MANAGING COLLEGE OPERATIONS IN WAYS THAT MINIMIZE EXPOSURE TO PERSONAL INJURY LAWSUITS OF STUDENTS AND THIRD PARTIES
A Risk Manager’s View

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To minimize the exposure to personal injury lawsuits:

1. **Institutions must accept the risk of lawsuits as inevitable but manageable.**
2. **Institutions must measure the risk of lawsuits to effectively manage risk.**
3. **Institutions must seek to manage risk of lawsuits practically, not technically.**
4. **Institutions can manage the risk by responding to injuries with a “cool head and a warm heart.”**

Colleges and universities want a safe environment for their campus community. Unfortunately, inherent risks in activities and practical limitations make it impossible to make higher education hazard free. But institutions can improve campus safety by managing the risks. By focusing on the risks that pose the greatest potential liability, the institution can assure that its management program will be as effective as possible while its exposure to lawsuits will be at a minimum.

**Accept the Risk of Lawsuits as Inevitable but Manageable**

If universities had no students or visitors, then no one could make a claim. The teaching and research activities at Universities create opportunity for harm or at least for someone to assert they have been harmed.

Lawsuits are inevitable. I once defended a claim by someone who entered a secured stairwell contrary to the signage. This person claimed damages for becoming winded by climbing up and down the stairs looking for a door that would open back into the building. People can and will file lawsuits for anything, regardless of responsibility and whether an injury occurred.

The purpose of litigation is so that injured parties may obtain compensation for their injuries. However, frequently those making claims are motivated more by emotion than monetary needs. They may want to fix blame on one someone else as a way of denying their own contribution to the accident. Or they may want to get a big judgment
out of greed or to fulfill their need for revenge. An appropriate response after an accident that responds to these needs may help avoid litigation.

The only sure way to minimize the risk of litigation is to minimize the risk of accidents. Accident prevention is the key.

**Measure the Risk of Lawsuits to Effectively Manage Risk**

Since all activity has some risk of injury associated with it, a truly comprehensive approach to accident prevention would cover every activity. Clearly, universities cannot worry about every activity as a practical matter. Institutions have only so much time and money to spend. Universities must dedicate limited resources to those activities most likely to give rise to liability, especially the causes of large liability claims. The areas of greatest risk are most demanding of attention.

Institutions should look at the history of litigation against educational institutions and other organizations to decide where the greatest risks lie. There is no central data bank. However, the experience of organizations in specializing in higher education risk can provide guidance. The loss information of United Educators Insurance Risk Retention Group, Inc., a leading liability insurer for educational institutions, shows the frequency and severity of personal injury liability claims in broad categories. Frequency is the number of claims while severity is the measure of how costly the claims are. A review of Chart 1 shows that premises claims have the greatest frequency. Athletic claims have the greatest severity.
United Educators also gathers information on the claimants. As Chart 2 shows, Students make more claims than any other group but not much more than other third parties. However, student claims are far more costly.
Another source of claim information is an insurance organization covering about 100 mostly liberal arts colleges (who has asked not to be identified). Chart 3 shows the severity of claims they experienced over a recent three-year period. Contrary to United Educators experience, vehicles and premises exposures were the source of greatest claim cost. Athletics resulted in just 11% of their claims dollars. However, their experience shows that athletic departments have the greatest number of large losses over $100,000 when transportation is included.

![Chart Three](chart.png)

Looking beyond higher education, J&H Marsh & McLennan recently published the 1998 Limits of Liability report that contains a listing and analysis of the largest liability claims across the US. Most claims on the list exceed $20,000,000. The report contains much that is irrelevant to education such as product liability actions against
car companies and drug companies. However, the report does list a number of claims
arising from events that could have happened at a university. The report concludes,
“many of the largest exposures arise from more pedestrian concerns, such as auto
liability.” The report says that organizations do not appreciate exposures to large
losses that arise from serving food, drawing a large contingent of the public to a single
location such as a sports event, and inviting the public to its premises. A university
faces these risks of large loss every day so these should be included in any liability
management program.

