

## **Educational Malpractice in A New Light: Emerging Trends in Negligence Causes of Action in Higher Education**

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### **Introduction**

It might seem difficult to believe today, but in the not-too-distant past judges, lawyers, and scholars earnestly considered a cause of action in tort for educational malpractice. Beginning with the landmark case of *Peter W. v. San Francisco Unified School District*<sup>1</sup> in 1976 and culminating with *Ross v. Creighton University*<sup>2</sup> in 1992, educational malpractice in the US was born, raised, and buried. Indeed, considerable legal precedent now holds that no cognizable tort claim arises out of negligently failing to educate students in K-12 and higher education settings.<sup>3</sup> Courts have generally rejected such claims citing an inability to create a workable standard of care for educators,<sup>4</sup> difficulties in determining causation and damages,<sup>5</sup> deference to educators' expertise,<sup>6</sup>

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<sup>1</sup>60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976).

<sup>2</sup>740 F.Supp. 1319 (N.D.Ill. 1990), *aff'd*, 957 F.2d 410 (7th Cir. 1992).

<sup>3</sup>The one and oft-cited exception was *B.M. v. State*, 200 Mont. 58, 649 P.2d 429 (Mont. 1982), where the court applied a statutory duty of reasonable care in placing students in special education programs.

<sup>4</sup>See Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*, 69 Den.U.L.Rev..57 (1992) (a comprehensive review of the rationales underlying judicial rejection of educational malpractice); Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 Md. L. Rev. 183 (2000) (thorough documentation of educational malpractice in the US).

<sup>5</sup>*Peter W.*, *supra* n. 1 at 822.

and concerns over excessive litigation.<sup>7</sup> For these reasons, courts simply do not want to undertake the messy job of determining just what is an adequate education.<sup>8</sup>

Yet cases and commentary that explore educational malpractice keep coming. Among the recent treatments is the emergence of a subset of cognizable negligence claims against educational institutions and rooted in “noneducational” aspects of education. Specifically, administrators and institutions are being challenged for failures outside of the classroom that result in non-physical harm. What makes these cases different from earlier challenges is the movement of judicial inquiry away from troubling educational practices and theories and toward more workable standards of behavior for administrators and institutions. This paper explores a developing schism in educational negligence jurisprudence that differentiates between traditionally barred claims of malpractice and new, seemingly cognizable, claims of negligence for non-physical harm in educational settings.

The remainder of this paper is comprised of the following three sections discussed in-turn, below: historical highlights of educational malpractice, emerging theories of negligence in educational settings, and conclusions and implications.

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<sup>6</sup>Ross, *supra* n. 2 at 414-15.

<sup>7</sup>*Id.*

## Historical Highlights of Educational Malpractice Jurisprudence

Despite seeing relatively little action in courts,<sup>9</sup> a strong consensus has developed around how courts dispose of such claims. As noted, legal, practical and policy considerations have combined to bar the cause of action across the US. This section sets out the general case against educational malpractice as embodied in three major opinions: *Peter W. v. San Francisco Unified School District*,<sup>10</sup> *Ross v. Creighton University*,<sup>11</sup> and *Andre v. Pace University*.<sup>12</sup>

The first thorough judicial treatment of educational malpractice is found in *Peter W. v. San Francisco Unified School District*.<sup>13</sup> There, a graduate of a K-12 public school system sued the District for inadequately educating him.<sup>14</sup> The plaintiff's case was at once important and troubling. Its importance rested in the deliberation of a novel legal issue. It is troubling because it highlighted an unusual, abject failure in public education where the vast majority of experiences are positive. But it was a failure. The plaintiff alleged that he had graduated from high school with fifth-grade reading skills and that

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<sup>8</sup>Id.

<sup>9</sup>Research for this article discovered only 23 cases with allegations and facts that could be characterized as claims of educational malpractice.

<sup>10</sup>Supra, n. 1.

<sup>11</sup>Supra, n. 2.

<sup>12</sup>170 Misc.2d 893, 655 N.Y.S.2d 777, rev'd, 161 N.Y.Misc.2d 613 (1996).

<sup>13</sup>Supra, n. 1. Few other earlier cases exist and none set out the case against allowing educational malpractice as comprehensively as *Peter W.* See *Salter v. Natchitoches Chiropractic Clinic*, 274 So.2d 490 (La.App. 1973) (setting out an earlier summary of educational malpractice claims).

