

The Responsibility of Universities for their Students' Personal Safety

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Abstract

*This article considers the nature and scope of a university's duty, based on the university-student relationship, to protect its students from physical injury. Given the dearth of Australian case authorities on this issue, the United States experience is examined and applied to the Australian context. The suggestion is made that the recent High Court of Australia decision in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* provides the best approach to determining whether a university owes its student a duty of care, and whether it has breached that duty. The concluding section describes some measures which universities can implement so as to discharge their legal responsibility for their students' personal safety.*

Cases of students suing their university¹ for bodily injury caused by the university's negligence are a rarity in Australia. A likely explanation is the inherent nature of the university's scholarly activities which are not such as to create substantial risks of bodily injury at least in comparison with most commercial and industrial enterprises. To this may be added the fact that the normal student populations of our universities are "notoriously agile and resilient".² Although this trend is likely to continue, the ever increasing student numbers and extensions of campus grounds, coupled with shrinking university budgets and a growing consumerism mentality among students, make negligence suits brought by injured students against their universities a very real possibility. University administrators have therefore to be continually vigilant in managing their exposure to

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¹ The term "university" will be used in this article to cover all institutions of higher education including colleges of advanced education.

² Aiken RJ, "Legal Liabilities in Higher Education: Their Scope and Management" (1976) 3 *Journal of College and University Law* 5, p 132 explaining why university administrators in the United States have not encountered unduly difficult problems in protecting themselves against claims by students for personal injury.

such liability. In order to do so, however, these administrators must have a clear picture of the nature and extent of their legal duty of care towards their students. The ensuing discussion seeks to provide such a picture.

Given the dearth of Australian cases involving students suing their universities in negligence, resort may be had to the United States which has a sizeable number of decisions and commentaries on the issue.³ As will become evident, the law of negligence in the United States shares many of the general principles of the Australian law. It will also be shown that the latest development in the United States sits well with a recent High Court of Australia decision⁴ involving a set of circumstances comparable to those creating a duty of care based on the special relationship between universities and their students.

For students to recover from a university under the tort of negligence, they must prove four basic elements, namely, that the university owed them a duty of care; the university breached that duty; the student suffered non-remote damage; and the breach caused the damage. The United States' experience suggests that the greatest obstacle for student plaintiffs has been establishing the existence of a duty of care owed by the university. Following this lead, this article will mainly concentrate on the establishment of a duty of care based on the special relationship between universities and their students. There will also be a discussion of the breach of duty with a view to showing how it is closely connected with the duty question. In the final section, some suggestions will be made concerning the policy and measures which universities should implement in order to avoid tortious liability.

I. The University-Student Relationship

Whether and to what extent a university owes a duty of care to its students for their personal safety depends on the special nature of the university-student relationship. Over a span of twenty years, the

³ A search for English and Canadian case authorities in various data bases yielded a few cases involving the university's duty of care towards their students based on the relationship between occupier and invitee; there were no cases where the duty was based on the university-student relationship as such. See also the leading English text by Farrington DJ, *The Law of Higher Education*, London, Butterworths, 2nd ed, 1998.

⁴ *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164.

United States courts have twice altered their view of the relationship.⁵ Commencing with a duty created by the doctrine of *loco parentis*, there followed a period when the courts refused to recognise a duty due to the demise of that doctrine. This “no-duty” stance has most recently been replaced by a reinstatement of a duty based on the inter-related concepts of assumption of responsibility and reliance. A brief description of these changes will contribute to our understanding of the special relationship existing between the university and its students both in the United States and Australia.

Until the 1960s, American universities were regarded as substitutes for parental authority over their students. Under the doctrine of *loco parentis*, universities exercised a great degree of control over both the moral and physical welfare of their students.⁶ Corresponding with this high level of control, the courts imposed on the universities a legal duty to protect the morals and personal safety of their students. In the late 1960s, student rights began to grow rapidly on university campuses throughout the United States, fuelled by the Vietnam War and the civil rights movement. Combined with the lowering of the voting age to eighteen in 1971, students were increasingly seen by the community as no longer needing “parental-type” supervision once they were university-bound. From the late-1970s to 1990, the courts viewed the changed social attitudes concerning university students as bringing about the demise of the *loco parentis* doctrine.⁷ Consequently, they held that universities had no legal duty to protect their students from the actions of other students, third parties or, indeed, themselves. However, a landmark case⁸ in 1991 signalled that the “no-duty” rule was losing favour with the courts. In its place was an increased judicial willingness to impose a duty of care on universities in certain circumstances.

⁵ For a good summary of the United States developments, see MacLachlan J, “Dangerous Traditions: Hazing Rituals on Campus and University Liability” (2000) 26 *Journal of College and University Law* 511.

⁶ Literally meaning “in the place of the parent”, the doctrine originated in 18th century English law to legally protect a teacher who practised corporal punishment for pupil misconduct both inside and outside of school: see Zickel P and Richner H, “Is the ‘In Loco Parentis’ Doctrine Dead?” (1986) 15 *Journal of Law and Education* 271, p 273.

⁷ *Bradshaw v Rawlings* (1979) 612 F 2d 135 (3d Cir.) is credited with being the case which ushered out the doctrine.

⁸ *Furek v University of Delaware* (1991) 594 A 2d 506.

Professors Robert Bickel and Peter Lake, two leading American legal commentators on higher education, have aptly described these judicial views of the university-student relationship in terms of the university as baby-sitter, as bystander and as facilitator respectively.⁹ In the following extract, they argue persuasively that, among the various images which have been suggested, the university as a facilitator most accurately describes the particular relationship between universities and their students:-

How best to generally describe, then, a relationship which is not childishly parental, but is multifaceted, voluntary and critical of mature development? ... “Babysitter” (or in *loco parentis*) is inappropriate in large part because we wish college students to grow and learn responsibility. It would be inappropriate to insulate our students – they must experience some interpersonal tension and risk because growth into full maturity requires this ...

Yet, the university is not a mere bystander: it actively involves itself in student life, and does and should set the tone of civility and responsible student conduct. Moreover, universities are not insurers. Students do not need indemnification from all risks; they do need guidance, support and facilitation. Landlord/tenant, business invitee images may be appropriate in a limited sense, but they do not accurately capture the student/university relationships ... The student-as-consumer image [mis-identifies the student/university relationship in terms of “consumption” which is often a very strange way to view the relationship¹⁰] ...

The university is both educator and facilitator (as opposed to educator and surrogate parent/disciplinarian). ... Each aspect of university interaction aims to educate and/or facilitate the education and development of the individuals who enter the university environment. ... As maturing young adults, college students seek to enter voluntarily into a community where they

⁹ Bickel R and Lake P, “The Emergence of New Paradigms in Student-University Relations: From ‘In Loco Parentis’ to Bystander to Facilitator” (1997) 23 *Journal of College and University Law* 755.

