INSTRUCTIONAL AND ACADEMIC ACTIVITIES: TRENDS IN TORT LIABILITY

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WORKSHOP: PERSONAL INJURY LIABILITY - ON AND OFF CAMPUS
Clearwater Beach, Florida
February 10, 1999
The core activities of a college or university--teaching, research, and service--can give rise to tort liability in a variety of ways. Physical or mental injuries to students, faculty, or staff may be alleged as a result of these activities. Students disappointed with the quality of their instruction continue to attempt to state theories of "educational malpractice." Faculty disputes with their colleagues may escalate to tort claims, and evaluations of faculty or students may be the subject of tort claims as well.

Tort claims are governed by state law, and thus a result in one state might not be replicated in another state, even with very similar facts. Nonetheless, analysis of opinions in "academic" tort claims suggests that state court judges are often looking beyond the law of their own state, and some trends can be traced. This paper will discuss several areas of potential institutional liability for claims arising from the academic, or instructional activities of the institution.¹

¹ This paper will not discuss tort claims arising out of recreational activities or physical education classes. These topics are addressed by another conference presenter.
Rather than analyzing the cases by the type of tort claim presented (since many cases involve multiple tort theories), the paper will examine trends in tort law by category of issue or disputants.

**Tort Liability for On-Campus Instruction**

Although most colleges and universities face the same type of premises liability as other landowners and landlords, additional factors come into play when a student alleges that an injury was caused by the negligence of a faculty member's instruction. For example, in *McDonald v. University of West Virginia Board of Trustees*, 444 S.E.2d 57 (W. Va. 1994), a student enrolled in a theater course sued the university for negligence, seeking damages for a broken leg and ankle. The professor was teaching a class in "stage movement," and had taken the class outdoors where the students were asked to run across a lawn simulating fear. Several students performed the exercise before the plaintiff took her turn. As she was running, she encountered a small depression in the lawn, stumbled and fell, and was injured.

Although the jury had found for the plaintiff, the trial judge had entered judgment for the university, which the Supreme Court of West Virginia affirmed. Although the student had sought to demonstrate that the professor’s supervision of the class was negligent, the court disagreed. The professor had inspected the lawn area before the class and had not noticed the small depression. Furthermore, evidence showed that theater students at the university were given safety instructions, and that the professor had discussed safety issues in that class. The syllabus included information on safety, including

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2 Some public institutions may be protected by the doctrine of sovereign immunity. They may, however, face liability under state tort claims acts.
what clothing to wear, layering of clothing, and body positioning. The faculty member required students to wear high top tennis shoes as a further safety precaution. The faculty member was present at the time of the student’s injury, and the court found that no amount of supervision or scrutiny would have discovered the “small depression” that caused the student to fall. Therefore, said the court, the faculty member’s actions were not a proximate cause of the injury, and the university itself was not required to maintain a lawn completely free of “small depressions.”

This case is interesting because of the relatively high level of caution with which the faculty member apparently behaved. Clearly, the safety instructions (which, since they were on the course syllabus, were easily proven) and the faculty member’s statement that she inspected the lawn area prior to the class were important to the defense of this lawsuit. A similar degree of care could not be demonstrated in Loder v. State of New York, 607 N.Y.S.2d 151 (N.Y. App. Ct. 1994), and this difference appears to have caused a very different result.

Alda Loder was enrolled in an equine studies course at the State University of New York at Cobleskill. It was her first such course. Each student was required to perform two weeks of “barn duty,” which included grooming a horse assigned to the student. When Ms. Loder approached the stall of the mare to which she was assigned and attempted to enter the stall, the mare kicked her in the face, causing serious injuries. The student sued, alleging that the university was negligent both in the way that the horse was tethered in the stall, and in its failure to properly instruct the student with respect to how to enter the stall of a fractious horse.
The trial court had found the university 60% liable for the student’s injury. The university appealed, but the appellate court sided with the student. First, said the appellate court, there was sufficient evidence of the horse’s propensity to kick to suggest that the university was negligent in its method of tethering the horse. Furthermore, there were no written instructions on how to enter the horse’s stall. The university employee who had shown the student how to enter the stall had used the incorrect procedure, according to an expert witness called by the university. Therefore, the court concluded, although normally the owner of a domestic animal is not responsible for injuries caused by that animal unless the animal is known to be “abnormally dangerous,” in these circumstances, the university was negligent in both failing to instruct the student regarding safety, and in its method of securing the horse.