<sup>14</sup>Id., at 817.

those entrusted with educating him negligently and carelessly advanced him through the system, rendering him nearly unemployable.<sup>15</sup>

Specifically, he argued that the district and its agents and employees: failed to apprehend his reading disabilities; assigned him to classes in which he could not read the books and other materials; allowed him to pass courses and advance through grades knowing he was underprepared; assigned him to classes with teachers unqualified to teach him; and allowed him to graduate although he was unable to read above the eighth grade level as required by a state statute.<sup>16</sup> All of this, the plaintiff argued, resulted in harm because he was unable to read beyond a fifth grade level and his future employment opportunities and income were adversely affected.<sup>17</sup> Moreover, he asserted that a “special relationship” existed between he and the district and that educators generally owe a duty to exercise reasonable care in educating students.<sup>18</sup>

In refusing the plaintiff’s claims, the court addressed the threshold question in every negligence case--whether one party owes a duty of care to the other.<sup>19</sup> Here, the court determined that precedent and policy considerations weighed against allowing a cause of action.<sup>20</sup> No legal precedent existed for establishing the requisite “special

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<sup>16</sup>Id., at 818 (CAL. EDUC. CODE § 8573 (West 1996)).

<sup>17</sup>Id.

<sup>18</sup>Id. at 820.

<sup>19</sup>Other traditional elements of a negligence claim include breach of duty, causation, and harm suffered. Elements of negligence here.

<sup>20</sup> Id. at 820.

relationship” between students and educators generally,<sup>21</sup> although a limited duty was recognized when public school authorities exercise reasonable care for the physical safety of students under their supervision.<sup>22</sup> The plaintiff’s case did not involve physical harm and the court was unwilling to extend the concept of duty beyond that.<sup>23</sup>

The court considered a variety of issues both practical and policy in nature to determine that the district owed no duty of care to the student.<sup>24</sup> Foremost among these were the inability to establish a workable standard of care for educators,<sup>25</sup> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for a breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>26</sup>

These considerations weighed overwhelmingly in favor of the District.<sup>27</sup> Additionally--and very important to the court’s decision--establishing a duty of care

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<sup>21</sup>Define special relationship here.

<sup>22</sup>Id. at 820-1 citing *Daily v. Los Angeles Unified School District*, 2 Cal.3d 741, 745-747 (1970).

<sup>23</sup>Id.

<sup>24</sup>Id. at 821.

<sup>25</sup>Id.

<sup>26</sup>Id. at 823.

<sup>27</sup>Id., at 825.

would likely result in flooding the district with litigation that would burden schools far beyond what they could reasonably address.<sup>28</sup>

So, the plaintiff's claims were denied and the court refused to recognize a cause of action for educational malpractice. Peter W. continues to be an important decision for courts considering negligence in education and stands for several universally accepted rationales for denying such claims. First, it is difficult if not impossible to establish a workable standard of care for educators because of innumerable theories about what "good" education includes.<sup>29</sup> Imposing such a duty would require courts to police the day-to-day activities of schools contrary to public policy concerns.<sup>30</sup> Second, the difficulty in establishing damages is insurmountable by courts.<sup>31</sup> Not only must fault be scrutinized, but also future losses are too speculative to determine with any measure of accuracy.<sup>32</sup> And third, recognizing a claim for educational malpractice would open the floodgates of litigation and schools would be overwhelmed with complaints from disgruntled students.<sup>33</sup> As discussed below, these rationales arise again in the context of higher education when students litigate educational failures in our post-secondary institutions.<sup>34</sup>

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<sup>28</sup>Id.

<sup>29</sup> Id.

<sup>30</sup>Id., at 821.

<sup>31</sup> Id.

<sup>32</sup>Id.

<sup>33</sup>Add disgruntled student article.

<sup>34</sup>*See, e.g.,* Wilson v. Continental Ins. Co., 87 Wis. 2d 310, 274 N.W.2d 679 (1979) (the Wilson court provides a well crafted summary of the underlying rationales against educational malpractice but stops short of using the term "educational malpractice").

What Peter W. was to K-12 education, *Ross v. Creighton University* was to higher education.<sup>35</sup> The *Ross* case involved a student-athlete who alleged that Creighton University had negligently and carelessly failed to educate him.<sup>36</sup> Kevin Ross was recruited to play basketball at Creighton despite his utter lack of academic preparation.<sup>37</sup> After four years of playing and studying at the University, his athletic eligibility expired and he left the school with 96 of the required 128 credits for graduation, the reading skills of a seventh grader, and overall language skills of a fourth grader.<sup>38</sup> At Creighton's expense, he then spent a year taking remedial education courses at a private preparatory school where he attended classes with grade school children.<sup>39</sup> After that, he attended classes at Roosevelt University but lacked funds to continue.<sup>40</sup> He ultimately endured an emotional and violent breakdown that he attributed to his experience at Creighton.<sup>41</sup>

Subsequently, Ross sued the university under theories of negligence and contract,<sup>42</sup> including educational malpractice.<sup>43</sup> Ross argued that University agents were negligent in admitting him knowing he was underprepared academically, and in advising

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<sup>35</sup>*Supra*, n. 2.