¹⁰ Bickel and Lake, note 9, p 785.

will be facilitated in learning, in recreation, indeed in many, if not all, aspects of life.¹¹

The same may be said of the relationship between Australian universities and their students. There was a time when the university stood in *loco parentis* over their students, attested to by legislation governing universities at the turn of the last century. This is evident in the preamble of the former *University and University Colleges Act 1900* (NSW) which reads:¹²

[I]t is expedient for the better advancement of religion and morality and the promotion of useful knowledge, to hold forth to all ... subjects ... an encouragement for pursuing a regular and liberal course of education; and to encourage and assist the establishment of colleges within the University of Sydney, in which colleges systematic religious instruction and domestic supervision, with efficient assistance in preparing for the University lectures and examinations, shall be provided for students of the University ...

This image of universities as “babysitter” was eroded considerably in Australia in the 1970s due to the rise in activism over student rights, coinciding with the anti-Vietnam war and anti-racism movements.¹³ Like the United States experience, the Commonwealth voting age was lowered in 1973 to eighteen years which was the age when most Australians commenced their university life. As to whether our universities were ever regarded as mere “bystanders” of their students’ personal safety is a matter of conjecture. The apparent absence of any negligence suits brought by students against their universities until the late 1990s suggests this to have been the case.¹⁴

¹¹ Bickel and Lake, note 9, pp 787-788.

¹² The entire Act has since been repealed and replaced by the *University of Sydney Act 1989* (NSW).

¹³ Reflecting the social changes which occurred during this period, the *University of Sydney Act 1989* (NSW) does not include the moral advancement of students among the University’s functions (s 6).

¹⁴ The only Australian case where a student sued his university in negligence based on the university-student relationship appears to have been *Waters v The University of New England* CA 40099/96 [1998] NSWSC 248 (unreported, 9 June 1998, Sheller, Powell and Stein JJA), to be discussed below.

Be that as it may, the current nature of university-student relations in Australia strongly fits into the image of the university as “facilitator” of the student’s education, broadly defined. In discharging their primary function of “fostering of intellectual development through an academic curriculum”, our universities are invariably engaged in aspects of student life in areas of security, housing, food and extra-curricular activities, all of which are, to some extent, “university guided”.¹⁵

It may be trite to observe that an unsafe environment is not a learning environment. Accordingly, as institutions of higher learning and in respect of university-related activities, universities need to exercise reasonable care to protect their students from personal injury caused by students to themselves, or by other students or by third parties. That said, however, the protection expected from universities is not the same as that of a surrogate parent. The law needs to balance, on the one hand, the autonomy of students as mature adults who can look after themselves and, on the other, the fact that many of these students are still in the process of growing into maturity and learning from life’s experiences. The method by which the law strikes this balance is the subject of the next section.

II. Answering the Duty Question

When determining whether a university owes a duty of care to protect their students from injury, the United States courts presently rely on the principle encapsulated in s 323 of the American Law Institute’s *Restatement (Second) of Torts*, the relevant part of which reads:-¹⁶

One who undertakes, gratuitously or for consideration, to render services to another which he should recognise as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from

¹⁵ *Furek v University of Delaware* (1991) 594 A 2d 506 at 516 (Del).

¹⁶ American Law Institute, *Restatement (Second) of Torts* (ALI Publishers, St Paul, Minnesota, 1965). Part (a) of the section states that the person undertaking to render services for the protection of another from physical harm is liable to the other if her or his failure to exercise reasonable care to perform her or his undertaking “increases the risk of such harm”. The cases show that this consideration is often subsumed under the issue of whether the defendant university had assumed the responsibility for the physical safety of its students.

his failure to exercise reasonable care to perform his undertaking, if ...

(b) the harm is suffered because of the other's reliance upon the undertaking.

The Supreme Court of Delaware case of *Furek v University of Delaware* is a good illustration of the application of this principle to the university-student setting.¹⁷ The plaintiff was a student of the defendant university who had participated in a hazing¹⁸ ritual as part of his pledge to a university fraternity. During the course of the ritual, another student had poured oven cleaner over the plaintiff's head resulting in burns and permanent scarring. Prior to the incident, the university had been notified of instances where students had been injured by hazing, and had issued a warning against hazing and threatened to revoke the charter of any fraternity engaging in such activities. The plaintiff sued the university for negligently failing to take more effective measures to stop hazing on its campus. In holding that the university owed the plaintiff a duty of care, the court emphasised the unique quality of the university-student relationship based on the "situation created by the concentration of young people on a college campus and the ability of the university to protect its students."¹⁹ The court expressly referred to s 323 of the *Restatement (Second) of Torts* and ruled that the university's policy against hazing, like its overall commitment to provide security on campus, constituted an assumed undertaking which the university was dutybound to carry out with reasonable care.²⁰

The court in *Furek* identified certain factors as influential in establishing the university's duty of care.²¹ First and foremost, the

¹⁷ (1991) 594 A 2d 506. For another good example of a case which relied on s 323 of the *Restatement*, see *Kleinknecht v Gettysburg College* (1993) 989 F 2d 1360 (3d Cir.) and discussed in Shea JF, "Duty of Care Owed to University Athletes in Light of *Kleinknecht*" (1995) 21 *Journal of College and University Law* 591.

¹⁸ "Hazing" involves subjecting new students to harassment, abuse and ridiculous tricks in order to gain acceptance into a university fraternity.

¹⁹ (1991) 594 A 2d 506 at 518-519.

²⁰ (1991) 594 A 2d 506 at 520.

²¹ In its judgment, the court relied heavily on the Massachusetts Supreme Court decision in *Mullins v Pine Manor College* (1983) 449 NE 2d 331 where the university was held liable for an attack on a female student by a non-student assailant.

duty arose because the university knew or ought to have known of the risk of injury to the student; this concept of knowledge is traditionally discussed in terms of the reasonable foreseeability of the student's injury.²² Second, it was firmly the consensus of the university community that the university had an obligation to protect students from criminal acts of other students or third parties. Third, the university stood in a better position than students to take effective controlling measures to eradicate hazing. And finally, the students themselves, their parents and the wider community had a reasonable expectation that the university would exercise reasonable care to protect its resident students from foreseeable harm.²³ It is also noteworthy that the court in *Furek* ruled against the university for its failure or omission (as opposed to positive conduct) to protect the plaintiff.²⁴

As for the judicial approach to the duty question in Australia, there is a dearth of case authority concerning the duty of care arising from the university-student relationship. The only case appears to be the New South Wales Court of Appeal decision in *Waters v The University of New England*.²⁵ The plaintiff was a senior student and office bearer of a residential college for students run by the defendant university. He had helped to organise a dinner and dance at the college for the residents alone. During the function, some uninvited persons entered the college and the plaintiff approached them and asked them to leave. The group left and the plaintiff followed them around the side of the building where he was unexpectedly attacked by one of the group. The plaintiff contended that the university was negligent in failing to provide professional security guards at the function. The Court of Appeal agreed with the trial judge that the university did not owe the plaintiff a duty of care on the ground that the assault was not

²² See also 57 AM JUR 2D *Negligence* (Bancroft-Whitney, San Francisco, 1936), para 54 which states: "One cannot be held responsible on the theory of negligence for an injury from an act or omission on his part unless it appears that he had knowledge or reasonably was chargeable with knowledge that the act or omission involved danger to another."