The student in *Loder* was a beginning student, and her lack of familiarity or experience with horses was a significant factor. If the student is experienced, however, the court may be less sympathetic. In *Niles v. Board of Regents of the University System of Georgia*, 473 S.E.2d 173 (Ga. App. 1996), the plaintiff, a doctoral student in physics at Georgia Tech, was injured in a laboratory accident. The student had been cleaning some equipment with a mixture of acetone, ethanol, and nitric acid, a highly explosive combination. A senior doctoral student had suggested that “recipe” as a cleaning solution. The student had been working in the laboratory on a project related to a course in superconducting crystals. He asserted that the university, through his professor, was negligent in its failure to instruct him that this combination of substances was volatile.

The court was not sympathetic to the student’s claim that he needed instruction. He had graduated *summa cum laude* with a major in chemistry, and had obtained a
master’s degree in physics with a 4.0 average. He had spent “hundreds of hours” in laboratories, according to the court, and had previously worked with all three of the substances. Therefore, said the court, the professor had the right to assume that the student either would know of the dangers of these substances, or would “perform the research necessary to determine those dangers and take the necessary precautions” (473 S.E. 2d at 175). Therefore, the faculty member had no duty to warn the student about the dangers of mixing “common chemicals,” said the court.

In physical injury claims related to classroom activities, then, the court will look at the student’s knowledge level. If the student is a novice, as in Loder, there is a duty to instruct and supervise. If the student is experienced, however, and has knowledge that is similar to the knowledge of the professor, then the court may not find a duty to supervise or instruct. And, of course, to the degree that the institution can demonstrate that safety precautions and safety training were carried out, the institution is more likely to prevail.

**Liability for Injuries in Off Campus Courses**

Many graduate, and an increasing number of undergraduate, programs require some form of off-campus internship experience for students. Student teaching is required for students seeking degrees or licenses in education; social work students are typically required to complete a practicum in a social service agency, and students enrolled in health care-related programs also have off-campus educational requirements. These experiences provide valuable opportunities for student learning, but may create liability for the college or university, even if it has no real control over what the student encounters in the off-campus placement.
Liability for activities at the off-campus site can occur in several ways. For example, the institution may be responsible for maintaining the safety of premises it does not own if it schedules a course there. In *Delbridge v. Maricopa County Community College District*, 893 P.2d 55 (Ariz. App. 1994), the college offered a course to the employees of the Salt River Project (SRP) on the site of that organization. Although SRP employees performed the instruction, they were considered adjunct faculty of the college, and they were paid by the college. Individuals participating in the course were considered students of the college. In a course in plant mechanics, the students were required to learn to climb a utility pole. The plaintiff, a student in the class, climbed the pole, lost his grip, and fell, which resulted in serious injury. His lawsuit alleged negligence on the part of the college in not providing him with a safe environment.

The trial court awarded summary judgment to the college, but the appellate court reversed, ruling that there was a special relationship between the college and the student. Despite the fact that the premises were also under the control of SRP, said the court, the college also had a duty not to expose its students to an unreasonable risk of harm. In response to the college's claim that it was not responsible for off-campus injuries, the court said:

The issue here... concerns a school district's duty to provide a safe *in-class* environment for its students. We do not accept [the college's] contention that the SRP lineman training class was not held on [college] premises. The record demonstrates that the facilities at which [the college] holds its classes become the [college] "campus." Even if we accept that the class was held off-campus, Delbridge was injured nonetheless while performing an exercise which was both supervised by the instructor and included in the curriculum [893 P.2d at 59].

The case was remanded for a trial court's determination as to whether the college breached its duty to the plaintiff.
Another college faced negligence liability for injuries to a student related to an off-campus internship placement. In Gross v. Family Services Agency and Nova Southeastern University, Inc., 716 So.2d 337 (Fla. App. 1998), Bethany Gross had enrolled in the doctoral program in psychology at Nova Southeastern University. The program required her to complete an eleven-month practicum at an off-campus organization. Nova gave each student a list of pre-approved practicum sites, and students selected six possible sites. Nova controlled the placement of students at the sites. Gross was placed at Family Services Agency, approximately fifteen miles from the university. One evening, while leaving the Agency, Gross was assaulted by a man in the Agency’s parking lot and was injured. Previous assaults had occurred in the parking lot, a fact of which the university was aware, but the student was not. The student sued the university for negligence in assigning her to an unreasonably dangerous internship site without adequate warning. She also sued the Agency, which settled her claim.