<sup>36</sup>*Id.* at 411.

<sup>37</sup>*Id.* Ross scored in the lower fifth percentile on the American College Test.

<sup>38</sup>740 F.Supp. 1319, 1322.

<sup>39</sup>957 F.2d 410, 412 (In a claim not discussed here, Mr. Ross alleged negligent infliction of emotional distress against Creighton as a result of his experience at the preparatory school).

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*, at 412. In July 1987, Ross suffered an emotional breakdown and locked himself in a Chicago hotel room and proceeded to throw furniture out the window. Mr. Ross stated the furniture represented Creighton employees.

<sup>42</sup>Ultimately, the appellate court remanded Ross' contract claim and Creighton settled for \$30,000.

<sup>43</sup>*Id.* at 411. It should be noted that in addition to educational malpractice, the plaintiff alleged a new tort of negligent admissions based on the University's admission of him despite knowing about his academic background and skills. Additionally, the breach of contract claim was remanded.

him to take “bonehead” courses that would not count toward his degree.<sup>44</sup> Additionally, Ross presented evidence that athletic department staff read his class assignments and typed his homework for him, thus depriving him of the educational opportunity he sought when he enrolled at Creighton.<sup>45</sup> Essentially, Ross argued the University had exploited his athletic abilities by allowing him to fail academically so long as he kept playing basketball.

Although both the trial and appellate courts sympathized with Ross’ situation,<sup>46</sup> neither federal court was willing to interpret Illinois law as allowing a cause of action for educational malpractice. Indeed, the appellate court went to great lengths to determine no such cause of action should exist under Illinois law.<sup>47</sup> Relying on earlier cases such as *Peter W. and Donahue v. Copiague Union Free School District*,<sup>48</sup> the Ross court detailed years of unsuccessful litigation regarding alleged failure to educate and concluded that no such cause of action exists anywhere in the U.S.<sup>49</sup> In the end--as with *Peter W.*--<sup>50</sup> the policy considerations in Ross were simply too much for a disgruntled student to overcome. It is too difficult and messy a task for courts to establish a standard of care for

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<sup>44</sup>Id.

<sup>45</sup>Id. at 412.

<sup>46</sup> Both courts discussed at length Kevin Ross’ personal problems and indicated sympathy toward him and similarly situated plaintiffs.

<sup>47</sup> Id. at 413.

<sup>48</sup>Id at 414. *See* *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440, 391 N.E.2d 1352 (1979).

<sup>49</sup>The court cited the lone and easily distinguishable case of *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982).

<sup>50</sup>*Supra* n. 1.

educators when so many different but effective pedagogies exist.<sup>51</sup> Moreover, the court recognized the difficulty in determining causation in failure to educate cases because of the profoundly interactive experience of learning and the shared roles between teacher and student. And finally, the Ross court cited the flood of litigation that would drown any institution if such cases were allowed to go forward.<sup>52</sup>

Hence, after Peter W. and Ross, the book on educational malpractice seemed closed in both K-12 and higher education. But that would not stop litigants and commentators from pursuing novel ideas about negligence in delivering education.<sup>53</sup> One post-Ross case--*Andre v. Pace University*<sup>54</sup>--is particularly noteworthy because the trial court acknowledged educational malpractice as a potential cause of action.<sup>55</sup> Although merely a trial court's opinion that was subsequently reversed,<sup>56</sup> Andre might speak volumes about changes in judicial attitudes towards education and negligence. Recall that prior to Andre no court, trial or appellate, was willing to entertain a cause of action for educational malpractice. Suddenly there was a court saying, "wait a minute-- why not?"

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<sup>51</sup>Ross, 957 F.2d at 414.

<sup>52</sup>*Id.*

<sup>53</sup>Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 Md. L. Rev. 183 (2000) (suggesting a novel basis for a cause of action); Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student Athletes?*, 69 Den. U. L.Rev. 57 (1992) (arguing for a limited cause of action in higher education); Patrick F. Linehan, *NOTE: Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 Geo. L.J. 753 (2001) (suggesting such claims might be best resolved under fraud and misrepresentation).

<sup>54</sup>170 Misc. 2d 893, 655 N.Y.S.2d 777 (1996).

<sup>55</sup>161 Misc. 2d 613, 618 N.Y.S.2d 975 (1994).

