In the wake of the events of September 11, 2001, and with war in Iraq now apparently imminent, insurance premiums have skyrocketed throughout the United States and abroad. This recent development has made it more difficult and expensive than ever for institutions to mitigate the financial risks of legal liability by purchasing insurance coverage. Furthermore, some insurance coverages are simply no longer available, at any price, since September 11th. Others, still, are now so expensive that they are cost prohibitive to cash-strapped colleges and universities.
To further complicate matters, a recessionary U.S. economy and the resulting epidemic of State budget deficits across the country, have dried up many resources previously available to higher education institutions to pay consultants and other experts to assist university risk managers, attorneys and administrators in the pro-active identification, assessment and management of risk on campus. Many of the resources needed to undertake renovations, repairs and other pro-active steps to help mitigate the risk of injury and, ultimately, institutional liability also are no longer available. As of this writing, these trends seem unlikely to change in the short term.

When these unfortunate developments are combined with the steady long-term trend, over the past few decades, of increased personal injury and tort litigation involving higher education institutions, the picture looks bleak indeed--especially since courts seem to be increasingly less willing to exempt universities from responsibility for their own negligent acts and omissions. More than ever before, colleges and universities now tend to be treated more like for-profit enterprises than the sacred cows they were for many decades. As a result, in addition to traditional areas of tort litigation, there appears to have been a marked expansion in cases involving the negligent supervision and instruction of students, the duty of the university to control others, and the duty to warn of foreseeable harm.

To confront this harsh reality, many college and university attorneys, risk managers and administrators have been compelled to consider internal steps they can take, pro-actively and affordably, to identify, assess and manage areas of risk on campus. In most instances, they find themselves in long ques, requesting an allocation of scarce institutional resources to reasonable, measured and appropriate steps to help protect students, faculty, staff and visitors from the
greatest and most foreseeable risks of injury and harm. Their pro-active steps often include the formation of risk assessment committees on campus, which represent meager yet vital investments in their academic institution’s future, even in a budget crisis. Ultimately, such an approach will reduce the number and severity of accidents and injuries to individuals on and off campus, which in turn leads to reduced legal liability and protection of the institution’s assets, resources and reputation.

In this session, we will identify and discuss in detail several significant recent cases and apparent liability trends on campus. Using these cases as a springboard for discussion, we will discuss various ways in which higher education administrators and their counsel can take steps, pro-actively and affordably, to help reduce the likelihood and severity of accidents and injuries in the first instance by identifying, assessing and eliminating unnecessary and foreseeable risks of harm to our most precious resources: students, faculty, staff and guests on campus.

Since it never will be possible to eliminate every risk, or to prevent every accident or injury, we also will discuss strategies to help mitigate institutional liability in the unfortunate event of a claim while minimizing institutional liability, cost and reputational damage.

Recent

\textbf{Decisional Law}

\textbf{Law}
Several recent court decisions serve as excellent examples to highlight the ongoing struggle in courts across the nation concerning whether they should continue to exempt colleges and universities from legal liability for injuries occurring on their property or in connection with their academic and other programs. These cases often involve conduct by a third party who is not an employee or agent of the defendant university, but who causes an injury to a University student, employee or guest–either on campus or in connection with a university sponsored off-campus program.

Traditionally, in the college and university context, American courts have been reluctant to impose a duty to anticipate and protect against unlawful acts by third parties unless the facts of a particular case make it reasonably foreseeable that such an act is likely to occur. In recent years, however, some legal scholars and commentators have hinted that this so-called “no-duty rule” may be gradually eroding with respect to higher education institutions, suggesting that they should be treated like business and other institutional defendants. In many instances, the caselaw supports their hypothesis. Nevertheless, college and university administrators and their counsel have been slow to accept this shift in the law, continuing to embrace the ‘no-duty’ defense, particularly in those cases involving criminal or reckless conduct by third parties.

The most recent cases asserting a duty by universities to control others tend to involve third parties who commit criminal, tortious or other unlawful acts against faculty, staff, students or guests, either on campus or in connection with university sponsored off-campus programs. Even though the “bad actors” in these cases are not always employees or agents of the institution, the plaintiffs often allege a failure by the university to provide them with adequate security, protection, or warning of the potential danger or harm. The defendants in these cases
typically assert either that they are entitled to some sort of statutory immunity (if they are public institutions), or that they did not owe the plaintiff a legal duty to protect or warn because the criminal actions in question were not reasonably foreseeable and were committed by a third party who was not an employee or agent of the institution.