Based on this information, I suggest that universities should consider the
following areas as important as they consider measures to minimize liability:

1. Athletics, because of the large cost of these claims to education
2. Vehicles, because of both the large cost and catastrophic potential
3. Facility safety, especially public buildings such as stadiums and classroom
   buildings, because of the cost of claims and potential for catastrophic events
4. Student life including dormitories, food service and extracurricular activities,
   because of the cost and frequency with which students sue

**Manage Risks Practically, Not Technically**

Personal injury lawsuits can stem from violation of a person’s safety, either
intentionally or unintentionally (negligence). Negligence is the failure to exercise the
degree of care the law requires under the circumstances. Usually, the law requires that
one act as a reasonably prudent person, showing fair play and common sense.

Juries determine whether one acted negligently after the fact with the benefit of
20-20 hindsight. A review of court cases gives examples of what may be negligence.
However, the more important question to ask when evaluating risk in activity is whether
an action is prudent. Sometimes prudence is not dictated by court cases. For
example, Illinois law imposes no liability for accidents occurring on natural
accumulations of ice and snow. The University of Chicago could save money by letting
the snow melt on its own; why worry about injured victims of fall. Nevertheless,
Chicago clears the walks.

To minimize the risk of lawsuits, institutions must analyze the risk of injury on its
campus and in its activities, focusing first on the riskiest areas. The analysis of risk
includes three basic questions:

1. Is this activity important to the mission of the institution?

_If activity is not important to the institution, avoid the risk by not doing it._
_ Teaching chemistry is important. Having a skydiving club may not be important._

2. Is the activity so hazardous or require special capabilities such as facilities and
equipment that it should not be done by the university?

_The first sustained nuclear reaction occurred under the University of Chicago’s
football stadium in 1942. From a risk management perspective, the test probably
should have occurred at Los Alamos, NM._

3. In a particular activity, how might accidents occur and what might be done to
prevent them?

_This is the central question to liability loss prevention. Actions include_
_a) Redesigning the activity to reduce or eliminate hazards_
b) Educating participants on the safest ways of conducting the activity_
c) Changing the environment to reduce the risk or adding safety equipment_

Since improving safety often involves change, sometimes those wanting change
will include a safety argument to build their case. A recent example of this is the
NCAA’s Executive Committee rule change regarding baseball bats. Beginning in the
2000 season, bats must not cause batted-balls to fly at more than 94 miles per hour.
The rule change effectively prohibits the metal bats now widely used today. The NCAA
explained that they changed the rule “to enhance player safety, to restore the
competitive balance in the game between offense and defense, and to preserve the integrity of the game." The NCAA set the standard at 94 mph because it determined that is the average reaction time required for a pitcher to get out of the way of a batted ball.

Some observers believe that baseball has changed because metal bats make hitting home runs easier. The final score of the 1998 NCAA championship game (USC 21, Arizona State 14) might support this conclusion. Rule changes for competitive purposes are not a risk issue.

While the NCAA concluded that the rule change will help protect pitchers, the safety improvement may not be material. The bat changes will at best allow the average pitchers to avoid being hit by batted balls, while slower than average players are still at risk. Even exceptional players may not be better off. In May 1998, a ball batted from Sandy Alomar’s wooden bat broke Baltimore Oriole pitcher Chuck Mussina’s nose. Mussina is considered an excellent fielder. Are teams to be concerned that rule change is adequate? Should pitchers wear catcher-style facemasks, stand behind screens as in batting practice or replace them altogether with machines? The rule change may have addressed competitive issues but safety concerns and litigation risk remain.

Safety improvements may require money that an institution does not have. However, sometimes the institution just must find the money. In one case, an institution thought about installing expensive fire equipment only in dormitories where required by the local code. It hoped to avoid installing systems in other dorms where the equipment was not required. The goal was to avoid the million-dollar expense. However, how could the institution justify the differing levels of safety based solely on a
technical distinction? In the end, the institution decided to spend the money because when it comes to safety, they decided a "dorm is a dorm."

To evaluate possible sources of injury, the critical part of minimizing losses, institutions must ask, "what can go wrong?" The analysis requires common sense, experience and imagination. Because negligence is based on what a prudent man who knew something about an activity would do, that has to be the perspective from which the activity is evaluated. Many potential problems are obvious. Others may be discovered through the experiences of others. Still others may be conceived only by applying a vivid imagination.