<sup>56</sup>655 N.Y.S. 2d at 780.

The Andre case involved two plaintiffs who enrolled in a graduate computer programming class based on assurances from their advisor and University materials that the course was “beginner level.”<sup>57</sup> There were no prerequisites for the course nor did either plaintiff have any experience in programming.<sup>58</sup> Shortly after the course began, the plaintiffs realized the course was too difficult for them because the textbook used and teaching problems were aimed at more advanced students.<sup>59</sup> After several meetings with the course instructor and their advisor the plaintiffs were not satisfied and requested a tuition refund for the course.<sup>60</sup> After the University refused to refund the tuition the plaintiffs asserted a variety of claims that included breach of contract, breach of fiduciary duty, and educational malpractice.<sup>61</sup>

In finding for the plaintiffs, the trial court focused on two propositions that not only departed from universal precedent, but also foreshadowed several later cases discussed below. First, the trial court determined a fiduciary duty existed between the school through its agents and the students.<sup>62</sup> The duty arose when the plaintiffs’ advisor undertook to advise them and the plaintiffs relied upon that advice.<sup>63</sup> Second, the court distinguished the case from earlier educational malpractice cases by asserting the inquiry

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<sup>57</sup>Id. at 779.

<sup>58</sup>Id.

<sup>59</sup>Id.

<sup>60</sup>Id., at 778.

<sup>61</sup>Id.

<sup>62</sup>618 N.Y.S.2d 975, 980-81.

<sup>63</sup>Id.

at hand did not focus on the “soundness of the method of teaching”<sup>64</sup> or the “quality of education received.”<sup>65</sup> Instead, the court stated that “the selection and use of the computer textbook in a beginners’ course which was written for computer science majors, scientists and engineers is a per se example of negligence, incompetence and malpractice.”<sup>66</sup>

The appellate court, of course, would have none of that. The decision was reversed on public policy grounds<sup>67</sup> and the lower court received a bit of chiding in the process.<sup>68</sup> Nevertheless, the lower court’s opinion in *Andre* seems important today because it is consistent with an emerging trend to recast educational malpractice claims around inquires that do not focus on pedagogy or the quality of education.

The next section discusses three recent cases where just such a recasting occurred and the courts evidenced a new willingness to scrutinize the student/school relationship.

### **Educational Malpractice in a New Light**

It is widely known that plaintiffs’ attorneys can be a determined and crafty lot. So when courts consistently told them that public policy rationales barred entertaining claims of educational malpractice, attorneys started focusing on claims that would not implicate those policy concerns. As a result, several recent cases that in most respect look

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<sup>64</sup>Id. at 981.

<sup>65</sup>Id.

<sup>66</sup>Id.

<sup>67</sup>655 N.Y.S.2d 777, 780.

similar to those set out above have been disposed of quite differently. Specifically, *Sain v. Cedar Rapids Community School*,<sup>69</sup> *Hendricks v. Clemson University*,<sup>70</sup> and *Johnson v. Schmitz*<sup>71</sup> suggest a very limited cause of action for non-physical harm negligence in educational settings.

*Sain v. Cedar Rapids Community School District*

In *Sain v. Cedar Rapids Community School District*,<sup>72</sup> the Supreme Court of Iowa explored whether a cause of action in negligence should be recognized based upon a high school guidance counselor's inaccurate information regarding eligibility requirements for college freshman intercollegiate athletes.<sup>73</sup> Similar to *Ross*<sup>74</sup> and *Andre*,<sup>75</sup> *Sain* relied upon inaccurate information provided by a school employee and suffered considerable non-physical harm.<sup>76</sup> Different, however, was the *Sain* court's willingness to look beyond the traditionally barred educational malpractice claims into other theories of negligence in educational settings.

Bruce Sain was a high school basketball star who hoped to play at the college level. He sought the advice of his high school guidance counselor regarding National

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<sup>68</sup>Id. at 779 (the court noted the lower court's ignoring of a long history of rejecting educational malpractice claims on public policy grounds).

<sup>69</sup>2001 WL 418044 (Iowa).

<sup>70</sup>339 S.C. 552, 529 S.E.2d 293 (2000).

<sup>71</sup>119 F.Supp.2d 90 (2000).

<sup>72</sup>*Hendricks*, supra., n. 75.

<sup>73</sup>Id. at 1.

<sup>74</sup>Supra n.2.

<sup>75</sup>Supra n. 59.

