at 1366-69 (3d Cir. 1993) (college owed student who was an intercollegiate athlete a duty of care when student engaged in school sponsored intercollegiate activity).  

276 Id. at 363.  
277 Id.  
278 RESTATEMENT (SECOND) OF TORTS § 448 (1965) provides:  

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

280 Id.  
281 Id.  
282 RESTATEMENT (SECOND) OF TORTS § 323 (1965) provides:  

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

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

284 Id.
the increased risk of harm “was a substantial factor in bringing about the harm.”\textsuperscript{285} The student is not required to prove that a faculty member’s presence would have prevented the harm, just that the absence of one increased the risk that the harm would occur.

The court held that the issue of whether the college breached its duty of care to the student\textsuperscript{286} and whether the absence of a faculty member increased the risk of harm to the student were questions of fact for the jury.\textsuperscript{287} The court stated that there was sufficient evidence for a jury to determine that the absence of a faculty member increased the risk that the Peruvian medical staff would harm the student.\textsuperscript{288}

An educational institution which establishes a program in a country where the student is not fluent in the local language or the doctor is not fluent in the student’s primary language may be found to have a duty of care to minimize the risk to the student by providing translation services. Moreover, if the program is operating in a developing country where the medical practices are not considered to be of the same level as the U.S., the educational institution may be found to have a duty of care to minimize the risk that the student will be exposed to unnecessary surgery. An educational institution which abandons its student to seek medical care from a rural clinic whose doctors do not speak English has breached its duty of care to the student.

2. Personal Injury – Student Housing

There are no reported cases in which a U.S. court has addressed a university’s duty to provide students in its study abroad program with safe housing. Students have, however, sued companies operating study abroad programs for injuries from accidents occurring in program provided housing. In \textit{Paneno v. Centres for Academic Programmes Abroad, Ltd.},\textsuperscript{289} the student attended Pasadena Community College and was enrolled in a study abroad program in Florence, Italy, which was operated by the Centres for Academic Programmes Abroad (CAPA).\textsuperscript{290} CAPA contracted with a company experienced in locating student housing to obtain apartment housing for students enrolled in the Florence Program.\textsuperscript{291}

In September of 2000, the student traveled to Florence, Italy, and commenced his studies without problem.\textsuperscript{292} During the program, the student resided with other students participating in the Program in an apartment to which he had been assigned by the Program.\textsuperscript{293} On October 21, 2002, while on the balcony to the apartment, the

\textsuperscript{285} \textit{Id.} at 366.
\textsuperscript{286} \textit{Id.} at 363.
\textsuperscript{287} \textit{Id.} at 366.
\textsuperscript{288} \textit{Fay}, 55 Pa. D. & C.4th at 366.
\textsuperscript{289} \textit{Paneno}, 118 Cal. App. 4th 1447 (The issue before the California Court of Appeals was whether the defendant was subject to the jurisdiction of California courts.).
\textsuperscript{290} \textit{Id.} at 1450.
\textsuperscript{291} \textit{Id.} at 1452.
\textsuperscript{292} \textit{Id.} at 1453.
\textsuperscript{293} \textit{Id.}
The issue before the court was CAPA’s motion to quash service; the court did not address the merits. When the court does address the merits, it will likely apply the same legal standard as it would if the injury had occurred in the U.S. and find that there is a special relationship between the educational institution and the student which creates a duty for the educational institution to exercise reasonable care in choosing and maintaining safe housing for students participating in its study abroad program.  

3. Sexual Assault – The Duty to Warn

In Bloss v. The University of Minnesota Board of Regents, the Minnesota Court of Appeals found that in designing its study abroad program, including the location of student housing, the University was exercising a discretionary function and thus, was protected by statutory immunity. At the time of the sexual assault, the student was participating in the “University’s Spanish in Cuernavaca Program at the Cemanahuac Educational Community”, a “cultural immersion program”. While participating in the program, students live with host families and either walk to school or commute via public bus or taxi. Host families must meet a set of criteria in order to participate in the Program. Students unhappy with their host family are allowed to select another family. The University, however, had “no written guidelines governing the distance of host families from schools or transportation for the program.”

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

294 Id.
295 See discussion supra Part I.B.1.
296 Bloss, 590 N.W.2d 661.
297 Id. at 662. Statutory immunity is only available to state owned post-secondary institutions. Statutory immunity is a reservation of protection from the waiver of sovereign immunity usually contained in a state’s tort claims act. Sovereign immunity usually protects the state agency when in its discretionary, policy making activities.
298 Id.
299 Id. All host families are located within walking distance or on a bus line. Id. at 663.
300 Id. at 663.
301 Bloss, 590 N.W.2d at 663.
302 Id.
303 Id.
304 Id. at 666 (citing the student’s deposition testimony).
305 Id. at 663.
The student had been assigned a host family whose residence was in a middle class neighborhood.\textsuperscript{306} At the time of the sexual assault, the student was riding in the front seat of a taxi which she had hailed on the street at night.\textsuperscript{307} The student was on her way to a friend’s house when the taxi driver sexually assaulted her.\textsuperscript{308} The student sued the University claiming “negligence in its failure to secure housing closer to the Cemanahuac campus, failure to provide transportation to and from campus, failure to adequately warn about risks, and failure to protect students from foreseeable harm.”\textsuperscript{309}

The court found that the University was engaged in a discretionary act when designing the study abroad program,\textsuperscript{310} because the design process required the University to engage in balancing “competing policy considerations,”\textsuperscript{311} including “academic, financial, political, economic, and social considerations.”\textsuperscript{312} The University was required to balance these competing interests in order to meet the educational goals of the study abroad program. The court indicated that it was not persuaded that the University could have done more to protect the student when the student acknowledged that she engaged in the very behavior that she was warned against during the mandatory orientation session.\textsuperscript{313} The court concluded by holding that the University is not a guarantor of student safety; it is both physically impossible and unrealistic to believe that a University can protect all of its students, all of the time while the student is participating in a study abroad program.\textsuperscript{314}