Those of you who attended this session last year will recall our discussion of the case of *Stanton v. Univ. of Maine System*, 773 A.2d 1045 (Me. 2001). In that case, a 17-year-old student-athlete attended a one week sleep away pre-season soccer program at the University of Southern Maine. During her stay, she was assigned to a dormitory room on campus. Halfway through the program, she attended a fraternity party where she met a young man. As she was leaving the party, the man told Stanton he had friends in her dormitory and would walk back there with her. Stanton used her key to open the dormitory entrance and the two rode the elevator together. When Stanton exited the elevator at her floor the man continued on it. Stanton went into her room, unlocked the door to her room and left it propped open. The man subsequently returned to Stanton’s floor, entered her open door and sexually assaulted her. It was the first rape on the campus in 6 years. The security measures in place in the dormitory included key access at the front entrance and to individual rooms, telephone hookups in each room, direct phones to campus security both inside and outside the front entrance to the dormitory, and resident assistants assigned to each floor. There were no orientation programs for pre-season soccer camp participants to inform them of the rules and regulations regarding safety within the University’s residential hall facilities. Nor were there signs posted in the dormitory informing residents of who should or should not be allowed in the dorms. The Superior Court granted summary judgment in favor of the defendant university based upon its
argument that it did not owe Stanton a duty of care, or in the alternative, that it had fulfilled whatever duty it owed to her by providing a dorm that was reasonably safe and secure in light of the circumstances. See id. at 1049. On appeal, the state supreme court vacated the lower court’s ruling, holding that a duty of care was owed by the University to Stanton as a matter of law and that a genuine issue of material fact existed regarding whether that duty was breached. See id. at 1051.

The court held that “the University owed a duty [founded on premises liability] to reasonably warn and advise students of steps they could take to improve their personal safety.” Id. at 1050. The court based its holding on the determination that “[a] student attending an educational institution has the legal status of a business invitee.” Id. At 1049. Thus, the court reasoned, the university owed Stanton “a duty to exercise reasonable care in taking such measures as were reasonably necessary for her safety in light of all then existing circumstances.” Id.

The court emphasized particular characteristics of a university campus as evidence of the foreseeability of a sexual assault occurring in a college dorm: a high concentration of young people, especially women, many of whom are away from home for the first time and may be unaware of security concerns. According to the Court: “[t]hat a sexual assault could occur in a dormitory room on a college campus is foreseeable and that fact is evidenced by the security measures that the University had implemented.” The Court found “the University owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety” irrespective of whether there had been prior criminal acts.

In our dialogue concerning Stanton, we discussed a number of examples of pro-active
steps universities might take in response to the case in the future in order to help protect guests (particularly minors) on their campuses from the type of attack suffered by Ms. Stanton, while at the same time reducing the risk of institutional liability? The suggestions ranged from preparing and distributing brochures on the subject of safety and security in dormitories to conducting a brief and informal orientation session for each guest staying in the dorms on the subject of safety and security on campus.

A subsequent case presenting similar facts but reaching an opposite result helps demonstrate the importance to an appellate court of a university taking pro-active steps, in advance of an attack, to help protect dormitory residents and reduce the likelihood of injury or harm.

**Case 1: Murrell v. Mount St. Clare College,** 2001 WL 1678766 (S.D. Iowa 2001).

**Facts:** In *Murrell*, a sophomore at Mount St. Clare College filed suit against the institution, alleging breach of implied warranty of habitability, negligence, and negligent misrepresentation claims as a result of a sexual assault suffered by the Plaintiff in her dormitory room. The student claimed that when she enrolled, the College published erroneous crime statistics pursuant to the federal Student Right-To-Know and Campus Security Act, which stated that no "rape" had been reported on campus in the school years between 1995 and 1998. However, the College was later forced to publish an amended version of those statistics which revealed one rape reported each in the 1994-95 and 1995-96 academic years. The Plaintiff testified, though, that when she chose to attend Mount St. Clare she did not personally review its crime statistics.

In September, 1998, the Plaintiff was a second-year student at Mount St. Clare and
resided in Durham Hall, a dormitory owned and operated by the College. Residents of the College's dormitories were issued secure keys, which were necessary to gain entrance into the dormitories. Guests in the dorm must show identification and be escorted by a resident when visiting a residence hall. The guest is required to remain in the presence of that resident during the time of his/her visit. Male access to the female side of the dormitory and vice versa is prohibited on Fridays and Saturdays between 2:00 AM and 8:00 AM and midnight through 8:00 A.M. the rest of the week. The College held mandatory security meetings for dormitory residents and dormitory residents were required to follow the security guidelines outlined in their student handbooks, which include locking their doors at all times and never propping open doors. In fact, any student caught propping open doors was subject to a $300 fine. Students testified, though, that doors separating the male and female sides of Durham Hall were frequently propped open in Durham Hall.

In the early morning hours of September 13, 1998, the Plaintiff agreed to allow the guests of a fellow student, J.D. Wilson, to stay the evening in her room while she stayed with Mr. Wilson. In the early afternoon of that same day, the Plaintiff claims that she repelled several advances from one of the guests, Seneca Arrington, and that she asked the guests to leave her room so that she could shower and get dressed. When Mr. Arrington and his fellow guest left, the Plaintiff began to prepare for a shower without locking her door. The Plaintiff claims that Mr. Arrington re-entered her room at that time and raped her. The University moved for summary judgment on plaintiffs’ claims. The court granted summary judgment on the implied warranty of habitability claim, noting that the plaintiff “alleged no latent defect in her housing accommodations” and “admitted that her lock worked.” Similarly, the court noted that the
The plaintiff had not “alleged any violation of any applicable housing codes.” The plaintiff instead claimed that Mount St. Clare provided inadequate security services to protect her. The court noted that there “is no duty to provide security services beyond a working lock under the implied warranty of habitability.” According to the Court:

The landlord is not an insurer against every conceivable act of a third party and his responsibility is limited to providing reasonable security.