This process requires effort. Sharing among educational institutions is of great value. The University Risk Management and Insurance Association, URMIA, and other organizations use the Internet to explore issues. URMIA's listserv open to members has regular postings from institutions looking for information about problems that occurred in specific activities. It's an efficient way to learn of actual problems. Other sources can include regular regional meetings to share experiences and information about possible liability hazards.

The opinions of specialists can help. Larger institutions may have the benefit of risk management or safety professionals on staff. Smaller institutions can turn to insurance companies like United Educators that may offer this service. URMIA and CSHEMA, the Campus Safety, Health, and Environmental Management Association, have resources available as well.

Be careful in documenting any analysis of risk. Memos that discuss hazards that are not subsequently addressed can become smoking guns on which plaintiff's attorneys make their case. For example, it is better to say simply that the stairs at Old
Main should be replaced rather than the stairs must be replaced before someone is injured.

The best solutions for addressing risk are often the most creative. For example, one concern about student internships is that partnering organizations may not fully understand basic safety practices. The problem is how to make sure they do. At the University of Chicago, representatives of agencies at which social work interns are placed are invited to attend a workshop. To get them to participate, the attendees are awarded continuing education credits to help their own professional needs.

**Respond to Injuries with a “Cool Head and a Warm Heart”**

Accidents will occur. Institutions must be prepared to respond when they do. These responses are central to controlling the consequences of accidents.

Emergency response plans should be developed for activities that have appreciable likelihood of injury. Laboratories and athletic facilities clearly require plans. Other activities may not justify detailed plans but do warrant some high level planning. At a minimum, police, fire and emergency medical responders should be familiar with the campus and its buildings so if a need arises, valuable time is not wasted. Emergency services should be accessible. Laboratory and athletic facilities may require first aid equipment and staff trained in first aid as well.

Beyond medical attention, institutions need to be prepared to respond to the physical, emotional and financial needs of the injured. Rather than adopting a bunker mentality against the threat of litigation, institutions can take advantage of their relationship to the injured. Frequently the injured, especially students, will share a
sense of community with the institution. This sense is more conducive to working out the consequence of an accident than if the injured were merely commercial customers.

In “Handling Catastrophic Incidents Requires a Cool Head, Warm Heart,” published in the September 1995 URMIA Journal, author Joseph McCullough of United Educators sets forth these essential tasks for responding to a serious incident from a claims management view:

1. Inform key persons and designate a liaison
2. Contact the family and offer assistance
3. Offer counseling to students and staff
4. Keep careful records
5. Communicate with the media
6. Investigate the incident

While the significance of each of these is greatest when the accident is serious, the spirit of these can help in more common occurrences. I have avoided litigation by visiting injured persons in the hospitals, conveying the University’s concern about the incident. Agreeing to pay the medical insurance deductible also helps.

**Enjoy the Benefits of Successfully Managing Risk**

The association of 100 liberal arts colleges I mentioned earlier is reaping the success of an important risk management initiative they enacted. Since their loss experience showed that falls were their biggest cost item, they decided to act. The first step was to educate the institutions about the true cost to the program caused by falls. At individual campuses, the one or two incidents annually did not seem significant. Collectively, the problem was the most significant. This realization led the colleges to enact campus-based programs to manage the risk.
Falls often result from imperfections in walks, damaged stairs and handrails and debris on floors. Eliminating these hazards will reduce falls.

Generally, each campus established a committee to focus on the issue. The members include representatives from each campus building. In addition to regular tours by facilities personnel, these representatives vigilantly look for walks, stairs, treads and floors that need repair or cleaning. Campuses have an annual budget for concrete replacement. The committees also have improved lighting for walks. The changes in a short time have resulted in significant reduction in claims.

**Begin with the Greatest, Work toward the Least**

Educational institutions should manage the risk of litigation thorough loss prevention and response planning. Because of limited resources, the risk that should be considered first are those that have the greatest loss potential. The loss prevention measures will depend on the unique circumstances of each institution as the nature and scope of activity will vary. Certain core elements are found in loss control programs. Appended to this paper are my views of the core elements for the areas presenting the greatest risk of lawsuits to colleges and universities. I encourage you to take this and begin!

**Contact Information**


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APPENDIX A – RISK MANAGEMENT FOR THE GREATEST RISKS

Minimizing Athletics Exposure

People are injured in athletics. It's an inherent risk that cannot be eliminated. Nevertheless, it is a frequent source of liability claims and the largest source of large liability claims in education. Institutions must take reasonable precautions to minimize the possibility of injury.