4. Federal Civil Rights Statutes\textsuperscript{315} – Title IX,\textsuperscript{316} the Rehabilitation Act,\textsuperscript{317} and Title III of the Americans with Disabilities Act\textsuperscript{318}

Although there are few cases, U.S. courts have applied federal civil rights statutes to U.S. schools operating study abroad programs when the alleged violation of the civil rights statutes occurred overseas.\textsuperscript{319} The courts’ rationale has been that it was the intent of Congress that the protection of these statutes apply to all education programs operated by U.S. educational institutions.\textsuperscript{320} Congress did not include an

\textsuperscript{306} Bloss, 590 N.W.2d at 665 (no evidence that host family resided in a high crime neighborhood).
\textsuperscript{307} Id. at 663.
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{310} The discretionary nature of the acts taken by the University in designing its study abroad program was essential for the court to find that Minnesota’s statutory immunity provisions applied to these facts. Id. at 664 (citing Minn. Stat. § 3.736, subd. 3(b) (1998)).
\textsuperscript{311} Bloss, 590 N.W.2d at 665.
\textsuperscript{312} Id.
\textsuperscript{313} Id. at 666.
\textsuperscript{314} Id.
\textsuperscript{315} The cases discussed in this section, although based upon statutory duties, illustrate additional types of behavior which create risks for the educational institution in its study abroad and international externship programs.
\textsuperscript{319} See Bird, 303 F.3d 1015; King, 221 F. Supp. 2d 783; Phillips, 2007 WL 3407728.
\textsuperscript{320} King, 221 F. Supp. 2d at 790.
explicit exception for study abroad programs.\textsuperscript{321} Because the role of the court is to apply the statute as intended by Congress, the court was not in a position to create an exception that both Congress and the executive branch agency charged with enforcing the statute had refused to create.\textsuperscript{322}

\begin{itemize}
\item[a.] Title IX

In order for a student to have a cause of action under Title IX for sexual harassment, the student must be enrolled in a U.S. educational institution.\textsuperscript{323} The fact that an educational institution receives U.S. federal funds in the form of student federal financial aid and that the educational institution recruits the student in the U.S. is not sufficient to confer jurisdiction on U.S. courts for acts of sexual harassment which occur in a foreign country.\textsuperscript{324} If, however, the student is enrolled in a U.S. educational institution and is participating in a U.S. educational institution’s study abroad program, the student is a person within the U.S. for purposes of Title IX, even though the acts of sexual harassment occur in a foreign country.\textsuperscript{325}

In \textit{King v. Board of Control of Eastern Michigan University},\textsuperscript{326} six female students who participated in the University’s Intensive Educational and Cultural Program in South Africa returned to the U.S. early due to the harassing conduct of three male participants in the Program.\textsuperscript{327} The students alleged that they were sexually harassed by the male students and that behavior of the male students created a hostile educational environment which deprived the female students of an educational opportunity.\textsuperscript{328} Two University faculty members administered the Program, one of whom had an assistant who was male.\textsuperscript{329}

The University argued that Title IX did not have extraterritorial application and thus, the court lacked subject matter jurisdiction.\textsuperscript{330} After reviewing the language of the statute, the available legislative history, and the regulations promulgated by the

\begin{itemize}
\item[321] \textit{Id.} at 788.
\item[322] \textit{Id.}
\item[323] See Phillips, 2007 WL 3407728.
\item[324] \textit{Id.}
\item[325] See \textit{King}, 221 F. Supp. 2d 783.
\item[326] \textit{Id.}
\item[327] \textit{Id.} at 784,
\item[328] \textit{Id.}
\item[329] \textit{Id.} Some of the acts which the female students objected to were as follows: One male student entered a female student’s room during the night and climbed into her bed. Two male students and the faculty assistant continually referred to female students by derogatory names. Two of the male students solicited South African women for sex from the group’s tour bus. Male students offered female students for sale. \textit{Id.} Although the female students reported these incidents to a faculty member, the faculty member said he was not the appropriate individual to whom complaints should be made and directed the female students to his assistant, who was one of the individuals engaging in the harassing behavior. \textit{Id.}
\item[330] \textit{King}, 221 F. Supp. 2d at 784. Subject matter jurisdiction was premised on a federal question. 28 U.S.C. § 1331 (2009). Thus, if the federal statute which gave rise to the court’s subject matter jurisdiction did not apply to events which occurred in a foreign country (the facts of the case before it), then the court had no jurisdiction to hear the students’ complaints.
\end{itemize}
agencies which had the power to enforce the statute, the court concluded that it was the intent of Congress that Title IX apply to all education programs of a U.S. educational institution.\footnote{King, 221 F. Supp. 2d at 790-91.} Because the female students were enrolled in a U.S. university, the female students were “persons within the United States” for purpose of Title IX, even if the education program that they were participating in and the harassing acts occurred in a foreign country.\footnote{Id. at 791.} The court found that “[s]tudy abroad programs are an integral part of college education today. A denial of equal opportunity in those programs has ramifications on students’ education as a whole and detracts from their overall education.”\footnote{Id.}

b. The Rehabilitation Act and Title III of the Americans with Disabilities Act

In \textit{Bird v. Lewis & Clark College},\footnote{Bird, 303 F.3d 1015.} the student, who was confined to a wheelchair, sued the College for violations of the Rehabilitation Act,\footnote{Rehabilitation Act of 1973, 29 U.S.C. § 794 \textit{et seq.} (2009).} and Title III of the Americans with Disabilities Act,\footnote{Title III of the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12181 \textit{et seq.} (2009).} alleging that the College discriminated against her in its operation of a study abroad program based on her disability. The student was accepted into the College’s study abroad program in Australia, which program was field based and required travel throughout the Australian continent.\footnote{Bird, 303 F.3d at 1017.} The College worked with the Australian company which made the arrangements for the program to revise the program to accommodate the student.\footnote{Id.} The faculty participating in the trip worked with the student to arrange alternative activities to replace those activities which the student could not participate in due to her disability.\footnote{Id.} The student and her parent were “assured that the program would be able to accommodate her disability.”\footnote{Id.}