Moreover, the court recognized that “the Plaintiff always retained the ability to lock the door to her quarters.” Moreover, the court wrote, “Plaintiff has not cited any instance of a person, who was not a known guest of a resident, entering Durham Hall and menacing her or any other residents in any way. [A] landlord is only liable for injuries resulting from a hidden or latent defect if the landlord knew or should have known of the defect.” The court concluded that the “College had taken measures to discourage residents from propping open doors and had no reason to foresee that the disregard of this regulation was creating a condition so dangerous it rendered Durham Hall inhabitable.”

The Plaintiff’s negligence claims stemmed from four discernable alleged duties owed by Mount St. Clare College.

The Plaintiff claimed that 1) Mount St. Clare had a duty to protect her arising out of their ‘special relationship’ with her, 2) Mount St. Clare had a duty to control third parties who posed a foreseeable threat, 3) Mount St. Clare had a duty to warn her of any defects in their security, and 4) Mount St. Clare had a duty not to misrepresent its crime statistics to her, inducing her to enroll in the school.

Under Iowa law, a landlord does owe a special duty of care to its tenants that includes
"taking protective measures guarding the entire premises and the areas peculiarly within the landlord's control against the perpetuation of criminal acts." This duty arises though, the court held, "from a landlord's duty ‘to protect its tenants from reasonably foreseeable harm.’” Thus, if the landlord had notice of repeated criminal assaults and robberies, had notice that these crimes occurred in the portion of the premises exclusively within his control, had every reason to expect like crimes to happen again, and had the exclusive power to take preventive action, then the landlord clearly would have had a duty. On the facts before it, the court found that no such duty arose for Mount St. Clare College. While there was evidence of some past crimes on campus, including sexual assaults, it held: “there is no evidence that these crimes occurred in the portion of the premises exclusively within the College's control.” According to the court:

A college, or any other kind of landlord, is incapable of foreseeing an acquaintance rape that takes place in the private quarters of a student or tenant, unless a specific student or tenant has a past history of such crimes.

The court cited favorably *Freeman v. Busch, et al.*, 150 F.Supp.2d 995 (S.D.Iowa 2001), where the plaintiff, a non-student, sued Simpson College for damages arising out of her being date raped by her former boyfriend, a student, while the plaintiff was unconscious from alcohol consumption at a party in the college's dormitory. Freeman claimed the dormitory's resident assistant failed to seek medical assistance on her behalf and instead left her with the offending ex-boyfriend, thus breaching the college's special duty to protect her. The Court held that no such special duty existed, writing:

A college is an educational institution, not a custodian of the lives of each adult, both student and non-student, who happens to enter the boundaries of its campus. A contrary
result would directly contravene the competing social policy of fostering an educational environment of student autonomy and independence.

According to the court in *Murrell*:

A college cannot foresee the intentional torts of all students and non-students on campus, and cannot insure that they will not occur.

Hence, the court held that the College did not breach its special duty as a landlord to protect the Plaintiff.

With respect to the Plaintiff’s claim that the College had a duty to control the conduct of a third person so as to prevent them from intentionally harming others, the Court noted that Section 318 of the *Restatement (Second) of Torts*, which imposes a duty upon a possessor of land to prevent licensees from causing harm, has two necessary elements:

(a) the owner knows or has reason to know that he/she has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control.

*Restatement (Second) of Torts* § 318. In Murrell, the court found that Mount St. Clare “had no way of knowing of the necessity to control Seneca Arrington.”

In important contrast to the court’s decision in Stanton, the court in Murrell wrote:

In order for Mount St. Clare to insure that students bring guests into the dorms that are unlikely to pose a threat, the College would have to prohibit guests altogether, or screen them intensively. This would result in exactly the type of contravention of student autonomy and independence that the Court insisted on avoiding in *Freeman*.

With respect to the Plaintiff’s negligent failure to warn allegation, the Court noted that “[u]nder
Iowa law, the duty to warn ‘is predicated upon superior knowledge, and arises when one may reasonably foresee danger of injury or damage to another less knowledgeable unless warned of the danger.’”

In this case, the court held, the “College could not possibly have superior knowledge of the danger Seneca Arrington posed to the Plaintiff, who chose to house Mr. Arrington in her room the previous evening in direct violation of the College's regulations.” According to the court,

[o]nce again, to expect a college or university to obtain even a significant level of knowledge about its students' guests would impose a custodial role that is usually inconsistent with a college or university's mission of educating students who are adults. Mount St. Clare already took measures above and beyond other colleges to separate male and female students after hours and track guests in its dormitories. It is not for the Court to determine whether institutions of higher learning should take stricter measures to control the college-age students they house, or more lax measures. It is a decision for these institutions, their students, and parents.

Therefore, the Court rejected the Plaintiff’s claim that the College breached a duty to warn her about the harm that she encountered.

Finally, with respect to Plaintiff’s negligent misrepresentation claim, asserting that the college misrepresented its crime statistics concerning sexual assault, the court noted that the “reportage of accurate crime statistics is a clear duty imposed on the College by the federal Student Right to Know and Campus Security Act and it was breached.” However, the court rejected plaintiff’s claim because she unable to show that she relied in any way on the misrepresentation. Furthermore, the Plaintiff’s negligent misrepresentation failed because she
did not demonstrate that the College's misrepresentation proximately caused the
sexual assault on the Plaintiff. Summary judgment was thus granted to the Defendant college.