Collegiate Athletic Association (NCAA) Division I eligibility requirements. The counselor had a general understanding of the requirements and consulted NCAA regulations before determining that Sain needed to complete three NCAA Clearinghouse approved English courses during his final year of high school.<sup>77</sup> One of the courses recommended to Sain was not a NCAA approved course. Ultimately, Sain received a full athletic scholarship at Northern Illinois University.

Unbeknownst to him, the new course was not approved by the NCAA. This fact went undetected until shortly after he graduated from high school when he received notice from the NCAA that he was not eligible to participate in Division I athletics because he had not completed his English course requirements.<sup>78</sup>

Sain brought suit against the school district for negligence and negligent misrepresentation,<sup>79</sup> asserting the guidance counselor breached his duty to provide competent academic advice concerning the eligibility to participate in Division I sports as a freshman.<sup>80</sup> The school district moved for summary judgment and the district court granted it, finding Sain's negligence theory amounted to a claim of educational malpractice and thus was barred.<sup>81</sup> Additionally, the district court found that the

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<sup>76</sup>Sain, *supra* n. 75, at 2 (Sain lost his full scholarship to Northern Illinois University because he was ineligible to compete in NCAA intercollegiate athletics).

<sup>77</sup>*Id.* The NCAA maintains a list of high school courses for each school that satisfy core academic requirements. The Clearinghouse evaluates courses and updates the list of those approved.

<sup>78</sup>*Id.* at 2.

<sup>79</sup>See Restatement (second) of Torts section 552(1) (1977).

<sup>80</sup>Sain, *supra* n. 75, at 2.

<sup>81</sup>*Id.*

negligent misrepresentation claim did not apply in an educational setting.<sup>82</sup> Sain appealed claiming the nature of the relationship between a student and guidance counselor imposes a duty on the counselor to use reasonable care when giving specific information about the course requirements for admission to college or participation in college athletics.<sup>83</sup>

The Supreme Court began its inquiry by looking at the nature of Sain's claim.<sup>84</sup> Acknowledging the universal rejection of a cause of action in educational malpractice, the court thoughtfully noted:

We must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice [citation omitted]. Instead, the specific facts of each case must be considered in light of the relevant policy concerns that drive the rejection of educational malpractice.<sup>85</sup>

The Sain court did just that and determined that this case was distinguishable from earlier cases involving educational malpractice.<sup>86</sup> Although recognizing that Sain's claim related to educational functions and supervision issues that courts have been reluctant to challenge, this case simply did not implicate most of the policy

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<sup>82</sup>Id. The district court noted that negligent misrepresentation has historically been limited to business and commercial settings and, therefore, refused to create a new cause of action by extending the cause of action to educational settings.

<sup>83</sup>Id. at 3.

<sup>84</sup>Id.

<sup>85</sup>Id. at 4. *See also*, Timothy Davis, *supra* n. 58, arguing that courts have been too eager to dismiss claims under educational malpractice and that no recent court has taken on the task of thorough analysis.

<sup>86</sup>Id. The court looked to the *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1996), the seminal Iowa case that in most respects parallels *Ross*, *supra* and *Andre*, *supra* in rationale and dicta.

considerations that bar educational malpractice.<sup>87</sup> Specifically, the court determined that unlike traditional malpractice claims, Sain’s case did not challenge classroom methodology or theories of education. It was unrelated to academic performance or lack of expected skills. Nor did his claim entangle the internal operations of the school.<sup>88</sup>

Instead, Sain challenged a specific act of providing information requested by a him when the school knew or should have known he would rely upon the information to qualify for NCAA athletic eligibility.<sup>89</sup> Here, the court did what it ought to do--it looked at the facts of the case in light of the policy considerations that weigh against recognizing educational malpractice and determined Sain’s claim was different.<sup>90</sup> Not only different, but also cognizable under negligent misrepresentation.<sup>91</sup> The court then turned its attention to the threshold question of whether duty existed between the school and Sain. Here a duty existed because a school guidance counselor is in the “profession” of giving advice and is paid to do so.<sup>92</sup> There is a transaction between the giver and recipient of advice that equals the requisite special relationship for duty under negligence analysis. Moreover, although the tort of negligent misrepresentation has arisen in commercial settings, the court recognized Sain’s economic interests were damaged when he lost his

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<sup>87</sup>Id.

<sup>88</sup>Id.

<sup>89</sup>Id.

<sup>90</sup>Id.

<sup>91</sup>Id.