The student based her allegations of discrimination on the fact that a number of locations did not have wheelchair access, that she was unable to participate in a number of outdoor activities, and that transportation was not always wheelchair accessible.\footnote{Id.} The College offered evidence that it had accommodated the students’ disability, including providing the student with alternative modes of transportation, purchasing a special cot, hiring student helpers, providing the student with a special wheelchair, and providing the student with alternative housing.\footnote{Bird, 303 F.3d at 1017.} At the conclusion of the trial, the jury found in favor of the College on all of the student’s causes of action except for breach of fiduciary duty.\footnote{Id. at 1019.}
The College claimed that neither the Rehabilitation Act or Title III of the ADA applied extraterritorially. Because the district court allowed the issue of violation of the Act to go to the jury, the Ninth Circuit addressed the merits of the issue; both courts assumed that the Acts had extraterritorial application. The Ninth Circuit held that the College’s failure to provide the student with wheelchair access on a number of occasions was not sufficient to establish a violation of the Acts, because compliance depends on “whether the program viewed in its entirety is readily accessible to and usable by individuals with disabilities.” Because the College had established that it had made a number of modifications to the Program in an effort to accommodate the student’s disability, and because there was evidence that the student “enjoyed many of the benefits offered by the program”, there was sufficient evidence to support the jury’s verdict that the College had not violated the Acts.

Relying on Oregon state law, the Ninth Circuit found that the College had a special relationship with the student, and thus, a fiduciary duty existed. “A special relationship arises when ‘one party has authorized the other to exercise independent judgment in his or her behalf’ and, as a result, the party owing the fiduciary duty must take care of certain affairs belonging to the other. What makes a relationship special is not its name, but the roles assumed by the parties.” Because the College had “assured “ the student and her parent that the program would accommodate the disability, because the College represented to the student that the Australian company making the arrangements had experience in accommodating the needs of individuals with disabilities such as hers, because the faculty member in charge of the program represented that there would be “adequate facilities” for the outdoor portion of the program, and because the College had made substantial modifications to its home campus to accommodate the student’s disability, there were sufficient facts for the jury to find that the College and the student had a “special relationship”. The Ninth Circuit upheld the jury award of $5,000.00 for the College’s breach of fiduciary duty.

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

344 Id. at n.1.
345 Id.
346 Id. at 1021 (citing Barden v. City of Sacramento, 292 F.3d 1073, 1075-76 (9th Cir. 2002) (quoting 28 C.F.R. §§ 35.149-151.).
347 Bird, 303 F.3d at 1017.
348 Id.
349 Id. at 1023.
350 Id.
351 The College had “installed ramps at her dormitory, changed its inside doors, and remodeled its bathrooms to make them wheelchair accessible. It even rebuilt parts of the biology labs where (the student) worked.” Id.
352 Bird, 303 F.3d at 1017.
353 Id. at 1019.
educational institution knows what its obligations to its students are and can therefore exercise reasonable care in the design and implementation of its study abroad programs.

II. The Educational Institution’s Duty to the Externship Placement Site

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

When an educational institution has knowledge that one of its students is likely to injure another person, the institution must act with reasonable care to prevent the injury. Knowledge means information that the educational institution actually knows, which, at a minimum, includes the information contained in a student file, but likely also includes that information which staff and faculty have that should have been reported to an individual with authority to act on the information. Where the educational institution does not have the ability to control the acts of the student, the duty of reasonable care may be limited to warning the non-student of the potential harm. The educational institution is “in control” when it has the ability to remove the risk – here the student – from the program or facility. When the educational institution is “in control,” a court is likely to find that the institution’s duty of reasonable care includes more than just warning the individual likely to be harmed. When the educational institution is “in control,” it may need to take steps to limit the ability of the dangerous student to harm others.

Although *Tarasoff v. The Regents of the University of California* is not a school case, it establishes the rationale and parameters for when public policy requires the recognition of a duty of reasonable care to protect third parties from a dangerous individual. In Tarasoff, the underlying event was Prosenjit Poddar’s murder of Tatiana Tarasoff. Prior to the murder, during his voluntary outpatient treatment at Cowell