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What steps, if any, might higher education institutions take, moving forward, in order to help protect students and others residing in their dormitories, and to help ensure a result such as the one reached by the court in Murrell, instead of the result reached by the court in Stanton? Certainly there seem to be significant differences in dormitory safety and security in the 2 cases, and one might suggest that those may have made a difference with respect to findings on liability in these two dormitory sexual assault cases. For example:

- The College in Murrell, unlike the University in Stanton, held mandatory meetings for dormitory residents concerning security, which the Court in Stanton not only found lacking but recommended.

- The College in Murrell published and distributed to dormitory residents a security handbook containing guidelines for residents. There is no reference to such a handbook being distributed to dorm residents in Stanton.

- The College in Murrell required locking dormitory doors at all times and prohibited propping doors (a factor in both cases). In Murrell, the College levied a fine of $300 for propping doors.

- In Murrell, the College required that guests provide identification and be escorted through the dormitory by a resident at all times while in the Hall. The Stanton case makes no reference to such a requirement.
• In *Murrell*, there were rules prohibiting visitation at the dormitory by members of the opposite sex at specified times of day.

• In *Murrell* and in *Stanton*, the dorm resident knowingly allowed a third party into the building, despite keyed locks and other security measures which otherwise would have deterred access to the dormitory by the rapist.

• The Court in *Murrell*, unlike the court in *Stanton*, construed foreseeability very narrowly, pointing to the importance of student autonomy and independence. This may have been a reflection of the plaintiff in *Stanton* being a 17-year-old minor at the time of the sexual assault, while the plaintiff in *Murrell* was an adult at the time of the incident.

**Case 2: King, et. al. v. Eastern Michigan University**

**Facts:** In this case, six female students from Eastern Michigan University (“EMU”) brought a Title IX claim alleging gender discrimination and sexual harassment against Eastern Michigan University. The Plaintiffs alleged that they were forced to leave a 5-week summer study abroad program sponsored by EMU in South Africa early because of the actions of three male EMU students – two of whom were participating in the program and another student who was the assistant to Dr. Okafor, the on-site faculty advisor. After repeated incidents of harassment by the three male students, which culminated in a violent altercation; and, after repeated attempts to involve Dr. Okafor in the resolution of the problem, the plaintiffs left the program early. They subsequently filed suit.
The case turned on whether Title IX has extraterritorial application outside the United States, and whether the court had subject matter jurisdiction over the plaintiffs’ claims? Although the court answered this question in the positive, resolving the substance of the case, the underlying facts and circumstances of the case provide excellent guidance concerning pro-active preventative steps institutions can and should take to avoid liability in this context.

Substantively, the court found the broad language of Title IX itself, the legislative history and the implementing regulations all “provide affirmative evidence that Congress intended for Title IX to apply to every single program of a university or college, including study abroad programs.” Defendants’ motion to dismiss Plaintiffs’ Title IX claim of sex discrimination was denied.

The main battle appears over the language of 20 U.S.C. §1681 which states “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . .” EMU focused on the language “no person in the United States” whereas the plaintiffs relied on “under any educational program” to make their argument. The court quoted Gesber v. Largo Vista Independent School District to define Title IX as remedial legislation with two primary objectives, “to avoid the use of federal resources too support discriminatory practices and to provide individual citizens effective protection against those practices.” 524 U.S. 274, 286-290 (1998). Since “remedial statutes are to be read broadly so as to effectuate their purposes” the court looked to the legislative history and implementing regulations for direction. Tcherepin v. Knight, 389 U.S. 332, 336 (1967). The legislative history
provided little discussion of “no person in the United States” limiting the phrase to the language of Title VI of the Civil Rights Act. However, more detailed discussion of the meaning of “education program or activity” was provided. There was “sufficient affirmative evidence that Congress intended extraterritorial application of Title IX where so required, i.e. where the educational program or activity makes it necessary for a student to leave the territorial limits of the United States in order to avail him or herself of the educational opportunities offered.” p.4

The court held that to limit Title IX jurisdiction over the international study abroad placement would in effect be limiting a woman’s opportunity to participate in these programs and would essentially allow for situations that would be illegal if they occurred in the United States. The court also found that plaintiffs were “persons of the United States” for purposes of Title IX. If plaintiffs proved such harassment occurred then as continuing EMU students they were denied equal access to resources when EMU failed to stop the harassment of its male students. The court stated, “Study abroad programs are an integral part of college education today. A denial of equal opportunity in those programs has ramifications on students’ education as a whole and detracts from their overall education.”

Examples
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Steps

Universities

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- Orient faculty and staff taking students abroad to the institution’s sexual harassment policy. Make sure they know to whom complaints should be reported under your policy and that they must be reported immediately. Have a plan for dialogue with those on-site
and the home campus when a crisis arises and know who will be included in the discussion.

- Review institutional sexual harassment policies to make sure they can reasonably be applied overseas. For example, does the policy specify who will investigate complaints of sexual harassment at off-campus locations? Does the policy provide for what happens if the alleged harasser is the only university employee on the trip?