²³ *Mullins v Pine Manor College* (1983) 449 NE 2d 331 at 335-336.

²⁴ For an explanation of how the now discredited "bystander" image of universities fostered the view that they owed no duty of care to their students in respect of omissions, see Bickel and Lake, note 9, p 781.

²⁵ CA 40099/96, [1998] NSWSC 248 (unreported, 9 June 1998, Sheller, Powell and Stein JJA).

reasonably foreseeable.²⁶ The appellate court also endorsed the following conclusion of the trial judge:-

Whilst I accept that the University is bound by a general duty of care towards its students to protect them from a risk of injury of which it is aware or ought to be aware and that the Master [that is, the principal] of the college was primarily responsible for the welfare of the students in the college, I am not persuaded either that the Master was guilty of negligence in allowing this particular function to proceed without the provision of paid security staff nor that there was an independent duty of care imposed on the University.²⁷

Regrettably, neither the trial judge nor the appellate court bothered to explain the basis for the university's "general duty" or the difference between that duty and an "independent duty".²⁸ Also, while the court was entirely correct to have rejected the existence of a duty of care based on the reasonable foresight test, it could have usefully proceeded to briefly identify the other factors which might be relevant in determining a university's duty to its students.

Since *Waters* does not adequately explain the judicial approach to be taken, other Australian case authorities dealing with analogous duty relationships need to be considered. The group of cases imposing a duty of care based on supervision and control immediately comes to mind.²⁹ These case authorities begin with the general rule that there is no legal duty on one person to control the actions of another to prevent her or him from causing injury to other people. But the cases

²⁶ CA 40099/96, [1998] NSWSC 248 at 7 per Stein JA, Sheller and Powell JJA concurring.

²⁷ CA 40099/96, [1998] NSWSC 248 at 6.

²⁸ It may be that the trial judge had based the general duty on the occupier/invitee relationship existing between the university and the student as a resident of the college, in which case that duty did not arise from the university/student relationship *per se*. As for the "independent duty", the judge may have been considering a non-delegable duty which might be owed by the university as opposed to its liability based on vicarious liability: see *Commonwealth v Introvigne* (1982) 150 CLR 258 at 271 per Mason J.

²⁹ See Balkin, RP and Davis, JLR, *Law of Torts*, 2nd ed, Butterworths, Sydney, 1996, pp 213-217; Fleming JG, *The Law of Torts* (Law Book Co, Sydney, 9th ed, 1998), pp 168-172; Trindade F and Cane P, *The Law of Torts in Australia*, 3rd ed, Oxford University Press, Melbourne, 1999, pp 409-410.

go on to recognise that there may be exceptions to this rule when the relationship between the defendant and another person is such as to impose a duty to control that person's actions. For instance, it has been held that parents³⁰ and school authorities³¹ owe a duty to control young children, and so do prison authorities³² in respect of their inmates. On closer examination, however, it is evident that this group of cases is not sufficiently analogous to cases involving universities and their students for the simple reason that universities do not have anywhere close to the same level of control over their students as parents, school and prison authorities do over their charges. The demise of the *loco parentis* doctrine in the United States (and arguably, in Australia too) in respect of the university-student relationship supports this proposition.

Another group of cases imposing a duty of care based on occupation and entry of premises also springs to mind.³³ Clearly, a university is an occupier of the buildings, structures and grounds of its campus based on the test prescribed by the common law governing this matter.³⁴ The test is whether the university has a sufficient degree of control over the premises such that it ought to realise that any failure of care on its part may result in physical injury to persons coming there. It is likewise clear that students are invitees of the university since they have come onto the campus for the benefit of the university.³⁵ The law imposes on the university, as occupier, a duty to take reasonable care to protect their students, as their invitees, from physical injury resulting from both the static condition of premises as

³⁰ *Smith v Leurs* (1945) 70 CLR 256; *Curmi v McLennan* [1994] 1 VR 513.

³¹ *Gewer v Downs* (197) 138 CLR 91; *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* [1996] Aust Torts Reports 81-399.

³² *Howard v Jervis* (1958) 98 CLR 177; *L v Commonwealth* (1976) 10 ALR 269.

³³ This used to be the tort of occupier's liability which was treated separately from the tort of negligence until it was subsumed under the latter tort by the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

³⁴ See *Wheat v E Lacon & Co Ltd* [1966] AC 552; *Northern Territory of Australia v Shoesmith* (1996) 91 LGERA 17.

³⁵ Although the High Court in *Australian Safeway Stores Pty Ltd* (1987) 162 CLR 479 held that the class of entrants (such as invitees, licensees, persons entering under contract and trespassers) no longer determined the content of the duty of care owed to any particular entrant, the court declared (at 488) that the content of duty "will vary with the circumstances of the plaintiff's entry upon the premises." For an identical development in certain United States jurisdictions, see *Poulin v Colby College* (1979) 402 A 2d 846 (Me); *Rowland v Christian* (1968) 69 Cal 2d 108 (Cal).

well as dangers arising out of activities conducted on those premises. While this category of duty may suitably describe some negligence actions brought by students against their universities,³⁶ the duty is not confined to students alone but covers anyone who is a visitor to the university. As such, it is distinguishable from the duty based on the university-student relationship. Another distinguishing feature is that the duty based on the occupier-invitee relationship requires the negligent incident to have occurred on the premises of the university. In contrast, the duty based on the university-student relationship is not so confined and could cover incidents happening outside the university campus such as, say, at the venue of a field trip. Yet another distinguishing feature is that the occupier-invitee relationship confines the duty of care in relation to the physical condition of the premises and activities conducted on the premises which the occupier had control over. This requirement of control by the university is not an essential feature of the duty created by the university-student relationship.³⁷ For instance, as will be seen below, the special relationship which a university has with its students may create a duty of care to protect them from criminal assaults even though the university may not have had any control over the assailants. We need therefore to look elsewhere for an Australian case authority which fits more closely with the university-student relationship.

The recent High Court of Australia case of *Modbury Triangle Shopping Centre Pty Ltd v Anzil*³⁸ (hereinafter called “Anzil”) performs this task admirably. The plaintiff was employed by a video

³⁶ For a discussion of United States cases of this nature, see Dumas DM, “Defective Buildings and Grounds – A Dangerous Condition for Colleges and Universities” (1991) 17 *Journal of College and University Law* 351, pp 353-354. For an English case, see *Evelyn Louise Lewis v The University of Bristol* [1999] EWCA Civ 1569; <<http://www.bailii.org/ew/cases/EWCA/Civ/1999/1569.html>>

³⁷ So in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164 at para 29, Gleeson CJ said: “The control and knowledge which form the basis of an occupier’s liability in relation to the physical state or condition of land was absent when one considers the possibility of criminal behaviour on the land by a stranger.”