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354 See *Tarasoff*, 551 P.2d 334.
355 See Schieszler, 236 F. Supp. 2d 602 (college had knowledge that student was dangerous to himself and thus had duty to protect student).
356 An educational institution’s lack of authority to control the acts of a student may come from a variety of sources, including state and federal law.
357 See *Nero*, 861 P.2d 768; see also *Fitzpatrick*, 2008 WL 3843078.
358 Id.
359 *Tarasoff*, 551 P.2d 334.
360 Id. at 339.
Memorial Hospital at the University of California Berkeley, Poddar informed his therapist that he was going to kill a girl (who was easily identified as Tatiana Tarasoff) when she returned home from her summer travels.\textsuperscript{361} The therapist recommended that Poddar be committed for observation in a mental hospital, and campus police were notified of the request for commitment.\textsuperscript{362} Campus police took Poddar into custody, but upon determining that he was “rational, released him on his promise to stay away from Tatiana.”\textsuperscript{363} The plaintiffs’ alleged that the therapist’s “negligent failure to warn Tatiana or others likely to apprise her of her danger” was the proximate cause of Tatiana’s death.\textsuperscript{364} The University claimed that it had no duty of care to warn Tatiana or her parents of Poddar’s threat.\textsuperscript{365} The California Supreme Court stated that “when the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim.”\textsuperscript{366} Applying Section 315 of the Restatement Second of Torts, the court found that a special relationship exists between the doctor/therapist and patient and that “[s]uch a relationship may support affirmative duties for the benefit of third persons.”\textsuperscript{367} In balancing the patient’s privacy interest, the interest in confidential dialogue between patient and doctor, and the protection of the public, the court held that the therapist had “a duty to exercise reasonable care to protect Tatiana.”\textsuperscript{368} The duty to exercise reasonable care required the therapist to notify the patient’s potential victim or the potential victim’s family member of the threat.\textsuperscript{369}

In \textit{Nero v. Kansas State University},\textsuperscript{370} the injured student was sexually assaulted in the basement recreation room of a co-ed residence hall by a male student during a summer session.\textsuperscript{371} Approximately one month earlier, the male student had been accused of raping J.N., a female student living in his residence hall, which resulted in criminal charges.\textsuperscript{372} After being released on bond, the male student was assigned to an all male residence hall for the remainder of the academic year.\textsuperscript{373} For the summer session, the only campus housing available was a co-ed dormitory, and the male student moved to the co-ed residence hall.\textsuperscript{374} The University did not warn the female students living in the co-ed residence hall that the male student had been charged with

\begin{footnotes}
\footnotetext{361}{Id. at 341.}
\footnotetext{362}{Id.}
\footnotetext{363}{Id.}
\footnotetext{364}{Tarasoff, 551 P.2d at 342.}
\footnotetext{365}{Id.}
\footnotetext{366}{Id. at 342-43 (emphasis added).}
\footnotetext{367}{Id. at 343; see also Merchants Nat’l Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409 (D. N.D. 1967) (Where Veteran’s Administration arranged for mentally ill patient to work, but did not inform employer of patient’s mental illness, Veteran’s Administration liable for wrongful death of patient’s wife when patient left work and killed wife during work hours.).}
\footnotetext{368}{Tarasoff, 551 P.2d at 348.}
\footnotetext{369}{Id. at 347-48.}
\footnotetext{370}{Nero, 861 P.2d 768.}
\footnotetext{371}{Id. at 771.}
\footnotetext{372}{Id.}
\footnotetext{373}{Id.}
\footnotetext{374}{Id. at 772.}
\end{footnotes}
The court determined that because the University was providing housing to its students, it was in competition with private landlords, and thus, owed the same duty of care to its students as a private landlord owed to its tenants. The court held that the University had "a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university’s control." The court emphasized that the University knew that the male student had been charged with rape and that the previous semester the University had taken reasonable steps to protect other students. The court also emphasized that the University could have refused to rent the male student a room in the co-ed residence hall during the summer session. Because the University had both the knowledge that the student was dangerous and the ability to control the dangerous student in order to reduce the risk of harm to the injured student, the University owed the injured student a duty of care.

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

Arguably all three cases are premised upon a “special relationship” with either the student or the third party – therapist/patient, landlord/tenant, and property owner. An educational institution could argue that because the student/university relationship itself is not sufficient to create a special relationship, the educational institution does not have a duty to the placement site or anyone at the placement site. Moreover, it is the placement site that is in the position of the business invitee and premises owner, not the

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375 *Nero*, 861 P.2d 768.
376 *Id.* at 779.
377 *Id.* at 780 (emphasis added).
378 *Id.*
379 *Id.*
381 *Id.* at *1.
382 *Id.*
383 *Id.*
384 *Id.*
385 *Id.* at *2.*
educational institution. Thus, if a special relationship exists it is between the placement site and the injured person, not the educational institution and the injured person.

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

In order for the educational institution’s duty of reasonable care to be triggered, the institution must have knowledge that the student is a danger. As stated previously, knowledge is that information which an educational institution has. An educational institution is not required to investigate each of its students prior to allowing the student to participate in the externship program. If, however, the educational institution has knowledge that one of its students has physically injured another student, the institution then has a duty to exercise reasonable care in placing that student in an externship program. Because knowledge can be received by the institution in different offices and by different people, the educational institution must insure that it communicates within itself in order to fulfill its duty of care to both its students and other third parties.

In the context of an externship program, a court would likely find that the educational institution had voluntarily assumed a duty to not place students at the externship site that the institution knew were dangerous. As discussed in more detail above, an educational institution voluntarily assumes a duty when there is an increased level of risk, the educational institution knows or should know of the increased risk, and the educational institution can control the risk. In the externship setting, there is an increased level of risk when it is reasonably foreseeable that the dangerous student is likely to harm others at the placement site. An educational institution can control the risk by the manner in which it designs and implements the externship program. For example, the educational institution can and should reserve the discretion to admit or deny students into the externship program or to limit student placement to particular sites. The educational institution can create internal methods of

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387 See discussion supra Part I.
388 A student may be deemed dangerous for one placement site, but not another. For example, in Nero, the male student was deemed too dangerous to be placed in a co-ed residence hall, but not a male residence hall. But see Butler, supra note 22, at 114-15 (author recommends
communication so that the externship director can determine if a student is dangerous and should not be placed at a particular site. A voluntary assumption of duty should only be found where the educational institution had knowledge that a student was dangerous. Moreover, it would be reasonable, and consistent with public policy, for the placement site to rely upon the educational institution to not send students the institution knows are dangerous to the placement site.