- Consider making investigatory powers delegable under the policy (e.g., by the Provost with respect to complaints against academics, by the Vice President for Human Resources with respect to complaints against institutional staff, by the Vice President for Student Affairs with respect to complaints against other students).

- Orient students concerning the institution’s policies in advance and inform them to whom complaints should be reported, both on-site and on the home campus.

- Consider developing a policy and program for those leaving study abroad programs early, which addresses refunds.

- Augment liability waiver forms for international trips to allow students to be sent home at the discretion of institutional representatives, without a refund, if they violate institutional rules, become a danger to themselves or others, or behave in a manner that disrupts the academic program.

- When complaints of sexual harassment are reported, investigate them promptly and take swift appropriate action to protect the rights of those involved.
Case 3: Texas A&M University v. Bishop

Facts: Bishop, a TAMU student, brought a personal injury action against the University for an accidental stabbing that occurred during a theatrical production of Dracula. The Drama Club produced the performance and was advised by two faculty members, Dr. Curley and Dr. Lesko. The club asked Mr. and Mrs. Wonios, a married couple in the community with previous ties to the TAMU Drama Club, to assist with the production. Mike Wonio directed and Diane Wonio assisted with the props and choreographed the fight scenes. The company decided to use a real knife in the stabbing scene and Diane prepared a “stab pad” with a target for Bishop to wear. During the performance, the other actor missed the stab pad and stabbed Bishop in the chest. He suffered a collapsed lung, was hospitalized for eight days and continued to experience weakness, insomnia and nightmares from the incident. Bishop sued the University and the jury found for the plaintiff for $350,000 in damages.

Procedural History: The jury found the Drama Club advisors and the Wonios acted as University employees and were negligent in the use of tangible property making the University liable for Bishop’s injuries. The court of appeals reversed, citing insufficient evidence to show the advisors and Wonios were employees in this situation. The Texas Supreme Court then reversed the court of appeals’ finding of insufficient evidence that Curley, Lesko and the Wonios were employees and remanded the remaining issues. On remand, the court of appeals found for Bishop on all issues and reinstated the jury verdict against the University.

Issue: Were the faculty advisors to the Drama Club university employees at the time of the incident? Were they responsible for the actor’s negligent use of tangible personal property?
Was it reversible error by the trial court in admitting the three investigative reports into evidence?

**Holding:** Yes. Yes. No.

**Reasoning:** Both faculty advisors were found to be employees at the time of the incident. Curley and Lesko were employed as faculty members within the University. Although both volunteered to be faculty advisors for the Drama Club, the court held that they remained employees during their duties. Despite receiving no compensation for their advisory role, both professors testified that the University encouraged faculty members to be involved as advisors, they placed this position on their resumes and advising clubs was considered in their annual evaluations, affected their compensation and impacted their tenure applications. In addition to the personal benefits to Lesko and Curley, the University required every officially recognized club to have an advisor and advisors were charged with enforcing University policy. Through the advisors’ role, the University had a right to control an organization’s activities to ensure it followed the rules and regulations. The court found this evidence sufficient to support the jury’s finding Lesko and Curley were University employees in their capacity as Drama Club advisors. Because of this finding the court did not need to address whether the Wonios were employees.

Governmental immunity can be waived in Texas under special circumstances. A governmental unit “may be held liable for personal injury caused by the condition or use of tangible personal property if the governmental unit would, were it a private person, be held liable under Texas law.” District courts were divided and the supreme court had not spoken on the issue of whether negligent supervision of the proper use of tangible personal property by another can be defined as use and therefore determine liability under the statute. The court found that
the advisors had a responsibility to oversee the conduct of the club to at least ensure University policies were followed and by failing to do so the University can be held liable for Bishop’s injuries. The record showed that Curley and Lesko never attended any meetings or rehearsals.

“The failure to properly supervise the Drama Club and its use of stage props (in this case a knife) is a negligent use of tangible personal property.” Therefore, the court found evidence to support the jury’s finding of negligent supervision of tangible personal property by the advisors. The court also held that official immunity does not apply. The court cited advising a club or organization is done by both public and private institutions and in this role advisors were not acting in accordance with government policy. This role and the decision to use a real knife was at the advisors’ professional or occupational discretion and not a determination of governmental policy.

Finally, the court held that no reversible error was committed in admitting Chief Stege’s three separate investigative reports. The University asked the Chief to revise his reports of the incident after he included his legal opinions. “Appellant makes no argument why this evidence was prejudicial and our review of the reports shows nothing that was not admitted by testimony during the trial.”

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• Clearly define the role of part-time advisors to student organizations. Consider having a separate policy, guidelines or contracts (for non-university employees) outlining the
obligations and expectations of advisors to student clubs. Clearly communicate the University's expectations and carefully screen advisors and check credentials.

- In selecting props for student theatrical productions, have rules or guidelines concerning the use and handling of weapons. Consider banning the use of real weapons, especially if their presence on campus property is already prohibited under a separate policy prohibiting weapons on campus. If real weapons are to be used, consider requiring that their use be approved by a senior administrator of the institution, supervised by a trained and qualified professional, and undertaken pursuant to a written set of safety guidelines for their use and storage. Train all students and staff who will come in contact with the weapon.