As will be pointed out below, the ability of a university to control the condition of its premises and activities conducted on it, may help to decide that it owed its students a duty of care. However, control is only one of several factors which the court may take into account.

³⁸ (2000) 75 ALJR 164. For a critical evaluation of this decision, see Dietrich J, “Liability in negligence for harm resulting from third parties’ criminal acts: *Modbury Triangle Shopping Centre Pty Ltd v Anzil*” (2001) 9 *Torts Law Journal* 152.

store situated in a shopping centre occupied by the defendant company. One evening after work, the plaintiff was attacked by some unknown assailants at the car park of the shopping centre. When the assault occurred, the car park was unlit which was in keeping with the defendant's usual practice of turning the lights off before the closing time of the video store. There was also evidence of recent criminal activity near the video store including the attempted break-in of the automatic teller machine situated close by. The High Court held that the defendant did not owe the plaintiff a duty of care in the circumstances.³⁹ Four of the five judges framed their decisions in terms of whether the defendant had undertaken to protect the plaintiff against criminal assaults by third parties, and whether it was reasonable for the plaintiff to have relied on such protection.⁴⁰ One of these judges, Gleeson CJ, regarded the following comment from an earlier High Court decision as directly applicable to the facts in *Anzil*:

In these situations the special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property *as to assume a particular responsibility for his or its safety*, in circumstances where the person affected might reasonably expect that due care will be exercised ... (Italics added).⁴¹

Gleeson CJ had earlier concluded that the defendant had no control over the behaviour of the assailants and no knowledge or forewarning of what they planned to do.⁴² This explains why he only regarded the

³⁹ By a majority, namely, Gleeson CJ, Gaudron, Hayne and Callinan JJ; with Kirby J dissenting.

⁴⁰ (2000) 75 ALJR 164 at pars 22-24 per Gleeson CJ; at pars 42-43 per Gaudron J; at para 91 per Kirby J; and at para 147 per Callinan J. In contrast, Hayne J, at pars. 113-114, based his decision on whether the defendant had the capacity to control the conduct of the assailants, holding that it did not and therefore owed no duty of care to protect the plaintiff from the assault. Gaudron J at pars 42-43, also agreed with Hayne J's analysis but, importantly, distinguished cases where the duty was based on control from those where it was based on an assumption of responsibility and reliance.

⁴¹ *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687 per Mason J and cited in *Anzil* (2000) 75 ALJR 164 at para 24 per Gleeson CJ who also added the italics.

⁴² (2000) 75 ALJR 164 at para 19.

“assumption of responsibility” portion of the above quoted passage as relevant to the case before him, ignoring the part on “control”. In this connection, Gleeson CJ observed that, while the defendant occupied the car park and controlled the lights in it including deciding when they would be turned on and off, the relevant question was whether the defendant assumed the responsibility to protect the plaintiff from attack by third parties.⁴³ Gleeson CJ went on to distinguish between the defendant’s “capacity” to decide when, and to what extent, the car park would be lit at night, and the defendant’s “assumption of responsibility” to protect people who might lawfully be in the car park against attack by criminals.⁴⁴ Ultimately, he held that the defendant did not owe the plaintiff a duty of care to protect him from such an attack because there was no evidence that the defendant had assumed this responsibility.⁴⁵ Specifically, the defendant’s responsibility for illuminating the car park did not amount to such an assumption. Furthermore, the plaintiff would ordinarily be expected to rely on his employer, a tenant of the shopping centre, to make arrangements for his after-hours security.⁴⁶

At this juncture, two aspects of the concept of assumption of responsibility require elaboration. The first is that the concept can be based on an actual or constructive undertaking by the defendant. An actual assumption of responsibility occurs where the defendant knowingly undertook the responsibility, while a constructive one occurs where the defendant ought, in law, to have undertaken the responsibility.⁴⁷ Whether there was an assumption of responsibility of either form depends on the particular facts and circumstances of the case. Secondly, the concepts of assumption of responsibility and reasonable reliance are two sides of the same coin. They operate together to create a special relationship upon which the law not only establishes a duty of care but imposes liability for omitting to discharge that duty.⁴⁸

⁴³ (2000) 75 ALJR 164 para 23.

⁴⁴ (2000) 75 ALJR 164 at para 25.

⁴⁵ (2000) 75 ALJR 164 at para 25.

⁴⁶ (2000) 75 ALJR 164 at para 25.

⁴⁷ See *Hill v Van Erp* (1997) 188 CLR 159 at 184-185 per Dawson J and agreed to by Toohey J.

⁴⁸ Cf. the main text accompanying note 24.

Although *Anzil* did not involve a university being sued by its student, the facts are sufficiently similar to university-student cases such as *Furek* and *Waters*, discussed earlier, to merit close attention. Like *Furek* and *Waters*, the defendant in *Anzil* did not have the power to control the persons who injured the plaintiff. Like *Furek* and *Waters* too, the fact that the defendant in *Anzil* had control over the state or physical condition of the premises was not held to be decisive – it might have been so had the duty been premised on the occupier-entrant relationship but that was not the basis on which the duty was argued in these three cases.⁴⁹ Instead, the factors which were held to be relevant in deciding the duty question were whether the danger was reasonably foreseeable by the defendant; whether the defendant had taken steps which showed that it had assumed the responsibility to protect the plaintiff from that danger; and whether it was reasonable for the plaintiff to have relied on such protection. In sum, the approach taken by Gleeson CJ in *Anzil* to answering the duty question corresponds entirely with the principle contained in s 323 of the *Restatement (Second) of Torts*.⁵⁰

III. Selected Instances Involving the Duty Question

The preceding discussion has suggested that the duty of care arising out of the university-student relationship is best determined by applying the inter-connected concepts of assumption of responsibility and reliance. The validity of this claim can be tested by applying the approach to some real life cases. These cases would, of necessity, have to be primarily from the United States. As will be seen, however, the facts and circumstances of the cases could readily have occurred in Australia.

Four types of factual situations have been selected for analysis here: cases involving criminal assaults, cases involving alcohol-related activities; cases of injuries during study or field trips; and cases involving injuries sustained during some recreational activity. The discussion of each of these situations will commence with a case

⁴⁹ Insofar as “control” is construed broadly in the sense of having the capacity to reduce the risk of harm being inflicted upon potential plaintiffs by third parties, such control is a relevant consideration in determining whether the defendant had assumed responsibility for providing risk protection.