III. Managing Risks and Defining Duties in a Law School’s International Externship Program

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

A law school can fulfill its duty to exercise reasonable care in the design and implementation of its international externship program if it has clearly defined educational goals for the program, identifies the reasonably foreseeable risks that students participating in the program will be exposed to, and takes reasonable action to minimize the risk to students. An international externship program has some of the same inherent risks as a study abroad program, and some unique challenges of its own. Because one of the purposes in developing an international externship program is to transition the law student from student to practitioner, identifying and managing risk in such a program is best done by using a facilitator model. This section provides a brief explanation of the facilitator model and then applies the model to the challenge of implementing and designing an international externship program.

A. The Facilitator Model

In Rights and Responsibilities, Robert Bickel and Peter Lake suggest that a responsible and efficient way for educational institutions to manage risk is through the allowing student to choose placement site as a means of limiting the institutions duty to the student.

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389 Beach, 726 P.2d 413.
390 Id.
391 Webb, 125 P.3d at 911.
392 See Butler, supra note 22; see also Donnell V. Cal. W. Sch. of Law, 200 Cal. App. 3d 715 (Cal. Dist. Ct. App. 1988) (law school had no duty to student injured on public sidewalk adjacent to law school property).
393 For a discussion of some of these risks, see Johnson, supra note 7, Hoye, supra note 14, and Hoye & Rhodes, supra note 19.
394 BICKEL & LAKE, supra note 20, at 159-213.
395 BICKEL & LAKE, supra note 20. See also Lake, supra note 20.
implementation of a “facilitator model”. When the educational institution acts as a facilitator, the institution acts as “a guide who provides as much support, information, interaction, and control as is reasonably necessary and appropriate to the situation.” In a facilitator model, students take responsibility for their own actions, but the facilitator can limit the choices which can be made.

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

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

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

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396 BICKEL & LAKE, supra note 20.
397 Id. at 193.
398 Id.
399 Id.
400 Id. at 194.
401 Whitlock, 744 P.2d at 60.
402 Baldwin, 176 Cal. Rptr. at 816.
Key to the facilitator model is determining what is reasonable.\textsuperscript{403} “A proper line of facilitation draws at what is reasonable. A facilitator cannot and does not eliminate all risks, but neither does it ask students to assume those unreasonable risks that would arise from lack of proper university planning, guidance, instruction, etc.”\textsuperscript{404} The facilitator allows for the inherent risk, but not the unreasonable risk.\textsuperscript{405} In order for the institution as facilitator to provide adequate “[i]nformation, training, instruction and supervision, discussion [and] options,”\textsuperscript{406} the educational institution must identify the reasonable risks that the “information, training, instruction and supervision, discussion, [and] options” are meant to address. The risks are those risks that are reasonably foreseeable to a prudent person. In determining whether a risk is reasonably foreseeable, the facilitator model utilizes the same balancing factors as used by the courts. Those factors are:

(1) Foreseeability of harm;
(2) Nature of the risk;
(3) Closeness of the connection between the college’s act or omission, and the student injury;
(4) Moral blame and responsibility;
(5) The social policy of preventing future harm (whether finding duty will tend to prevent future harm);
(6) The burden on the university and the larger community if duty is recognized;
(7) The availability of insurance.\textsuperscript{407}

The educational institution should “use reasonable care to prevent foreseeable risks.”\textsuperscript{408} By using the same balancing test to identify risks as a court will use in imposing a duty on the educational institution, the institution is insuring that it is satisfying its duty to its students at the same time it is designing the educational program.\textsuperscript{409} The program should undergo periodic review to insure that no new risks have developed either during the implementation of the program or by the passage of time.

Use of the facilitator model does not mean that the educational institution will not be sued by a student. Nor does it mean that there is no risk of injury to a student in the educational institution’s program.\textsuperscript{410} By using a facilitator model, an educational institution should be making conscious decisions as to what types of risks are appropriate and perhaps necessary to create the type of learning opportunities that

\textsuperscript{403} BICKEL & LAKE, supra note 20, at 195.
\textsuperscript{404} Id.
\textsuperscript{405} Id.
\textsuperscript{406} BICKEL & LAKE, supra note 20, at 193.
\textsuperscript{407} Compare Patterson, 155 Cal. App. 4th at 828 (citing Rowland, 443 P.2d 561.); with BICKEL & LAKE, supra note 20, at 202.
\textsuperscript{408} BICKEL & LAKE, supra note 20, at 203.
\textsuperscript{409} In addition, the institutions records should be organized in a manner which allows the institution’s counsel to understand the steps taken to both identify and minimize risk, making it easier for counsel to defend the institution in the event of litigation.
\textsuperscript{410} The facilitator model allows for inherent risk. See BICKEL & LAKE, supra note 20, at 195.
students need to develop into mature, responsible, and productive citizens. The educational institution can decide what risks students should not be exposed to, what risks the institution is willing to insure against, and what risks students should insure against. By using a facilitator model, the educational institution knows and understands the risks and the duties imposed by those risks.

B. Facilitating the International Externship Opportunity

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

The mere fact that most of the externship program will occur in a foreign country does not alleviate the law school of its duty to its students or the placement site. Nor does it alleviate the requirement that the law school comply with the ABA Standards for the Accreditation of Law Schools. The law school’s international externship program will be shaped in part by the law school’s duty to its students to exercise reasonable care in the design and implementation of its curricular programs and by the ABA Standards which establish minimum criteria for the program.