<sup>92</sup> Id. at 6 (the court noted that even indirect pay suffices).

scholarship and therefore extended the concept of duty to an education setting.<sup>93</sup> Hence, the court remanded for trial the issue of whether, as a matter of fact, the guidance counselor was negligent in advising Sain.<sup>94</sup>

So why is this such a big deal? For starters, much of the things asserted by Sain were asserted in Peter W.,<sup>95</sup> Ross,<sup>96</sup> and Andre,<sup>97</sup> yet were dismissed under the bar against educational malpractice before a jury heard them. The Sain court looked beyond the initial inquiry of educational malpractice and discovered that something else occurs in education that is outside of classroom pedagogy and learning theories yet has profound effects on students. Moreover, Sain suggests a developing schism in types of claims brought by students against educational institutions for negligence. One side--the barred side--looks at negligence in classroom activities and learning outcomes. The other side--and seemingly not barred--looks at negligence in administrative and support services. As discussed below in Hendricks,<sup>98</sup> this recasting of educational malpractice has unfolded into higher education, as well.

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<sup>93</sup> Id. See also Prosser and Keeton on the Law of Torts section 105, at 725-26, section 107, at 745 (5<sup>th</sup> ed.1984).

<sup>94</sup> Id. at 9.

<sup>95</sup> Supra n. 1.

<sup>96</sup> Supra n. 2.

<sup>97</sup> Supra n. 58.

<sup>98</sup> 339 S.C. 552, 529 S.E.2d 293 (2000).

*Hendricks v. Clemson University*

Similar to *Sain*, *Hendricks v. Clemson University* involved alleged negligent advising of a student athlete. Hendricks played baseball for three years at St. Leo College on a seventy five percent scholarship and wanted to transfer to Clemson to play his final year.<sup>99</sup> Under the terms of his transfer—regulated by the NCAA—Hendricks would graduate from St. Leo with credits earned at Clemson during his final year.<sup>100</sup> Upon transferring to Clemson, Hendricks worked with an academic advisor to ensure his eligibility to play baseball and that his coursework there would transfer back to St. Leo.<sup>101</sup>

Things for Hendricks were difficult from the beginning. First, Clemson did not offer the same major he had pursued at St. Leo (administration). His advisor recommended he declare speech and communications as his major with a minor cluster in administration.<sup>102</sup> Next, the advisor registered Hendricks for fifteen credits hours for the fall semester but within two weeks realized she had not evaluated Hendricks under the NCAA’s fifty- percent rule.<sup>103</sup> The fifty- percent rule requires student athletes to complete at least half of the course requirements for their degree to be eligible to compete during their fourth year.<sup>104</sup> Hendricks’ advisor discovered that his original course load would not comply with the rule so she advised him to drop two courses and

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<sup>99</sup> *Id.* at 555.

<sup>100</sup> *Id.* at 556 (this arrangement is referred to as the “one-time-transfer exception”).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

add three in speech and communications, leaving him with eighteen credits. But because his advisor miscalculated his credits and misinterpreted his transcript, Hendricks' second registration did not comply with the fifty- percent rule. After the fall semester, Hendricks discovered that he should have enrolled for twenty credit hours in speech and communications to be eligible to play baseball in the spring.<sup>105</sup> Hendricks was ineligible to play and that spring Clemson went on to play in College World Series without him.<sup>106</sup> Hendricks returned to St. Leo where he attended classes at his own expense and graduated the following spring.<sup>107</sup>

Hendricks sued Clemson for negligence, breach of fiduciary duty, and breach of contract.<sup>108</sup> He alleged a variety of damages including his tuition, room, and board while at Clemson, his tuition, room, and board for his final year at St. Leo, lost wages for his final year at St. Leo, emotional suffering and lost enjoyment of life, lost College World Series experience, lost opportunity to play Division I baseball, and lost professional baseball opportunities.<sup>109</sup> The trial court granted Clemson's motion for summary judgement ruling that the South Carolina Tort Claims Act barred a cause of action against a public school for anything less than "gross negligence."<sup>110</sup> Additionally, the trial court ruled for Clemson on the breach of contract claim stating that Clemson had fulfilled its

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<sup>105</sup> Id. at 557.

<sup>106</sup> Id.

<sup>107</sup> Id. Hendricks received some financial assistance during the spring semester because he played baseball.

<sup>108</sup> Id. at 558.

<sup>109</sup> Id.