⁵⁰ Reproduced in the main text accompanying note 16, especially s 323(b).

example taking the “no-duty” approach, followed by a case based on assumption of responsibility and reliance. One purpose of providing these contrasting cases is to document the major change in judicial thinking which has lately transpired in the United States. Another purpose is to show that the approach based on assumption of responsibility and reliance reflects much more accurately the university-student relationship than does the “no-duty” approach in answering the duty question.

Cases involving criminal assaults: The physical location and layout of many campuses, combined with the concentration of energetic young people, make assaults on students a not infrequent occurrence. The Illinois Appellate Court decision in *Rabel v Illinois Wesleyan University* is a good example of a case involving a criminal assault on a student where the “no-duty” approach was applied.⁵¹ The plaintiff, a student of the defendant university, was seriously injured after being abducted from her college dormitory by another student as part of a fraternity prank. In dismissing the plaintiff’s claim that the university owed her a duty to protect her against misconduct from another student, the court said:-

[W]e do not believe that the university, by its handbook, regulations or policies voluntarily assumed or placed itself in a custodial relationship with its students, for the purposes of imposing a duty to protect its students from the injury occasioned here ... It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others. Imposing such a duty of protection would place the university in the position of an insurer of the safety of its students.⁵²

The approach taken by the Delaware Supreme Court in *Furek*, discussed previously, stands in stark contrast to the above.⁵³ It will be recalled that the court had there held that the defendant university owed the plaintiff student a duty of care to protect him from the

⁵¹ (1987) 514 NE 2d 552. For another case example, see *Eiseman v State of New York* (1987) 70 NY 2d 175 and discussed in Kobasic DM, Smith ER and Zucker LB, “*Eiseman v State of New York: The Duty of a College to Protect its Students from Harm by Other Students Admitted under Special Programs*” (1988) 14 *Journal of College and University Law* 591.

⁵² (1987) 514 NE 2d 552 at 560-561.

⁵³ See the main text accompanying notes 17 *et seq.*

misconduct of another student performed during a hazing ritual. The court reached its decision after finding that there was evidence that the university had known of the hazing activities on its campus and had assumed responsibility to protect its students from injury caused by such activities. It also found that it was reasonable for students such as the plaintiff to have relied on the protection being afforded by the university.

The view was expressed earlier that the New South Wales Court of Appeal in *Waters* had failed to clearly spell out its approach to the duty question.⁵⁴ The judgment in that case would have been much improved had it invoked the concepts of assumption of responsibility and reliance. Under this approach, the court would first have to consider whether the university could have reasonably foreseen the criminal assault of the plaintiff by a third party. The evidence could have gone either way. On the one hand, there was no evidence of any warning or apprehension of problems with intruders at previous closed functions such as the one organised by the University college.⁵⁵ On the other hand, the court had noted that the student committee, of which the plaintiff was a member, was charged with supervising the function “including if necessary ensuring that intruders were excluded.”⁵⁶ Assuming the assault was reasonably foreseeable, the court would next have to decide whether the university had undertaken the responsibility of protecting those students attending the function from assault by intruders. The evidence was that the university had previously provided security personnel for open functions like the College ball but had never contemplated the same for closed functions.⁵⁷ This would have suggested that the university had not assumed the responsibility to provide the same level of protection at closed functions. Assuming, however, that the evidence supported a finding that the university had undertaken this responsibility, the court would finally have to consider whether the students attending the function could have reasonably relied on the university for protection against assaults by intruders. The evidence went against a finding of reliance because the organising committee had not requested the university to provide

⁵⁴ See the main text accompanying note 28.

⁵⁵ CA 40099/96 [1998] NSWSC 248 at p 7.

⁵⁶ CA 40099/96 [1998] NSWSC 248 at p 6.

⁵⁷ CA 40099/96 [1998] NSWSC 248 at p 6.

security nor had its members summoned the university's Yeoman despite being aware of university directions that the Yeoman be called in the event of intruders on campus.⁵⁸ All told, based on the approach involving the concepts of assumption of responsibility and reliance, the court in *Waters* was correct to have decided that the university did not owe the plaintiff a duty of care.

Cases involving alcohol related activities: The period spent at university is often the time when students learn to drink alcohol responsibly or irresponsibly as the case may be. The United States Court of Appeals decision in *Bradshaw v Rawlings* illustrates the “no-duty” judicial approach to negligence actions against universities brought by students who had suffered injuries arising from alcohol consumption.⁵⁹ The plaintiff had attended an off-campus class picnic. A faculty advisor had planned the picnic with the class officers and had co-signed a cheque used to purchase beer for the picnic. The widely advertised event attracted a large number of students but no faculty member was present at the picnic. The plaintiff was seriously injured on the way home when the car in which he was travelling lost control and hit a parked vehicle. The driver was a fellow student who had consumed too much beer at the picnic. The court refused to hold that the university owed the plaintiff a duty of care to supervise the consumption of alcohol at the picnic and to provide safe transportation of students from the venue. It did so on the ground that the students were adults who did not have a custodial relationship with their university.⁶⁰ The court reasoned that such a relationship would “place an impossible burden on the college.”⁶¹

The *Bradshaw* decision has been the subject of strong criticism.⁶² Since the faculty advisor had assisted with the planning of the picnic and was aware that alcohol would be consumed, the university was obliged to put in place a safe system of transportation from the venue. In saying this, the advisor was not expected to control the students as

⁵⁸ CA 40099/96 [1998] NSWSC 248 at pp 6-7.

⁵⁹ (1979) 612 F 2d 135 (3d Cir).

⁶⁰ (1979) 612 F 2d 135 (3d Cir) at 141.

⁶¹ (1979) 612 F 2d 135 (3d Cir) at 142.

⁶² Notably by the Supreme Court of Delaware in *Furek* (1991) 594 A 2d 506 at 517-518. See also Bickel RD and Lake PF, “Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of *In Loco Parentis* and the *Restatement (Second) of Torts*” (1994) 20 *Journal of College and University Law* 261 pp 273-276.

such but to reduce the risk of injury through drunk driving. The advisor or another staff member would have been in the best position to perform this task and students could reasonably have relied on this being done. As Professors Bickel and Lake have stated somewhat tersely:-

One who digs a ditch in a public way and fails to light it must answer to a jury for injuries occasioned to those who unwittingly fall into the unlit ditch; and so it is with funding, sanctioning, promoting and nearly consecrating a beer-soaked rite of passage, and then knowingly leaving it unsupervised on or off campus.⁶³

The concepts of assumption of responsibility and reliance underpinning the above critical evaluation of *Bradshaw* were influential in the Georgia Court of Appeals decision in *Kappa Sigma International Fraternity v Tootle*.⁶⁴ The plaintiff's estate sued the university fraternity when Tootle⁶⁵ was killed in a car accident caused by the negligence of Fair, a non-member who had become intoxicated by drinking beer at a fraternity party. Fair had consumed beer which he had brought to the party and no member of the fraternity had sold, offered or served him any alcoholic beverage. Furthermore, Fair had been driven home by his girlfriend and the accident occurred later when he was driving around town with his friends. The court held that the fraternity did not owe Tootle a duty of care because there was no evidence whatsoever that it had undertaken to prevent persons attending the party from subsequently driving while intoxicated. Merely because Fair had become intoxicated at a party organised by the fraternity was insufficient to establish such an undertaking.⁶⁶ The court held that it would have been otherwise had the fraternity sold or served alcohol to Fair when he had been in a noticeable state of intoxication, knowing that he might soon be driving a motor vehicle. In these circumstances, the fraternity would have been under a legal obligation to prevent Fair from driving while intoxicated and

⁶³ Bickel and Lake, note 62, p 287.