- Consider having students in non-mandatory extracurricular activities sign liability waivers in advance of their participation.

**Case 4: Severson v. Purdue University (2002 WL 31479121 – Nov. 7, 2002)**

**Facts:** Jay Severson, a resident-advisor in a dormitory at Purdue University, was murdered by a resident after Severson reported finding drugs in the resident’s possession. Severson had previously reported the presence of drugs in the dorm and, acting on a tip from other residents, he informed the Purdue University police department of the possible presence of additional drugs in Eskew’s room. Four days later, and before the police investigation was concluded, Severson entered Eskew’s room to check the smoke detector. While there, Severson discovered cocaine in the room. Eskew threatened to kill Severson if he reported the drugs to the authorities. An hour later, Severson did report the cocaine to authorities; but, by the time the
police arrived, Eskew had fled the dormitory. The next afternoon, Eskew entered the residence hall, shot and killed Severson and then committed suicide. Severson’s parents sued the University, its police department and its board of trustees, as well as four individuals in charge of the residence hall, individually. The plaintiffs’ claims ranged from §1983 claims based upon the parents’ assertion they were deprived of the constitutional liberty interest in a relationship with their son, as well as state law common law tort claims for negligence, intentional and negligent infliction of emotional distress, negligent hiring and supervision.

The trial court granted summary judgment for all defendants against the Seversons on each of their federal and state claims.

**Issue:** Was summary judgment proper?

**Holding:** Yes. The court of appeals affirmed the trial court’s entry of summary judgment for the defendants on all but one of the plaintiffs’ claims. With respect to the 42 U.S.C. §1983 claim against Purdue University, the court found that as an “arm of the state” Purdue was not a “person” as defined by §1983. Therefore, the court lacked subject matter jurisdiction and the proper disposition of the case dismissal, not summary judgment.

**Reasoning:** The court found Purdue was not a “person” under §1983 because the institution was created by state statute, the legislature dictated Purdue University’s powers and mission and the state funded the institution. In light of its creation, and relying on the Supreme Court’s opinion in *Regents of the University of California v. Doe*, 519 US425 (1997) and other Indiana precedent, the court held that Purdue University was an “arm of the state” and, therefore, not subject to a §1983 claim. The court ruled the trial court did not have subject matter jurisdiction; and therefore, that it was proper for the appeals court to raise this issue, *sua sponte.*
The court treated the summary judgment motion as a motion to dismiss the count and found in favor of the University. The court also held that the Board of Trustees, the residence hall administrators sued individually and the police officers all were “persons” for §1983 purposes. The court upheld the trial court’s entry of summary judgment against the Seversons and in favor of each of the defendants. The court also upheld summary judgment with respect to the Seversons’ state constitutional claim that the administrators created a “snake pit” of danger that led to their son’s death. The court found that substantive due process “imposes no obligation to protect citizens from private harm even in the face of known dangers.” Moreover, the court concluded that no special relationship was formed between Severson and the police department when he informed them about the drugs. According to the court, the police department did not cause Severson to be murdered, it did not undertake to protect Severson, and it did not prevent Severson from taking any precautions he felt necessary.

Likewise, the court affirmed the entry of summary judgment on the Seversons’ negligence claims. The court held the Seversons had no evidence of prior violence by student residents against their advisors. Nor did they offer any evidence that the murder of their son was foreseeable to the defendants. In the court’s opinion, the University did not gratuitously assume the duty to protect Severson because it did not specifically undertake to intervene in the situation. Once again, the court concluded there was no evidence that the University or the police knew of a specific need to protect Severson, or that they received a request from Severson for protection.

**Examples**
Proactive Steps Universities Might Take in Response to
**this Case:**

While there was no finding of liability for the defendants in this case, there was the deeply disturbing violent murder of a resident assistant by a student living in his dormitory. Furthermore, the murder was preceded by a threat to commit the murder by the killer a day in advance of the killing. Under these circumstances, what steps might a college or university take to prevent a similar killing—recognizing, of course, that not all injuries or intentional acts will be preventable.

- When the threat of murder was reported by the R.A. to police, perhaps the R.A. could have been temporarily reassigned or moved to another dormitory or off campus housing until the student who made the threat was apprehended.
- The killer’s access to the dormitory might have been deterred long enough to summon police if the locks to the dormitory were changed and all doors to the dormitory locked until he was apprehended.
- Students living in the dorm or throughout the campus might be alerted to the threat and told to watch out for the offending student and to call police if he is seen anywhere on campus.

**Analysis.**

On balance, the above cases seem to suggest that in order to help avoid accidents, injuries and liability therefor, colleges and universities should engage, pro-actively, in the identification, assessment and reduction of risk—both on campus and in connection with university sponsored off campus programs. Ultimately, this is the best institutional hedge against the apparently eroding no-duty defense. More importantly, it also is the most effective way to demonstrate to a
court, following an accident and the filing of a lawsuit, that the institution discharged any duty it
did owe by exercising reasonable care to help prevent foreseeable harm.