Although the trial court awarded summary judgment to the university, stating that it had no duty to control the Agency’s parking lot, the appellate court reversed. The court rejected the trial court’s determination that this was a premises liability case. Instead, the court stated: “Nova had a duty to exercise reasonable care in assigning [the student] to an internship site, including the duty to warn her of foreseeable and unreasonable risks of injury” [716 So.2d at 337]. The court characterized the relationship between the student and the university as “an adult who pays a fee for services [the student] and the provider of those services [the university]” [716 So. 2d at 339]. Therefore, said the court, the university had a duty to use ordinary care in providing educational services and
programs. If the student was injured by the acts of a third party, then the university would only be liable if a special relationship existed. The court ruled that a special relationship did exist in this situation, relying upon a case involving litigation by a British tourist who sued a car rental company for failure to warn customers about the risk of crime in certain areas of Miami. The car agency’s knowledge of the risk of crime, and the fact that the tourist was not from the U.S., created a special duty, said that court, to warn the foreign tourist of “foreseeable criminal conduct” [Shurben v. Dollar Rent-A-Car, 676 S.2d 467 (Fla. App. 1996)]. So, too, the university had a duty to warn the student of the risk of assault, given its knowledge that previous assaults had occurred in the vicinity.

Although not a tort claim, an interesting issue related to an internship placement is found in O’Connor v. Davis and Rockland Psychiatric Center, 126 F.3d 112 (2d Cir. 1997), cert. denied, 118 S. Ct. 1048 (1998). Ms. O’Connor alleged that she was sexually harassed by an employee of Rockland, where she had been assigned by Marymount College for a required field experience. Although the student was considered a volunteer by Rockland, she was paid by the college through the federal work study program. She sued Rockland under Title IX, but the court ruled that the hospital was not an educational institution and thus was not subject to Title IX. Nor was the student an employee of

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3 The court cited the ruling of a Massachusetts trial court, which refused to grant summary judgment in a negligence claim by a student who was sexually assaulted by an employer to whom she had been referred by the college’s placement office. In Silvers v. Associated Technical Institute, Inc., 1994 Mass. Super. LEXIS 506 (Mass. Superior Ct. 1994), the court did not rule on the negligence claim, but merely rejected the college’s attempt to have the case determined in its favor prior to trial. The court noted that the employer accused by the former student of assault had specifically asked the college’s placement office to send him only resumes for female graduates. The placement staff did not inquire as to the reason for the gender restriction; the court viewed that omission as possible evidence of negligence. Although the court stated that the college only had a duty to exercise ordinary care in the placement of its students, it stated that the female-only request should have stimulated some sort of inquiry from the placement office. Its failure to do so, said the court, was fatal to its motion for summary judgment.
Rockland, so her Title VII gender discrimination claim failed as well. Although the court opinion notes that the college was “dropped from the case” (possibly because of a settlement), the outcomes in Gross and Delbridge suggest that the college might have faced liability, particularly if other students had been subject to abusive treatment at that site.

Although universities may have the same duty with respect to off-campus instruction that they do if the instruction is on campus, they may also enjoy the same form of immunity off-campus as they have for on-campus injuries. In Emberg v. University of Maryland University College Asian Division, 3 F. Supp. 2d 1127 (D. Haw. 1998), a federal trial court ruled that the University of Maryland’s off-campus programs in the Pacific enjoyed the same Eleventh Amendment immunity that the institution would have been granted if the individual had been injured on one of the university’s campuses in Maryland. Despite the fact that the Asian Division was self-supporting, its budget was part of the University’s budget, and any judgment against it would have to be paid from the state treasury.