⁶⁴ (1996) 473 SE 2d 213.

⁶⁵ Tootle was not a student of the defendant fraternity but it would not have made any difference to the outcome of the case had he been one.

⁶⁶ (1996) 473 SE 2d 213 at 215.

roadusers, including Fair himself, could have reasonably relied on the fraternity to do so.⁶⁷

Cases occurring during study or field trips: Many university courses require students to undertake study or field trips which may expose them to increased physical danger on account of the physical location or activity involved. The Utah Supreme Court decision in *Beach v University of Utah* illustrates the “no-duty” judicial approach in these situations.⁶⁸ The plaintiff had gone on a university organised camping trip to an area marked by rocky crevasses. She had become intoxicated and, while returning to her tent after dark, became disoriented and fell down a cliff. The plaintiff contended that the faculty chaperone knew or had the capacity to know that she had the propensity to become disoriented after drinking since he had seen her asleep under some bushes after drinking wine on a previous camping trip. However, at the time of the second incident, the plaintiff had herself testified that she did not appear intoxicated or disoriented. The court relied on this evidence to conclude that the plaintiff’s situation was not distinguishable from that of the other students on the trip. As to whether the university owed a duty of care to the students, the court cited *Bradshaw* to hold that “[a] realistic assessment of the relationship between the parties precludes our finding that a special relationship existed between the University and Beach or other adult students.”⁶⁹ Accordingly, the court accepted the notion that university students are adults and as such do not require extra protection beyond that which they can provide for themselves.

An entirely different approach was taken by the New York Supreme Court in *Mintz v New York*.⁷⁰ The plaintiff was the administrator of the estate of Mintz, a student who had joined an overnight canoe trip organised by staff of the defendant university. Mintz drowned when a sudden storm overtook the party while they were paddling in a lake.

⁶⁷ (1996) 473 SE 2d 213, at 214, referring to applicable state legislation imposing liability to sellers or servers of alcohol in respect of injuries caused by drunk driving. Cf. *Zavala v Regents of the University of California* (1981) 125 Cal App 3d 646 where the plaintiff was a visitor at a university staff party who had seriously injured himself when he fell off a campus balcony. The university was held partly liable as its employees had continued to serve alcohol to the plaintiff after he was noticeably intoxicated.

⁶⁸ (1986) 726 P 2d 413.

⁶⁹ (1986) 726 P 2d 413 at 419.

⁷⁰ (1975) 362 NYS 2d 619 (App Div).

The court held that the university owed a duty to Mintz and the other students to exercise reasonable care in the planning and execution of the trip.⁷¹ This was because the staff members who had arranged the trip and accompanied the students were in the best position to reduce any reasonably foreseeable risk of injury of the kind which befell Mintz. It was also reasonable for the students to rely on the staff members to put in place measures which protected them from the reasonably foreseeable injury.⁷²

These same considerations should have been applied to the facts in *Beach*. Rather than invoke the dubious and simplistic assertion that students are adults who can be expected to protect themselves, the court in that case should have examined the evidence to see if the university chaperone had assumed responsibility to protect the plaintiff from the risk of injury of the kind which she suffered, and whether it was reasonable for the plaintiff to have relied on the chaperone for such protection.⁷³

Cases occurring during recreational activities: In keeping with their objective to provide students with a “well rounded” education and the creation of an environment conducive to learning, universities generally sponsor a wide variety of sporting and other recreational activities for the benefit of their students. Many of these activities carry the risk of physical injury to participants. The New York Court of Claims case of *Rubtchinsky v State University of New York at Albany*⁷⁴ exemplifies the “no-duty” stance taken by courts in cases of this nature. The plaintiff was a student who was injured in a “pushball” game which was part of the orientation programme of the defendant university. The plaintiff claimed that the university had a duty to supervise this activity, the failure of which had caused his injury. The court rejected the claim and went so far as to say that:-

[E]ven in professionally refereed games such as football, and pushball is in that category, there are isolated instances of violation such as clipping with resulting injury. It is entirely possible that even if the [university] had provided referees

⁷¹ (1975) 362 NYS 2d 619 at 620.

⁷² The court eventually held that the university had not breached its duty of care because the staff members had taken adequate safety precautions.

⁷³ For further critical commentary on *Beach*, see *Furek* (1991) 594 A 2d 506 at 517. See also Bickel and Lake, note 9, pp 781-782.

⁷⁴ (1965) 260 NYS 2d 256.

from its own staff that this incident might have occurred. We do not believe that the [university] should be made the insurer of the safety of those who participate in this type of sport.⁷⁵

Underpinning this comment is the view that university students are mature individuals who are able to care for themselves.⁷⁶ This is true to an extent but, in itself, is insufficient basis for holding that universities owe no duty of care in relation to these sporting and other extra-curricular activities of their students. It is submitted that the approach which more accurately reflects the factual reality of these situations is the one based on assumption of responsibility and reliance.

The United States Court of Appeals case of *Kleinknecht v Gettysburg College*⁷⁷ provides a good example of this approach. The plaintiffs, who were the parents of Drew Kleinknecht, sued the defendant college in negligence for the death of their son who suffered a fatal heart attack while participating in a college lacrosse practice. Drew had been recruited to play lacrosse for the College's inter-collegiate competition and his injury occurred while he was participating in a mandatory practice in preparation for the competition. The plaintiffs claimed that the university was under a duty of care to provide speedy and effective emergency medical service to Drew, the failure of which had substantially contributed to his death. The court agreed, after noting that there was evidence that the university had taken steps to render such a service to its student-athletes, and that it was reasonable for those athletes to rely on the university to discharge its undertaking.⁷⁸

Reverting to the case of *Rubtchinsky*, the court's finding that the university did not owe a duty of care may have been correct but for the wrong reason. Rather than relying on the simplistic notion of "no-duty" due to student maturity, the court could have found that, on the

⁷⁵ (1965) 260 NYS 2d 256, at 259-260.

⁷⁶ Thus, the court in *Rubtchinsky*, note 74 at 259, found that the plaintiff was "a self-reliant young man with a mind of his own" who had "voluntarily assumed the risks of the game."