1. The Community – The Students and The Placement Site

At first blush, it would seem that because law students are graduate students, the law school owes its students a lesser duty of care than the undergraduate institution owes to its students. This analysis is faulty. In those cases where an educational institution was deemed to owe the graduate student a lesser duty of care, the graduate student’s lower level degrees had provided the student with the basis of specialized knowledge as to the risks involved in the behavior that the student was engaging in. Law students do not come to the laboratory of legal practice with a standardized basis of knowledge. It has been recognized that the practice of law can be dangerous. Moreover, the practice of law in a foreign country includes the risks inherent in foreign travel, primarily the risk of the unknown. The risk of foreign travel is, however, a risk

411 See Bloss, 590 N.W. 2d 661.
412 See discussion supra Part II; see also BICKEL & LAKE, supra note 20, at 205 ("The boundaries of a campus are more elastic than geographical.").
413 A.B.A. STANDARDS, supra note 2, at 305 (governing study outside the classroom).
414 A.B.A. STANDARDS, supra note 2, at Preamble ("The Standards for Approval of Law Schools of the American Bar Association are . . . minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.").
415 See discussion supra Part I.A.1.a.
416 See Fu, 643 N.W.2d 659; see also Niles., 473 S.E.2d 173.
417 See Butler, supra note 22.
which makes life worth living.\textsuperscript{418} An international externship experience includes the types of risks inherent in the practice of law and inherent in foreign travel. Because these are the types of experiences which assist students to mature from student to practitioner, these risks are reasonable. Nevertheless, because law students do not usually have specialized knowledge of risk in the workplace or risk in foreign travel, a law school should presume that it owes its students a duty of care similar to the duty an undergraduate institution owes its students.

This duty of care is not overly burdensome; it merely requires that the law school, particularly the faculty designing the program, do what it teaches it students they will do in the practice of law – identify risks and then create risk avoidance strategies. This is exactly what the facilitator model requires. Thus by using the facilitator model to design the international externship program, the law school is modeling good lawyering skills for its students.\textsuperscript{419}

The law school also owes a duty to the externship site.\textsuperscript{420} Unlike a domestic externship, it is unlikely that the foreign placement site will have an opportunity to meet and interview a student prior to the student’s placement at the site. The placement site will be relying upon the law school to screen student applicants such that only those students that meet the requirements of the program will be placed at the externship site. Such reliance by the placement site on the law school is reasonable.

2. The Duty

Law schools owe students participating in the school’s curricular programs a duty of care.\textsuperscript{421} Because students earn academic credit for their participation in international externship programs,\textsuperscript{422} such programs are curricular programs and thus, law schools owe their students a duty of care in the design and implementation of the program.\textsuperscript{423} The extent of that duty is determined by the application of ordinary tort principles.\textsuperscript{424} In determining the nature of the duty, the law school’s educational goals in creating an international externship opportunity for its student\textsuperscript{425} should be balanced against the

\textsuperscript{418} Bickel & Lake, supra note 20, at 195.
\textsuperscript{419} Stuckey, supra note 2, at 129.
\textsuperscript{420} See discussion supra Part II.
\textsuperscript{421} See discussion supra Part I.
\textsuperscript{422} A.B.A. Standards, supra note 2, at 305 (“A law school may grant credit toward the J.D. degree for courses or a program that permits or requires student participation in studies or activities away from or outside the law school...”).
\textsuperscript{423} See Brigham Young Univ., 118 F.2d 836.
\textsuperscript{424} See Hawkins, 2008 WL 2952888.
\textsuperscript{425} For an example of an international externship program’s goals see Micronesian Externship Program, supra note 15 (“The Micronesia Externship Program aims to provide students experience in the following areas: a. working in an international environment; b. understanding the role of the United States in the development of the law of other nations; c. understanding how the law develops in various communities; d. understanding cultural differences and how those differences help to shape the law; e. understanding alternative dispute resolution models as they relate to cultural needs and understandings; and f. understanding the intersection between local culture and tradition and the law.”)
burden of imposing the duty, 426 including whether the imposition of the duty would defeat the educational aspects of the program. 427 In determining whether the law school has met its duty of care, a court will look to the industry standard, which for law schools is compliance with the ABA Standards. 428

The law school does not need to eliminate all risk from its externship program. 429 The law school may knowingly include risks if those risks are the type of risk which will assist the student to accept responsibility, to develop leadership skills, and to make the transition from law student to global practitioner of law. 430 Inclusion of such risks will only be deemed reasonable if (1) the risks further the educational goals of the program, 431 (2) the program informs the students of the risk, (3) the program provides the student with strategies that will assist the student to avoid the risk, and (4) the risk is no greater than the risk the student would be exposed to if they were in the foreign country as a tourist. 432 By providing the student with the knowledge of the risk and the training to address the risk in a safe manner, the law school is acting as a facilitator. If the risk to the student is no greater that if the student were a tourist, the law school has not voluntarily assumed a duty, because there is no increased level of risk. Moreover, because public policy requires that students and non-students be provided with the same legal protections, 433 educational institutions should not be held to a higher standard than other businesses; students and tourists should be treated the same.