For tort liability purposes, then, the physical location at which a student or staff member is injured is not the controlling issue. What is more important, according to these cases, is whether the college took adequate precautions to ensure the safety of its students, even if it did not have total physical control of the site. For further information about potential tort liability related to internship programs, see Lori Chamberlain, “The Perils of Internship Programs,” 26 College Law Digest 171-174 (January 25, 1996).
Tort Claims in Faculty-Student Conflicts

Although faculty enjoy considerable latitude under the doctrine of academic freedom, they have not escaped litigation by students disappointed in the letters of recommendation written in their behalf, faculty behavior in class, or criticism of their performance by faculty or academic administrators. For example, in Ostasz v. Medical College of Ohio, 691 N.E.2d 371 (Ct. Cl. Oh., 1997), Ostasz, a former medical resident seeking hospital privileges at the end of his residency requested a letter of reference from the director of the Medical College of Ohio. The director, Dr. Horrigan, reviewed the former resident’s file and noted that he had experienced academic problems during his residency, as well as the fact that six other residents had provided letters expressing their reservations about Ostasz’s competency. Dr. Horrigan’s letter expressed reservations about Ostasz’s competency. Ostasz was not granted hospital privileges, and sued Horrigan and the Medical College of Ohio for defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. The court applied the doctrine of qualified privilege to the letter because its purpose was to assist the hospital in determining whether to grant Ostasz hospital privileges. Only if the writer of the letter acted with actual malice would the privilege be lost. The court found no malice in Dr. Horrigan’s letter, and awarded judgment as a matter of law to the medical college.

But if a professor acts unprofessionally, even if that behavior occurs in class, defamation liability may be found. In Smith v. Atkins, 622 So.2d 795 (La. App. 1993), Theresa Smith, a first-year law student at Southern University, filed claims of defamation, invasion of privacy, and intentional infliction of emotional distress against one of her law professors, Curklin Atkins. Professor Atkins routinely discussed his social life in class,
and directed many sexually-explicit comments to Ms. Smith and another female student in front of the class. He called Ms. Smith a “slut” in front of the entire class on two occasions, and related a humiliating event experienced by Ms. Smith at a local bar, also to the entire class. The trial court ruled in the plaintiff’s favor in the defamation claim, but rejected her emotional distress claim. The appellate court affirmed the defamation ruling, but reversed the ruling on emotional distress, finding that “calling a female law student a ‘slut’ is defamatory per se” [622 So.2d 799], and thus that she sustained an intentional injury. A dissent suggests that the evidence supporting the emotional distress claim was very weak and that the majority wanted to “punish” the professor for his unprofessional conduct, despite the fact that punitive damages are not available in Louisiana for defamation. Although it is not possible to ascertain the majority’s motivation from simply reading the published opinion, it is quite likely that the majority was incensed by the alleged behavior of the faculty member.

Another student successfully raised a tort claim for emotional distress against several faculty and administrators at St. Augustine College. In Ross v. St. Augustine College, 103 F.3d 338 (4th Cir. 1996), an honors student who testified on behalf of a professor who had successfully sued the college claimed that she was retaliated against by faculty and administrators who wrongfully awarded her low or failing grades, altered her transcript, and prevented her from graduating. The administration also tried to have her impeached as president of the senior class. The jury found the college and some of the individual defendants (including the academic vice president) liable for intentional infliction of emotional distress, and also awarded the student punitive damages. The appellate court upheld both awards.
A very significant case involving a middle school student is instructive for faculty and administrators who are asked to write letters of recommendation for current or previous students or employees. In *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582 (Cal. 1997), a middle school student and her parents sued several previous employers of the vice principal of the student’s middle school, Robert Gadams. They alleged that Gadams had sexually assaulted the student, and that he had been accused of similar conduct while serving in a similar position in other school districts. The plaintiffs stated claims of negligence, negligent hiring, negligent misrepresentation, fraud, negligence per se, as well as a Title IX violation, based primarily on the highly positive letters of reference written on Gadams’ behalf by prior employers. The court stated that, “although policy considerations dictate that ordinarily a recommending employer should not be held accountable to third persons for failing to disclose negative information regarding a former employee, nonetheless liability may be imposed if . . . the recommendation letter amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of physical harm to a third person” [929 P.2d at 584]. But the court rejected the plaintiffs’ claim that the school districts’ failure to report the assault charges against Gadams to state authorities (as required by law) provided an independent basis for tort liability.