⁷⁷ (1993) 989 F 2d 1360 (3d Cir). For a detailed analysis of this decision, see Shea JF, "Duty of Care Owed to University Athletes in Light of *Kleinknecht*" (1995) 21 *Journal of College and University Law* 591.

⁷⁸ (1993) 989 F 2d 1360 at 1368-1369.

evidence, the university had not assumed responsibility for supervising the game and that the participating students had not relied on such supervision to protect them from the risks of injury inherent in the particular sporting activity.

IV. Answering the Breach of Duty Question

The proposed approach to the duty question, based on a university's assumption of responsibility and students' reliance, connects well with the established judicial method of determining whether the university had breached its duty of care.⁷⁹ That method requires a court to initially establish the standard of care reasonably expected of the defendant and to then decide whether the defendant's conduct fell short of this standard.⁸⁰ The standard of care is determined by balancing a number of factors such as the magnitude of the risk of injury, the seriousness of the injury, the social utility of the activity concerned, and the practicality of precautions to reduce the risk.⁸¹ These factors complement those of assumption of responsibility and reliance which, it has been suggested, govern the determination of whether a university owes a duty of care to protect their students' personal safety. Take a case which involved a high risk of serious injury to a student participating in a university sponsored activity, the activity contributed positively to a healthy learning environment, and the university (more so than the student) had the ability to implement measures to reduce the risk. While these factors would have assisted the court to define the appropriate standard of care expected of the university in question, they would also have materially contributed to the court's earlier determination of whether the university owed a duty of care to the student. Specifically, the very same factors of magnitude of risk, seriousness of injury, social utility and practicality of precautions would have heavily influenced the court's deliberation over whether the university had undertaken to protect its students from the injury complained of, and whether it was reasonable for the students to rely on the undertaking.

⁷⁹ See *Annetts v Australian Stations Pty Ltd* (2001) Aust Torts Reports 81-586 at pars 52-66 per Ipp J for a good description of the inter-relationship between duty of care and its breach (as well as remoteness of damage) .

⁸⁰ See Balkin and Davis, note 29, pp 257-266; Fleming, note 29, pp 127-136; and Trindade and Cane, note 29, pp 440-445.

⁸¹ See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

The above connection between the issues of duty and breach of duty was evident in the dissenting judgment of Kirby J in the High Court case of *Anzil*.⁸² His Honour considered both these issues together by discussing them in terms of whether there existed “a duty of care of a relevant scope”.⁸³ Several factors persuaded Kirby J to conclude that the defendant was liable for the plaintiff’s injury. There was first evidence that the defendant was aware that a number of similar criminal acts had occurred in the vicinity and had received requests to extend the period of illumination of the car park for reasons of security. This was pertinent to the factor concerning the degree of risk and seriousness of the injury. Secondly, the extension of lighting was “closely bound up in the mutual economic interests”⁸⁴ of the defendant, its tenants and their employees of whom the plaintiff was one. The factor at issue here was the social utility of the activity in question. Thirdly, the defendant had reserved and exercised sole control over the lighting, and the cost of increasing the period of illumination was minimal. Clearly, the factor concerning the practicality of precautions was operative here. These factors led Kirby J to observe that:-

[The defendant] was in the best position to anticipate and guard against such risks [as befell the plaintiff]. Doing so was within the scope of the economic activity in which it was engaged.

The [defendant] was entitled to refuse to take the step which its tenant’s employees had requested it take. But when it did so, it assumed legal responsibility for damage caused to the [plaintiff] by the want of reasonable care to a legal neighbour inherent in that response.⁸⁵

These observations could readily be applied to the university-student context. A university’s liability in negligence towards one of its students would depend on the particular risk and injury incurred by

⁸² (2000) 75 ALJR 164. Since the majority judges had ruled that the defendant did not owe a duty of care to protect the plaintiff against an assault by third parties, they did not proceed to consider the breach of duty question.

⁸³ (2000) 75 ALJR 164 at pars 88-92. See further Dietrich, note 38, pp 158-160, 165-166.

⁸⁴ (2000) 75 ALJR 164 at para 91.

⁸⁵ (2000) 75 ALJR 164 at pars 90-91.

the student, the social utility of the activity under consideration to the university and its students, and the differing capacities of the university and the student to prevent or reduce the risk.

The image of the university as facilitator⁸⁶ also lends itself well to answering the breach of duty question. As maturing young adults, students voluntarily join the university community where they will be facilitated in their learning and in many other aspects of life.⁸⁷ The nature of university living is such that students will invariably be exposed to risks to their personal safety of various kinds. When discharging their responsibility to facilitate education and growth, universities have to employ “the subtler realms of ‘control’” which comprise “the middle ground between custodial control and licence.”⁸⁸ Applying this image of the university as facilitator to the traditional factors involved in the standard of care inquiry produces the following general propositions:-⁸⁹

- where a very high risk of injury is present, the argument for a high standard of care is stronger. Conversely, students encounter many ordinary risks of physical danger which only the most extreme precautions taken by the university can prevent. When courts consider the degree of the risk, they should recognise that universities as facilitators may permit some exposure to risk of injury in order to assist their students to become more self-reliant and responsible.
- where the risk of very serious injury is present, the argument for a high standard of care is stronger. Conversely, students are frequently exposed to risks, even high risks, of minor injury which universities would be hard pressed to prevent. When courts consider the seriousness of the injury risked, they should recognise that there may be occasions when universities as facilitators need to expose their students to such risks in order to develop their self-reliance and sense of responsibility.

⁸⁶ See the main text accompanying note 11.

⁸⁷ Older students would expect less of their university experience compared to their younger counterparts, resulting in variations in the appropriate standard of care.

⁸⁸ Bickel and Lake, note 9, p 788.

⁸⁹ These propositions have been inspired by a similar list contained in Bickel and Lake, note 9, pp 789-791.

- where the risk attending an activity serves to promote some desirable aspect of learning, the argument for a high standard of care is stronger. Conversely, students do engage in many activities during their time at university which are of little or questionable benefit to them. When courts consider the social utility of the activity, they should appreciate that universities as facilitators may elect to actively support or promote some activities which they regard as beneficial to the growth of their students, while distancing themselves from other activities which they view as antithetical to their students' wellbeing.
- where universities are in a better position than their students to reduce or prevent the risk of injury, the argument for a high standard of care is stronger. However, the courts should be sensitive to the unique student context where too much prevention may work in the long term to the detriment of students.