Because the law school has superior knowledge regarding its students and can prevent the student from participating in the international externship program, 434 the law school owes a duty of care to the placement site. The duty is only triggered if the law school has knowledge that the student is dangerous. Because not all law schools provide the same types of services for their students, 435 a law school may not have the

426 See Patterson, 155 Cal. App. 4th at 832-33.
427 See Bloss, 590 N.W.2d 661 (court refused to impose duty which would defeat “cultural immersion” aspect of program).
429 See Bloss, 590 N.W.2d 661.
431 A.B.A. STANDARDS, supra note 2, at 304(e)(1) (“A field placement program shall include ... a clear statement of the goals and methods, and a demonstrated relationship between the goals and methods to the program in operation”); see also A.B.A. Standards, supra note 2, Interpretation 305-4(a) (“A law school that has a field placement program shall develop, publish and communicate to students and field instructors a statement that describes the educational objectives of the program.”).
432 See Bloss, 590 N.W.2d 661; see also discussion supra Part I.C.3; A.B.A. CRITERIA, supra note 427, at § VI.C.; A.B.A. STANDARDS, supra note 2, at 307.
433 See, e.g., Beach, 726 P.2d at 418.
434 See A.B.A. CRITERIA, supra note 427, at § IV.
435 Usually an independent, stand alone law school does not provide the same types of services to its students as a university-affiliated law school.
type of knowledge that will trigger the duty. Although a law school can not knowingly
ignore information,\textsuperscript{436} it does not have a duty to investigate the student beyond
the information that the law school already knows or should know. The faculty member
responsible for accepting students into the program should seek information from the
associate dean for academic affairs, the dean of students, and the registrar regarding
whether the student is in good standing, whether there are any disciplinary charges
pending, and whether there is any other information in the student’s file that indicates
the student is dangerous. If the law school accepts students from other schools into its
international externship program, the law school should request that the same type of
information be provided by the visiting student’s home institution.\textsuperscript{437} The law school has
a duty to exercise reasonable care to not place a student that the school knows is
dangerous at the placement site. At a minimum, reasonable care requires checking the
student’s file.

\textbf{3. Foreseeability}

A law school is not responsible for all injuries which arise within the context of the
international externship program. The law school has a duty of care to protect students
from the reasonably foreseeable risk of injury. In determining foreseeability, focus
should be on knowledge and control. Knowledge in the context of foreseeability is not
just what the law school knows, but also what a reasonable faculty member,
administrator, or law school should have known. In order for a law school to have
control, the law school must have the ability to take action that will manage the
unreasonable risk. A risk is unreasonable if the student’s exposure to the risk does not
further curricular goals. A law school can manage risk by (1) informing students about
the risk and how to appropriately address the risk, (2) reducing the amount of harm
which can be caused by the risk, or (3) eliminating the risk.\textsuperscript{438} Because most of the
risks that will arise in the context of an international externship program will occur in the
foreign country, the law school will not always be in control.

The law school cannot just ignore risks which it knows or should know about. At
a minimum, the law school must provide the student with the knowledge that the student
needs in order to take action to protect themself.\textsuperscript{439} In identifying and informing
students about the risks of the international externship program, law schools will be held
to industry standards. The industry standard is that standard which is provided by the
ABA and requires that a faculty member must supervise the program,\textsuperscript{440} must train,
evaluate, and communicate with the supervising attorney at the placement site,\textsuperscript{441} and
periodically conduct “on-site visits or their equivalent”.\textsuperscript{442} Implicit in the supervision
requirement is communication with the student while the student is at the placement

\textsuperscript{436} See Schieszler, 236 F. Supp. 2d 622.
\textsuperscript{437} See A.B.A. \textit{CRITERIA}, supra note 427, at § IV.C.
\textsuperscript{438} See Bloss, 590 N.W.2d 661.
\textsuperscript{439} \textit{RESTAMENT (THIRD) OF TORTS} § 42 cmt.f (2005).
\textsuperscript{440} See A.B.A. \textit{STANDARDS}, supra note 2, at 305(c).
\textsuperscript{441} Id. at 305 (e)(4).
\textsuperscript{442} Id. at 305(e)(5)
Although the primary purpose of the site visit and communication with the supervising attorney will be to insure the educational component of the externship program, a law school faculty member cannot ignore obvious indicators that there is a foreseeable risk of harm to the student. If from the faculty member’s contact with the placement site, the faculty member can or should be able to identify reasonably foreseeable risks to the student, then the law school must act to address the risk such that the likelihood of harm to the student is minimized. Industry standards, which require site visits and contact with both the supervising attorney and the student, provide the law school with sufficient opportunity to identify risks of foreseeable harm to the student. Failure to follow industry standard will likely be deemed to be a breach of the law school’s duty of care. Moreover, failure to minimize unreasonable risk which was or should have been identified when the law school followed industry standards will also likely be deemed to be a breach of the law school’s duty of care.

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

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

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443 Id.
444 See Butler, supra note 22.
446 See Brigham Young Univ., 118 F.2d 836.
447 A.B.A. CRITERIA, supra note 427, at § VI.C.1.
448 Id. at § VI.C.2.
449 Id. at §§ VI.C.1.b. & 2.b.
then a prudent law school should not place law students in volunteer positions in that
country.\footnote{\textsuperscript{451} Atlanta’s John Marshall Law School will not place students on islands where the U.S. Peace Corps will not place female volunteers.}

The law school exercises the ultimate control in that it chooses the country, approves the site, and is involved in placing the student at the site.\footnote{\textsuperscript{452} A.B.A. CRITERIA, \textit{supra} note 427, at § IV.A.} A law school acting as a facilitator and following industry standards will exercise more control in an international externship program, because there is more risk, than it may exercise in a domestic externship program. The law school is, however, not required to control all aspects of the program. Although the law school should take a proactive approach in choosing the country and pre-screening placement sites, the law school can design the program such that the student can apply to more than one of the pre-approved placement sites.\footnote{\textsuperscript{453} Students applying to the Micronesian Externship Program are allowed to choose from a list of 22 approved placement sites. \textit{See MICRONESIAN EXTERNSHIP PROGRAM APPLICATION}, \url{http://www.johnmarshall.edu/academics/Micronesian01.php} (last visited on Aug. 13, 2009).} Likewise, if more than one student applies to the same placement site, the site can be given the opportunity to choose who will receive the offer.\footnote{\textsuperscript{454} Placement sites participating in the Micronesian Externship Program receive the application materials of all students who applied for that site. The placement site makes the final decision as to which student will receive the offer. \textit{Id.}} The goal of the law school as facilitator is not to micro-manage the student’s international externship experience, but to provide the student with options which fulfill the educational goals of program and where risk can be managed at an acceptable level.