Athletics in education involve a number of programs: physical education classes, intramurals, recreation, club sports, intercollegiate athletics and use of facilities by outside groups. The degree of involvement by the institution varies. Nevertheless, a basic risk management program should address the following issues at least:

A. Facilities
   1. Is the equipment and building regularly inspected, maintained and documented?
   2. Is the facility appropriate for the activity that is taking place?
   3. Are activities separated sufficiently?
   4. Are spectators out of harm's way?

B. Training and supervision
   1. Are the participants trained in how to perform the activity properly by a qualified instructor?
   2. Is the activity supervised by qualified coaches and officials?

C. Personal protection
   1. Has the athlete provided reasonable assurance that he or she is fit enough to participate?
   2. Is appropriate personal protective equipment provided?

D. Have participants signed assumption of risk forms in which they acknowledge that they willingly accept the risks in participation?

E. Emergency response
   1. Is aid responsibly accessible?
   2. Do participants know where to go to obtain aid?

Minimizing Vehicle Exposure

Vehicles present a serious risk to universities, both because of the frequency of accidents but also the potentially catastrophic risk. Automobile fatalities are regular occurrences in our communities. Because of the lethal nature of traveling by car, van and bus, institutions should take reasonable care in assuring that vehicle use is appropriate.

United Educators Insurance has prepared a monograph on vehicle safety in education. This is an excellent resource for evaluating vehicle risks.
I feel at a minimum, the vehicle safety program should address the following:

A. Are vehicles regularly maintained and is this documented?
B. Do drivers have the skills to drive the vehicle as demonstrated by their license classification, their training, their experience and their motor vehicle record?

**Minimizing Facility Exposures**

Premises present major source of injuries, especially from falls. Facilities also present a significant catastrophic risk, especially from fires and building collapse. For this reason, institutions need to maintain their facilities and to make sure that they are reasonably safe. The following are the key issues to address.

A. Is the facility design and construction of the facility appropriate for the activity?
B. Does the facility meet the relevant building codes including fire and life safety?
C. Is the facility regularly surveyed to determine if repairs are necessary and are these surveys documented? Of particular concern should be the condition of walks, floors, stairs, and rails.
D. Is the facility reasonably secure with lighting, locks, and security patrols?
E. Does the nature of the facility entice inappropriate behavior (sculptures that kids may use for skate board ramps, athletic equipment that invites inexperienced folks to attempt to use)?
F. Do facility users have training in emergency response including for fire? Do local emergency response departments including fire and police have sufficient familiarity with the facilities so that their actions are not unreasonably delayed?

**Minimizing the Student Exposure**

Students are involved in every activity on campus. Those issues discussed above deal with some of the most serious exposures. Other activities should be evaluated.

Students are most likely to make a claim against the university, since they are the largest group on campus daily. They are involved in activities that are new to them. They also frequently lack good judgment. While the educational institutions generally no longer stand in the shoes of their parents, students are part of the community. As such, schools should take care to avoid student accidents.

An area of emerging concern is the student experiences away from campus including foreign study and internships. These activities have all the risks that institutions face on campus but with the less control over them. I feel that institutions must make it clear to students what it can and cannot provide the student in these experiences. Some risks, such as criminal and political risks including terrorism, are inherent in away from campus activity and issues over which the institution has little control.
Institutions should make sure that the organizations accepting the interns or students in foreign study programs know what their responsibilities are. Since the institution has little control, the partner should know the institutions expectations of them for training, safety, security and supervision. The institution should do a reasonable check to confirm that the partner is complying.

URMIA is researching this issue and will be publishing a report with its recommended loss control recommendations. My current recommendations are:

A. Explain to the student what the risks and responsibilities of the activity and document the discussion. The student must be told about specific activities and behaviors that might be problematic in the environment. The student should also be told of local resources to approach for help if necessary.

B. Obtain assumption of risk forms (unless the experience is required for graduation) in which the student acknowledges the risks and assumes the consequences. The form should set forth what the institution can and cannot do for the student.

C. Establish an emergency response plan which provide a mechanism for the student to contact the campus if issues cannot be resolved locally to the students satisfaction and for emergency legal or medical assistance.