The court rejected the plaintiffs’ negligence, negligent hiring, negligence per se, and Title IX claims, but ruled in the plaintiffs’ favor on their negligent misrepresentation and fraud claims. The court ruled that, given defendants’ knowledge of the prior charges against Gadams, it was foreseeable that he would repeat the behavior in another school. And it was also reasonably foreseeable, said the court, that the hiring school district would
read the letters of recommendation and rely on them in making a hiring decision. The letters contained only positive information and omitted any mention of the charges that had been brought against Gadams. The former employers, said the court, had two choices in deciding how to write a letter of reference in this situation. First, they could write a "full disclosure" letter that discussed all the relevant facts known to the writer of the letter. Or second, they could have written a "no comment" letter or merely verified the dates of his employment. The court rejected the notion that an employer has a duty to disclose any relevant information to a prospective employer, absent some special relationship. No such special relationship had been alleged by the plaintiffs. Thus the court held that "the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons" [929 P.2d at 591]. The letters, said the court "essentially recommending Gadams for any position without reservation or qualification, constituted affirmative representations that strongly implied Gadams was fit to interact appropriately and safely with female students" [929 P.2d at 593]. Furthermore, said the court, the injury to the student was the proximate result of the school district’s decision to hire Gadams in reliance on the letters of recommendation.

Faculty and administrators may face defamation claims by students who dislike the negative comments made about their academic performance or their behavior. In Hupp v. Sassér, 490 S.E.2d 880 (W. Va. 1997), a graduate student was told that his teaching assistantship might not be renewed because several students had complained about his alleged unprofessional and intimidating behavior toward them. An instructor had also
been exposed to abuse by the teaching assistant. After a meeting between the dean and the student, the student was told that his assistantship would be renewed on the condition that he did not repeat the abusive behavior and that further complaints would result in immediate termination of his assistantship. The student rejected those conditions on his employment, and filed a claim of defamation, as well as other non-tort claims. The court examined each of the statements attributed to the dean that the student had alleged were defamatory, concluding that each was either truthful and factual, which meant that they could not be defamatory, or was a subjective conclusion about the student’s behavior, which is protected by the First Amendment and thus not actionable. Because the court had determined that the statements had no defamatory content, it did not reach the issue of whether or not a qualified privilege existed.

On occasion, faculty members have sued students for defamation. These claims tend to occur when sexual harassment is alleged by a student. For example, in Chiavarelli v. Williams, 1998 N.Y. App. Div. LEXIS 13249 (N.Y. App. Div. 1998), the chair of the division of cardiothoracic surgery at the SUNY Health Science Center in Brooklyn sued the chief resident for defamation. The plaintiff claimed that the defendant write a libelous letter concerning alleged sexual advances made by the plaintiff to the defendant, and then circulated the letter to the plaintiff’s supervisors. The letter claimed that the plaintiff had given the defendant negative evaluations because the defendant had spurned the plaintiff’s sexual advances. Although the defendant sought to have the complaint dismissed because the plaintiff had not alleged or proven special damages, the court agreed that the claim should be characterized as a claim of libel per se, which does not require a plaintiff to allege special damages. Allegations that suggest that a professional is unfit for his or her
professional role reflect adversely on that individual's integrity, and even if no claims are made that the professional is incompetent in his or her profession, defamation per se may be established without evidence of special damages.

Although it is difficult for a student to prevail in a tort claim against a faculty member or academic administrator unless the alleged misconduct is egregious, the cases discussed above demonstrate that, unfortunately, egregious misconduct does occur. In those cases, settlement of the claims is clearly a wiser alternative than defending the litigation.

Tort Claims Involving Faculty Conflicts with their Peers

Although academic institutions tolerate a wide range of ideas and behavior, some differences of opinion between faculty colleagues wind up in court. Although many of these lawsuits involve just the faculty as individual defendants, occasionally the college or university is also named. For example, in Henry v. The Delaware Law School of Widener University, Inc., 1998 Del. Ch. LEXIS 7 (Ct. Chan. Del. 1998), aff’d, 718 A.2d 527 (Del. 1998), a law professor denied tenure sued his colleagues, the dean, and the law school for libel because his colleagues believed that his behavior was not sufficiently professional to warrant tenure. Specifically, the faculty noted that the professor lectured too fast, ignored student questions, and did not allow discussion in his class. Student complaints about his teaching had been confirmed during classroom visits by other faculty members. The court found these statements to be critical comments about his teaching and thus not defamatory. Even had the comments been defamatory, said the court, they were privileged because they were made in the context of a tenure review and were only made
to individuals involved in the tenure decision. Furthermore, stated the court, professional
behavior was an appropriate criterion to be considered in a tenure decision, and the law
school’s policy documents had expressly included that criterion.