The section that follows provides some specific and relatively affordable suggestions and
ideas for doing so

**Pro-actively identifying, analyzing and reducing risk**

In the wake of the above court decisions and others like them, there are a number of steps
university administrators and their counsel can take, pro-actively, to identify, analyze and reduce
risk on their campuses and in their programs.

**The Risk Assessment Committee.**

First and foremost, is the formation of a campus wide risk assessment committee. At a
minimum, the Committee should include an attorney from the University’s legal staff (in order
to help protect the Committee’s discussions and deliberations from subsequent disclosure under
the attorney-client privilege), as well as a representative of the Department of Risk Management.
These individuals are generally familiar with the types of injuries and claims that have been
occurring on campus in recent years. They also will be knowledgeable of the greatest areas of
potential liability exposure and risk the institution faces. In addition, a representative from the
University’s business operations area (preferably someone with budget authority to help fund the
implementation of the Committee’s recommendations), and a representative from the facilities
operations or buildings and grounds area who can oversee implementation. Finally,
representatives from the student affairs staff and individuals with authority over the campus
police, fire department and athletic events should be considered as members. The committee
should not be too large. In order to be effective, however, it must have the endorsement and
support of the institution’s senior administration. Making appointments to the Committee a presidential appointment can help improve its effectiveness and influence on campus.

The purpose of the Risk Assessment Committee is to identify areas of potential legal liability and activities posing the greatest risk of injury or property damage, on and off campus, in connection with the University’s activities and programs. Having the Committee address one or two major issues at a time seems to work best. For example, in an academic year the Committee might decide to focus its efforts on one or two major issues, such as (by way of example only): international programs, transportation, fire safety, kids on campus, or major special events on campus. The Committee also might decide to identify as priorities for an academic year any recent incidents or activities that have resulted in injuries or deaths to students, faculty, staff or guests (e.g., a bus accident, a dormitory fire). Incidents which have led to litigation or institutional liability are excellent candidates for topics to be addressed by a Risk Assessment Committee. Once the Committee has identified one or two major topics to address, it can begin researching the detailed facts and circumstances surrounding them, identifying the specific risks they pose, asking key players from campus to meet with the Committee to discuss them, and determining which risks are inherent and necessary to the institution’s educational mission and which are not. For example, if the Committee is examining international study abroad programs and discovers that one of the program sites sponsors an annual bungee jumping field trip, the Committee might conclude that while the international program itself is extremely valuable in numerous ways and should continue, the bungee jumping field trip presents and unnecessary risk of injury and liability and is not a required in order for program participants to benefit from the international study abroad experience. Under such circumstances, the
Committee could recommend that the University stop sponsoring the field trip by doing things like arranging the transportation for it, posting notices of it, collecting money for it and sending university employees on it. By making it clear that the University no longer sponsors the trip, the risk of injury and institutional liability have been reduced without detracting from the institution’s academic program. Moreover, even though the university no longer sponsors the trip, that is not to say that a group of program participants, wholly on their own, cannot go on their own independent trip. A critical element in the process is that the Committee narrowly tailor its recommendations to address precisely the threat of injury, harm or liability posed (and no more), rather than using the process as an excuse for eliminating activities or programs that committee members find undesirable for other reasons. The credibility of the Committee, its effectiveness and its viability depend upon its rationality, precision, and focus in carefully crafting reasonable recommendations to the senior administration. Any recommendations which are made but not approved by the administration for implementation should be immediately withdrawn and all references to them eliminated from the Committee’s final report and documentation.

**Suggested**

**Steps**

to

**Help**
Reduce

Legal

Liability

When

Accidents

Do

Happen

In spite of the best front end preventative law and a superior risk assessment program designed to prevent accidents and reduce institutional legal liability, accidents, injuries and lawsuits will inevitably occur at every college and university from time to time. When they do, there are a number of steps that can be taken, pro-actively, at the behest of a risk assessment committee or in-house counsel, to help reduce the institution’s liability, expense and damage to
reputation. The following list is not intended to be exclusive and all of these are merely suggestions for consideration.

1. **Just**

   the

   **Facts**

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   **Please**

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   Train campus police, fire and emergency personnel employed by the University not to make admissions against interest or express their personal opinions at the accident scene or afterwards (verbally or in writing) concerning who was at fault for the incident, how the University will or should handle it, whether there have been prior similar accidents in the past, etc. These personnel should simply do their jobs and write down the facts, and only the facts, in written their reports.

2. **Utilize**

   the

   **Attorne**

   y
- Client

Privilege

When personal injury accidents or incidents occur and there is any chance that University may have some share of liability or responsibility for them, involve in-house counsel immediately and copy or direct all internal communications concerning the incident, its investigation, recommendations for subsequent remedial action or repairs to counsel. Do not copy non-employees of the institution without counsel’s prior authorization. This will help protect communications from disclosure in the event of litigation.

3. The Work

Product

Doctrine

When a serious accident or incident occurs and as soon as litigation seems
imminent, in-house counsel should either investigate it on behalf of the University or request, in writing, that another employee or agent of the institution do so, expressly stating in the written request that litigation is anticipated in the matter and requesting that the investigator direct his or her report to the institution’s in-house counsel. This approach can help protect the investigator’s documents and materials from disclosure in the event of subsequent litigation regarding the incident.