A brief evaluation of two of the cases considered previously will suffice to illustrate the operation of the above propositions. Regarding instances of criminal assault on students, it will be recalled that, in *Waters*, the plaintiff student had sued his university for failing to employ professional security officers to guard against the risk of assault by intruders at a closed function of a residential college run by the university.⁹⁰ Assuming that the university did owe the plaintiff a duty of care, the question of whether it had breached its duty would have depended on certain factors. One of these was the degree of risk of injury of the kind suffered by the plaintiff. On this issue, there had been no problems with intruders at previous closed functions. Another factor in the breach of duty equation was the social utility of the activity which the plaintiff was engaged in. On this score, the plaintiff was a member of the student committee organising the function which had undertaken to ensure that intruders were excluded. Student policing could well be seen as promoting self-reliance and responsibility among students. As for the factor concerning the practicality of precautions, the evidence showed the employment of professional security personnel would have been most unlikely to have prevented the "unexpected, unprovoked and spontaneous

⁹⁰ See the main text accompanying notes 25 *et seq.*

assault” which took place on the plaintiff. These factors would have combined to conclude that the university had not breached its duty of care.⁹¹

Turning next to cases involving alcohol consumption, it will be recalled that the plaintiff in *Bradshaw* had sued his university for failing to provide a safe means of transportation from an off-campus university sponsored picnic where alcohol was served.⁹² Assuming that the university was found to owe a duty of care, the issue of whether the duty had been breached would have depended on a number of factors. They would have included the high degree of risk of serious injury occasioned by the fact that a large number of intoxicated students would have required transportation back to their homes after the event. To reduce or prevent the risk, the university could have arranged the transportation or engaged staff to serve the alcohol so as to prevent it being served to students who were noticeably intoxicated. These preventive measures would not have been unduly onerous to the university, which was in the best position to implement them. These various factors would have led to the conclusion that the university had breached its duty of care to the plaintiff.

V. The Role and Measures to be taken by a Responsible University

It is safe to say that students rarely sue their universities in negligence for failing to protect their personal safety. Whatever the reason for this, it suggests that universities should exercise sound judgment in deciding whether to defend tort claims brought by their students when they do arise. Professors Bickel and Lake have made the point cogently by reminding universities of one of their primary objectives:-

If indeed the university has a responsibility regarding the moral development of its students, that responsibility certainly presumes reasonable efforts to enforce fundamental notions of civility throughout the campus. And statements to our students that this is our mission remain mere platitudes if we continue to argue in the courts that we have no duty, and thus no

⁹¹ So held by the court in *Waters*, CA 40099/96, [1998] NSWSC 248, at p 7.

⁹² See the main text accompanying notes 59 *et seq.*

accountability, regarding serious student injury occasioned by fellow students, even when we could have prevented, or greatly minimised, the risk of such injury.⁹³

The United States experience also shows that students do not succeed in their legal claims where the university has been diligent in discovering its legal liabilities and responsibilities and taking appropriate measures to discharge them. What follows are some examples of preventive measures which have been implemented by or recommended to American universities in respect of the four types of cases discussed earlier in this article. These measures deserve to be seriously considered by Australian university administrators.

To reduce or prevent criminal assaults of their students, some universities have conducted crime awareness classes to teach students that they are potential crime victims and to instruct them in protective measures.⁹⁴ In addition, some campuses have “neighbourhood watch” programmes in which students participate as lookouts and report suspicious activities to the university security staff who then investigate. When a serial rapist terrorised its campus, one university distributed leaflets providing safety instructions to students, increased campus lighting and security, and checked the locks of all residents' doors.⁹⁵

Regarding injuries occasioned by alcohol consumption, some universities have banned intoxicants from campus altogether while others have permitted alcohol to be served only by servers who have completed an on-campus training session on alcohol responsibility. It may be that a middle ground may be found where universities permit certain essentially self-policed on-campus functions where alcohol is served in order to facilitate responsible alcohol use. Such a policy would avoid pushing these functions off-campus where the risk of alcohol related injuries is increased considerably.

⁹³ Bickel and Lake, note 62, p 293. While the statement refers to students injuring one another, it could equally apply to the duty of universities to protect their students from injuries by third parties.

⁹⁴ See Bhirdo KW, “The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students” (1989) 16 *Journal of College and University Law* 119, p 133.

⁹⁵ Bhirdo, note 94, p 133. See further Steinberg TN, “Rape on College Campuses: Reform Through Title IX” (1991) *Journal of College and University Law* 39.

As for the prevention of injuries during study or field trips, it is essential for students to be accompanied by university staff who are properly trained to supervise the risk-producing activities engaged in during these trips. Student training and awareness of any inherent risks involved in the activities, and the provision of an emergency medical action plan are other measures which universities should have in place.⁹⁶

In respect of injuries suffered during recreational activities, universities should require a person who is proficient in first aid to be located at or near their sporting venues. All practices and games involving university athletes⁹⁷ should be supervised properly by such a qualified person. Universities should also work with coaches and health care professionals to create and implement a medical emergency action plan. The plan should include a handbook detailing the procedures to be taken in an emergency including the provision of emergency transportation.⁹⁸

The measures suggested above are consistent with the image of the university as a facilitator of students undergoing a process of maturation. The university as facilitator exercises subtle forms of authority and control over many risk-producing activities engaged in by students, or over circumstances which pose risks of injury to students. Facilitating the transition between home and parental discipline to life on campus requires universities to play a unique role in society. That role is discharged legally by identifying factors which reflect the responsibility of students to look after themselves and balancing them against those factors which reflect the responsibility of universities to guide their students to greater self-reliance and responsibility.

⁹⁶ For measures which the court held were reasonable for a canoe trip, see *Mintz v New York* (1975) 362 NYS 2d 619.

⁹⁷ Whether the same duty of care or its scope extends to every athletic activity conducted on campus (for example, off-season games, club sporting events and gym classes) is debatable. The decision in *Kleinknecht v Gettysburg College* (1993) 989 F2d 1360 (3d Cir) does not go this far. The court observed (at 1368) that “[t]here is a distinction between a student injured while participating as an intercollegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests, scholastic or otherwise. This distinction serves to limit the class of students to whom a college owes the duty of care that arises here.”

⁹⁸ See Shea, note 77, pp 613-614.

Conclusion

Without wanting to sound unduly pessimistic, universities should be prepared for an increase in the number of negligence actions brought against them by their students. The rising numbers of students, the strained resources of universities, and the fast growing consumerist and business mentality of the university community, all work towards this happening.

Courts handling these civil actions will need to recognise the special relationship existing between universities and their students. Universities are not insurers of their students' safety but neither can they claim that they owe no duty of care to protect their students under any circumstances. Practically, this means that there are circumstances when universities are dutybound to reduce or eliminate risks of injury to their students. The preceding discussion has argued that the best method of judicially identifying these circumstances is the one based on assumption of responsibility by the university and reasonable reliance by their students. These same considerations underpin the judicial inquiry into the standard of care expected by a university towards its students and whether the university has breached that standard.

One suspects that most Australian universities already have in place policies and practices aimed at reducing or preventing the risks of injury to their students from the conduct of their fellow students, third parties or themselves. Where this is not the case, implementation of such policies and measures is imperative. Even where they exist, it would be prudent for university administrators to conduct periodic reviews of their policies and measures to ensure that they adequately meet their legal obligations. When doing so, these administrators can learn much from the experiences of their counterparts in the United States.