A dispute over the origin of a course proposal resulted in court action by one
appeal denied, 676 A.2d 397 (Ct. 1996), cert. denied, 117 S. Ct. 180 (1996), Professor
Narumanchi, a professor of accounting at Southern Connecticut State University, wrote a
memo to the department accusing Professor Abdelsayed of plagiarizing his idea for a
course; he also accused the plaintiff of plagiarism the following day at a department
meeting. The defendant requested that the university investigate the matter, and the
academic vice president determined that the plaintiff had not committed plagiarism. After
that determination, the plaintiff demanded that the defendant retract his statement and
apologize; the defendant refused to do so. The plaintiff brought a defamation claim
against the defendant; the jury awarded him $15,000. On appeal, affirmed, agreeing with
the trial court’s determination that the plaintiff was a public figure and thus had to
demonstrate that the statement was made with actual malice. Finding sufficient evidence
in the record that the defendant made his charges either knowing that they were false or in
reckless disregard of their falsity, the court found that the plaintiff had carried his burden.
The appellate court also affirmed the trial court’s determination that the accusations were
defamatory per se and thus the plaintiff did not need to provide evidence of actual injury
to his reputation.

In a case that shows evidence of strong professional rivalry between two former
sued his former postdoctoral fellow for defamation. Dr. Rosen chaired the Department of Pharmacology and Toxicology at the University of Maryland at Baltimore, where Dr. Arroyo was employed as a postdoctoral fellow and then as a research associate. The two scientists worked together on a project, and Arroyo drafted a paper based on the research, listing herself as first author and Rosen as a co-author. She submitted it to a journal; it was returned for revision. Although Rosen asked to see the reviewers’ comments, Arroyo revised the paper and resubmitted it without showing it to Rosen. Rosen was concerned because he did not believe that their data supported the conclusions that Arroyo had drawn in the paper. Although the paper had been accepted for publication, Rosen asked Arroyo to withdraw it. She appealed to the Pharmacy Dean, who had the paper reviewed by external experts, who agreed with Rosen’s concerns. Arroyo then filed charges of scientific misconduct against Rosen with the U.S. Dept. of Health and Human Services; she also sent a letter to forty-three colleagues around the U.S. accusing Rosen of misconduct. Two investigations—one internal and one by his funding agency—cleared Rosen of all the charges. Arroyo continued her campaign against Rosen, and apparently provided a journalist with confidential material from the investigation. Rosen sued Arroyo for defamation and invasion of privacy. A jury found for him on both claims and also awarded him $25,000 in punitive damages.

On appeal, Arroyo claimed that her acts were privileged because they were related to the investigation. She attempted to use the absolute privilege afforded to witnesses when testifying in a judicial proceeding. The court rejected this argument, stating that a university hearing does not have the trappings of a judicial process (such as witnesses being under oath or subject to cross examination, the unavailability of discovery, and the
lack of a record of the hearing). Despite the fact that Rosen was found by the trial court to be a public figure, the appellate court affirmed the jury’s finding that Arroyo had exhibited actual malice in her statements because she knew that they were false or did not attempt to ascertain whether or not they were false. The court also found sufficient evidence of malice in Arroyo’s act of providing confidential information from the hearing to a colleague and to a newspaper reporter. And distribution of the confidential information was also an invasion of privacy, said the court, since the report was not a public document.

Liability for Vehicular Accidents

Many college activities require students and/or faculty and staff to travel to other institutions or locations to participate in athletic events, cultural events, or additional instruction. Often a vehicle owned by the institution is used, and liability may attach if an accident occurs.