4. Special Problems

Although there are risks inherent in any international program, international externship programs create fewer risks for educational institutions, than do study abroad programs. In an international externship program, unlike a study abroad program, the law school does not hold classes and does not provide housing.\footnote{\textsuperscript{455} See A.B.A. CRITERIA, \textit{supra} note 427, at §§ IV & V.} Therefore, the types of risks which open a law school to the imposition of a duty under the “special relationship” doctrine such as business-invitee, premises owner, or landlord tenant theories should not be applicable to an externship program.

a. Travel

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

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

b. Housing

Unlike study abroad programs, law schools do not provide housing for students participating in an externship program. But housing is necessary in order for the student to participate in the externship program. Both the law school and the student are usually unfamiliar with the best and safest housing alternatives for the student. Although students can sometimes locate housing using internet resources, because of the student’s lack of knowledge, there is still a risk that the student will not identify safe and appropriate housing.

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

c. Medical Treatment

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

When designing the externship program, especially if placement sites are located in developing countries, the law school should research the medical care available and provide this information to students. Students should be informed of the practice of local or “indigenous” medicine and the dangers, if any, of participating in such healthcare practices. Students with special healthcare needs should be informed to

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457 *Id.* Appropriate housing is defined in the Externship Agreement as “a furnished studio apartment or its equivalent in a secure area of the island.” Safe housing “means the housing has functioning windows and doors with locks and is not located in a known high crime area.” The student is responsible for paying for the housing.
458 *Compare A.B.A. Criteria, supra* note 427, at § II (requiring that at least one tenure track faculty member be present on-site “for the entire duration of the program”); with *A.B.A. Standards, supra* note 2, at 305(e)(5) (requires “periodic on-site visits or their equivalent by a faculty member”).
461 Students participating in the Micronesian Externship Program are informed that the practice of “local” medicine is still prevalent on most islands, that most of the “local” medicine has not been subject to any scientific testing, and has not been FDA approved. Students are also
bring their own medication with them, as they might not be able to fill prescriptions in the foreign country. All students should be provided with information regarding the Center for Disease Control and Prevention’s recommended vaccinations and health warnings. All students should be required to obtain health insurance and evacuation insurance.

d. Extra-curricular Activities

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

e. Acts by Employees of the Placement Site

As a curricular program, the externship program is governed by the law school’s policies and by the federal civil rights laws. Thus, the law school’s non-discrimination policy, its harassment policy, and its disabilities policy apply to the subjects in the Micronesian Program are also encouraged to bring any over the counter medication which they think they might need as these products are not always available on-island. Any such medication should be transported in its original, un-opened packaging. Center for Disease Control and Prevention available at http://www.cdc.gov (last visited on Aug. 21, 2009)

462 See Hoye, supra note 14; see also MICRONESIAN EXTERNSHIP PROGRAM, supra note 15 (insurance information).
463 See discussion supra Part I.A.1.b.
466 See discussion supra Part I.A.1.b.
program. The law school must communicate these policies to the placement site, provide the placement site with copies of the policy and copies of the applicable laws, and should obtain the placement sites agreement to abide by the policy.

f. Acts by the Student at the Placement Site

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

As discussed in more detail above, if the law school has knowledge that the student is dangerous, the law school has a duty to inform the placement site of the danger and possibly to remove the student from the placement site.

g. Cultural Competency

Many of the risks which students may be exposed to may not be obvious, but may arise because of cultural differences. Although the law school may not be able to

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469 A.B.A. STANDARDS, supra note 2, at 305(e)(4).
470 Law school policies can be provided electronically.
471 Students participating in the Micronesian Externship Program sign an Agreement for Participation which provides as follows:

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

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

472 See discussion supra Part II.B.3.
473 Cultural competency means more than just knowing something about the country and the cultural of its people. Acquiring cultural competency requires that one acknowledge, identify, and deconstruct their own cultural assumptions; be aware of the manner in which cultural assumptions are present in non-verbal communication; and learn cultural awareness.
identify the specific harm, the risk that certain culturally inappropriate behavior may create a risk of harm to the student is reasonably foreseeable. A law school will only be able to assess the risks posed by cultural incompetence if the law school itself possesses cultural competence. A law school will possess cultural competence if a member of its faculty or staff has cultural competence. A law school should not consider offering an international externship opportunity in a community for which it does not have cultural competence.474

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

IV. Conclusion

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

Because international externship programs do not require classroom and library space or require the number of faculty and staff as do traditional study abroad programs, externship programs cost less. If designed well, international externship programs can also expose the law school to less risk of liability. The key to diminishing the risk to the law school is to insure that the faculty who design the program assess all reasonably foreseeable risk to the student or which could be caused by the student and take reasonable steps to reduce the risk. Because students participating in an international externship program are likely to have more direct contact with the local population, it is essential that the externship program is designed to impart knowledge of local customs and traditions and is designed to achieve cultural competency in the participating students.

International externship programs require students to completely immerse themselves in the foreign country’s professional and social culture. Unlike study abroad programs, externs are not tourists. Externs are performing legal work under the supervision of foreign attorneys – solving the real world problems of real world clients.

474 See A.B.A. CRITERIA, supra note 427, at § II.C.2. (“At least one member of the full-time faculty or on-site staff must . . . (b) be familiar with the country in which the program is offered.”).
International externship programs enrich the law school because they provide students the ability to move from domestic student to global practitioner of law. Students who participate in international externship programs are more likely to be able to competently practice law in a global economy upon graduation from law school.