<sup>110</sup> S.C.Code Ann. Section 15-78-60(25)(supp. 1998).

obligation to Hendricks.<sup>111</sup> Finally, the trial court concluded that Hendricks suffered no ascertainable damages.<sup>112</sup>

Hendricks appealed and argued the trial court erred in deciding the issue of gross negligence on summary judgment and that a jury should decide whether Clemson's conduct rises to the level of gross negligence.<sup>113</sup> The appellate court agreed with Hendricks, citing a range of authorities that indicate there is no fixed definition for the term,<sup>114</sup> but that in South Carolina, the best definition is "the failure to exercise slight care."<sup>115</sup> Under this standard, a jury could decide that Clemson, through its agent, was grossly negligent and therefore potentially liable to Hendricks. Indeed, in reviewing the facts, the appellate court suggested such a finding was likely.<sup>116</sup> Originally, the advisor failed to evaluate Hendricks pursuant to NCAA rules, then upon realizing that, she failed to consult her advisors and erroneously advised Hendricks again. Failing twice to properly advise Hendricks, the appellate court concluded might convince a jury that gross negligence occurred.<sup>117</sup>

In addition to the issue of liability under the Tort Claims Act, the appellate court concluded that the existence of a duty owed to Hendricks by Clemson was a question for

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<sup>111</sup> Hendricks, *supra* n. 104, at 558.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 559.

<sup>114</sup> The court cited several S.C. cases, including *Clyburn v. Sumter County Sch. Dist. #17*, 317 S.C. 50, 451 S.E.2d 885 (1994). Additionally, the court cited *Prosser and Keeton*, *supra* n. 99, at 212 "There is no generally accepted meaning for gross negligence but the probability is when the phrase is used that it signifies more than ordinary inadvertence or inattention but less perhaps than conscious indifference to the consequences."

<sup>115</sup> Hendricks, *supra* n. 4, citing *Clyburn*, *supra* n. 120.

<sup>116</sup> *Id.* at 560-61.

<sup>117</sup> *Id.*

a jury. Again, the court looked at precedent for the proposition that once an actor voluntarily acts, a duty to use due care arises.<sup>118</sup> Considering the facts of this case, the court concluded that Clemson could have assumed such a duty. After all, Hendricks' advisor was hired as an "athletic academic counselor" with primary duties to make sure athletes are maintaining NCAA eligibility.<sup>119</sup> The appellate court saw a genuine factual dispute here regarding whether Clemson had assumed a duty to advise Hendricks concerning compliance with NCAA rules. Further, Hendricks' asserted breaches of fiduciary duty and contract were factual issues, as well, and thus required further development at the trial level.<sup>120</sup>

Hendricks presents some troubling issues for institutions of higher education. As noted, negligence analysis in education settings has typically ended at the duty question. Courts have been reluctant to extend instances where a duty is owed by the institution to the student for a variety of policy reasons. However, as with *Sain*, the Hendricks court looked closely at the facts and distinguished the case from earlier malpractice claims. Thus, Hendricks represents yet another example of a court willing to avoid summarily dismissing claims of negligence in education. As the case below suggests, that willingness might not be limited to the advising of student athletes.

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<sup>118</sup> Id. citing *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997).

<sup>119</sup> Id. at 561.

<sup>120</sup> Id. at 563-64.

*Johnson v. Schmitz*

Another recent case illustrates the growing schism between negligence claims in education. In *Johnson v. Schmitz*,<sup>121</sup> a Yale graduate student sued the University for negligence and breach of fiduciary duty.<sup>122</sup> Johnson alleged that two of his faculty advisors conspired to appropriate his original research and pass it off as their own.<sup>123</sup> Johnson claimed that Yale had a duty to protect students from faculty misconduct, and the University breached that duty by failing to intervene and discipline the faculty members. Yale argued that such claims are barred under educational malpractice and therefore Johnson had no cognizable cause of action.<sup>124</sup> The University moved for dismissal under FRCP 12(b)(6) for failure to state a claim upon which relief can be granted.<sup>125</sup>

First, the court distinguished Johnson's case from educational malpractice cases on the grounds that he was not claiming "inadequate education." Rather, the court recognized that the negligence he asserted did not involve pedagogy or educational theories and his claim was not barred.<sup>126</sup> Next, the court relied on Connecticut law to arrive at a two-prong test for establishing whether a duty of care exists. First, it must be determined whether an ordinary person in the defendant's position, knowing what the defendant knows or should know, would anticipate harm of the general nature of that

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<sup>121</sup> 119 F.Supp.2d 90 (2000).

<sup>122</sup> *Id.* at 91. Johnson also sued under contract theories and sued individual faculty members.

<sup>123</sup> *Id.* at 92.

<sup>124</sup> *Id.* at 95.