Colleges are subject to the doctrine of respondeat superior or vicarious liability, just as other employers are. However, the doctrines require that the injured party prove that the college’s employee or agent be acting within the scope of his or her authority at the time the accident occurred. This requirement provided a defense in Smith v. Gardner and Board of Regents, San Jacinto College District, 998 F. Supp. 708 (S.D. Miss. 1998). The plaintiff was involved in a two-car accident with Gardner, who was an assistant baseball coach employed by the college. The baseball team had travelled to Meridian, Mississippi to participate in two baseball games; three college vans were used to make the trip. Gardner had the keys to one of the vans, and took it, without the knowledge or
permission of the coach, to make to personal trips. One trip was to purchase beer for himself, which he then drank. The second trip was to purchase chewing tobacco and to engage in a sightseeing trip at 3:00 a.m. During this sightseeing trip, Gardner’s van struck Smith. Gardner’s blood alcohol content was well over the legal limit, and he was arrested for driving under the influence of alcohol.

The court rejected the plaintiff’s claim that the college should bear responsibility for Gardner’s actions. It noted that Gardner’s supervisor had no knowledge of the trip, that Gardner was not engaging in activity that benefitted the team, and that the excursion was for Gardner’s personal benefit. To the plaintiff’s argument that Gardner was on an officially-sanctioned college trip, the court replied that simply being away “on business” did not mean that every action that Gardner took was related to his job. The court awarded summary judgment for the college.

In *Clement v. Delgado Community College*, 634 So.2d 412 (La. App. 1994), *cert. Denied*, 637 So.2d 478 (La. 1994), nine members of the college’s baseball team sued the student coach, who had been driving a college van, and the college for injuries sustained when a tire blew out suddenly and a serious accident ensued. A jury had found the tire manufacturer 60 percent liable and the college 40 percent liable, primarily because it was established that the driver acted negligently in his reaction to the blowout by hitting the brakes and had not been trained. The court stated that the college had three duties to the baseball players: to properly maintain the vehicle, to select a qualified driver, and to train the driver properly. The appellate court affirmed the finding of the jury that the college had not properly maintained the vehicle, that the college was negligent in allowing a student to drive the van when its own policies required that all van drivers have a
commercial driver’s license (which the student did not possess), and that the college was negligent in not training the driver how to respond to a tire blowout, even though a similar incident had happened the previous year. It also reversed the liability finding against the tire manufacturer, resulting in a multi-million damage award to the nine plaintiffs, an amount that had to be paid in full by the college.

The outcome in the Delgado Community College case underscores the importance of serious attention to both vehicle maintenance and to the training and supervision of drivers. The court noted that faculty and staff were never transported in these vans, and that the team’s coaches used other forms of transportation and simply met the team wherever the games were held. These facts were very damaging to the college because they suggested a lack of concern on the college’s part for student safety.

**Liability for “Educational Malpractice”**

Students have been attempting to state claims for educational malpractice for several decades, and, at least where tort theories are involved, they are no more successful today than that have been previously. Although some courts have agreed to entertain breach of contract claims brought by students who assert that the college made promises in catalogs or promotional materials that were not kept, courts use a public policy rationale for refusing to entertain tort claims. For example, in *Cencor, Inc. v. Tolman*, 868 P.2d 396 (Colo. 1994), the court affirmed the appellate court’s rejection of the plaintiffs’ tort claims, but agreed that their breach of contract claims against the college

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should be heard. And in Andre v. Pace University, 655 N.Y.S.2d 777 (N.Y. App. Div. 1996), a court rejected students’ contract claims, characterizing them as disguised tort claims that would require the court to evaluate the adequacy of the textbook selected and the quality of instruction—an assignment that the court said it was not equipped to do. A municipal court had entertained the plaintiffs’ educational malpractice claims and had awarded them damages; the appellate court sharply criticized the trial court for ignoring “well settled law” in New York, and reversed all findings of liability against the college. The same court later rejected a claim by a Columbia University student that the university had failed to provide the promised educational quality (Sirohi v. Lee, 634 N.Y.S.2d 119 (N.Y. App. Div. 1995)).

Conclusion

Although colleges and universities retain their protection against tort-based claims of educational malpractice, they are clearly vulnerable to a multitude of other tort claims. In the cases reviewed for this paper, little deference is given to colleges because of their special mission to educate students, or as bastions of academic freedom. Courts are applying the same liability standards to colleges as they do to other employers, landowners, landlords, or service providers. Particularly when an activity is potentially dangerous, such as the operation of a vehicle or activities involving dangerous substances, appropriate training is most important, followed by appropriate supervision. Administrators and faculty need to be provided with training themselves in order to be able properly to provide training and supervision for the individuals in their care.