4. **Circulation of Incident Reports**

Have campus police, fire and ambulance incident reports involving personal injuries and property damage occurring on university property automatically forwarded to the institution’s risk manager. If litigation against the institution seems possible as a result of the incident, have the incident reports forwarded promptly by the risk manager to in-house counsel.
5. Kill ‘em

With Kindness.

When accidents or injuries do occur, be pro-active in your response. Approach the potential claimant first and, without making admissions or apologies, express concern for their well being, check-up on them regularly to see how they are getting along and follow up with them over time. This compassionate approach can sometimes help prevent a claim from ever being filed or a claimant from retaining counsel. If they threaten to sue or make demands, ask them what it is they want from the institution. If they tell you, inform them you will check into it and get back to them. Then check with the institution’s counsel. It is often surprising what claimants want early on . . . pleasantly surprising.

6. Avoid just
circling

the

wagons

when

things

go

wrong. It often drives frustrated claimants toward litigation and makes them angrily conclude that the university does not care about them.

7. Apologies

,  

Admissions

and

other
Problems

Litigation, like love, means never [getting] to say you’re sorry. Unfortunately, an apology is treated in many jurisdictions as an admission against interest when it is made by a defendant or potential defendant. It can be used against you in a court of law unless it is very carefully worded. Before making statements or issuing letters of apology or admitting fault, consult with the institution’s counsel and give them advanced input into what you say. Carefully crafted apologies which do not admit fault can, however, sometimes help prevent claims from turning into lawsuits.

8. Choose your battles wisely.

If it appears to counsel that the institution has clear liability with respect to a particular claim, try to settle it early and get a signed release of all claims. It costs
less (in money, time and negative publicity) than waiting until the claimant has
retained counsel, filed suit and litigated for several
years. The best lawsuit is always a settled lawsuit given the uncertainties of
litigation. Choose your battles wisely.

9. Involve

Involved

People

in

Preventative

Measures. If your institution is self-insured, consider involving the in your
preventative law program the same people who are ultimately responsible for
defending the lawsuit if things go wrong. They will be personally invested in the
process.

10. Alternative

Dispute
Resolution. Consider resolving disputes and claims via early mediation. Mediation is an informal settlement process facilitated by a neutral third party chosen by the University and the claimant. No settlement can be forced upon you. It can save the institution a great deal of time and money, especially if it is used prior to the filing of a lawsuit. Mediation has an excellent track record of success. It often resolves a dispute in less than a day, rather than taking years of protracted litigation. The key is using mediation early, before the attorneys fees and costs get too high.

Conclusion

As this discussion of tort litigation involving colleges and universities illustrates, the volume, breadth and diversity of negligence claims being litigated continues to increase. As a result, higher education institutions find themselves spending increasingly large portions of their diminishing budgets on legal fees, court costs and skyrocketing insurance premiums. This, in turn, diverts vital financial resources away from the educational mission of the university.

It seems inevitable that there will continue to be significant tort litigation against colleges and universities in the foreseeable future. If recent history is any guide, the courts are likely to continue to have increasingly higher expectations of colleges and universities in areas such as the protection of students, faculty, staff and guests from foreseeable harm by third parties. The volume of recent case law also seems to confirm that individuals who are injured on campus are more likely than ever to pursue litigation, even if the accident may have been largely their fault.

The best institutional tool against litigation is improved risk assessment and pro-active management of risk on campus. In this context, the best defense to the proliferation of tort claims is a good offense, in the form of reducing the risk of injury and harm to students, faculty,
staff and guests. To that end, college and university administrators and their counsel should
invest greater thought, time, energy and resources in preventative law, risk assessment, training,
orientation and educational programs for faculty and staff. These steps are time consuming and
expensive, especially with the current budget crisis and economic strain facing most colleges and
universities. They are not nearly as time consuming, expensive, stressful or destructive to
institutional reputation and morale, though, as protracted litigation. Furthermore, with an
investment in preventative law, the funds the institution expends go to the use and benefit of the
institution and its core constituencies, instead of to lawyers. Like most good investments, this
type of institutional investment can pay huge dividends. In fact, avoiding even one major piece
of litigation can save a college or university hundreds of thousands of dollars (or more) and
untold damage from the accompanying negative publicity and reputational damage. When
mistakes are made by the institution, which is inevitable, it is generally much more cost effective
and efficient to spend the institution’s resources at the beginning of the dispute to pay the injured
party reasonable compensation for his or her claim. Such an approach allows the institution to
choose its battles wisely, fighting only those it reasonably believes it can win and defending only
those claims which are deemed justified: on principle, on the merits or otherwise.

It never will be possible, of course, to eliminate all of the risk of injury or harm on a
university campus or in connection with University programs. With careful planning, though,
the financial, institutional and human costs of protracted tort litigation can often be avoided, or at
least significantly mitigated.
ENDNOTES

*A special thanks to Kathy Brannock, our law clerk, who researched recent case law and prepared a number of the case summaries utilized in this paper.

1. R. Bickel & P. Lake, “The Emergence of New Paradigms in Student-University Relations: From ‘In Loco Parentis’ to Bystander to Facilitator,” 23 J.C.U.L. 755 (Spring 1997)(“Courts are increasingly willing to apply traditional tort law notions of duty to the university.”).