<sup>125</sup> *Id.*

suffered was a likely result of their action or inaction. Second, public policy considerations must be weighed against the idea that the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case.<sup>127</sup>

The court looked at Johnson's assertion that Yale had promised to safeguard students from academic misconduct,<sup>128</sup> that the first prong of the test—foreseeability—was satisfied. The court speculated that if Yale's rules for protecting students were inadequate or if Yale failed to enforce them adequately, it is foreseeable that one of its students could suffer emotional distress or economic harm.<sup>129</sup> Further, the court concluded that the second prong—public policy considerations—weighed in favor of Johnson, as well. The court balanced the parties' interests and determined that universities are in the best position to avoid the harm Johnson alleged. Moreover, finding a duty here would further a legitimate policy and legal objective by allowing the tort system to function a prophylactic factor in preventing future harm to students by faculty.<sup>130</sup> Accordingly, the court ruled that since Johnson might show the existence of a duty of care, and he has alleged that the duty was breached, and he was harmed, the count against Yale should not be dismissed.<sup>131</sup>

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<sup>126</sup> Id. at 91. The court relied on two Connecticut educational malpractice cases in distinguishing Johnson's case: *Gupta v. New Britain General Hospital*, 239 Conn. 574, 687 A.2d 111 (1996), *Doe v. Yale Univ.*, 252 Conn. 641, 748 A.2d 834 (2000).

<sup>127</sup> Id. at 99.

<sup>128</sup> Id. at 96. Johnson introduced Yale's administrative policies and graduate school materials that amounted to assurances of safeguarding.

<sup>129</sup> Id.

<sup>130</sup> Id.

<sup>131</sup> Id.

What we are left with from Johnson is yet another example of a court pursuing a thorough exploration of educational malpractice issues and a clear distinction between the line of cases that involve classroom activities and learning outcomes (i.e., Peter W.,<sup>132</sup> Ross,<sup>133</sup> Andre<sup>134</sup>) and those that involve other institutional functions. Such a bifurcation might change much about how colleges and universities approach issues of liability.

### **Conclusion and Implications**

This article has argued that recent cases in education settings suggest a willingness on the part of courts to allow nonphysical harm negligence claims to go forward. Courts have applied a more sophisticated approach to analyzing such cases from what has historically been the insurmountable summary judgment dismissal of educational malpractice claims. The result is an emerging distinction between troublesome issues of negligent teaching and more workable issues that deal with administrative and support services. Perhaps most important here is the similarity between cases now allowed to go forward and those barred a few years ago. Hence, the title of this article “Educational Malpractice in a New Light.” Of course, the claims now going forward to trial are not malpractice claims. But neither were many of the earlier claims, including those in Ross<sup>135</sup> and Andre.<sup>136</sup> The new light shining on educational

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<sup>132</sup> Supra n. 1.

<sup>133</sup> Supra n. 2.

<sup>134</sup> Supra n. 58.

<sup>135</sup> Supra n. 2.

malpractice has exposed other, novel potential negligence claims that should pique the interest of all those interested in US higher education. Certainly, the three cases presented here to make that point might be viewed as something less than a trend in jurisprudence. But there are relatively few cases regarding negligence in education and the three presented nearly represent the entire population of cases over the past couple of years.

However, there are many issues unresolved about the proposition the negligence is extending into new areas. First, courts have left us with little guidance on differences between such claims in K-12 and higher education. Indeed, most courts rely on precedent from both settings in resolving all negligent education controversies and have ignored obvious material differences such as mandatory attendance laws, consumerism in higher education, teacher certification, etc. What is needed is a solid case that makes that distinction.

Additionally, the cases highlighted here suggest a different status regarding the relationship between athletes and their schools. As noted, the question of whether a duty is owed to those students poses unique issues compared to students generally. Courts have acknowledged a different relationship and have allowed student athlete plaintiffs to go forward to trial. Would any attorney welcome the grim prospect of defending Creighton University today if Ross brought his claims and made it to trial? Concerns about school image, public trust, and athletic department credibility might be crippling under the likely high exposure afforded a case like that. Moreover, the standard of care so

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<sup>136</sup> *Supra* n. 58.

difficult to show in the classroom might be easier to establish for administrators who frequently belong to associations with ethical and behavioral codes.

Other issues, including statutory limits on such causes of action need to be explored. Tort claim acts might well bar the majority of cases against public schools, but as discussed above, that is not necessarily true. In the end, the ever-expanding body of negligence law in higher education simply cannot be overlooked. Bickel and Lake's recent book "The Rights and Responsibilities of the Modern University,"<sup>137</sup> thoroughly documents that trend and the litigation will likely continue to grow.<sup>138</sup> It remains to be seen whether the trends documented here will have "legs" and ultimately mean much to higher education. However, there is certainly cause to pay closer attention to the once futile cries for educational malpractice—it appears the courts might be doing just that.

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<sup>137</sup> Carolina Academic Press (1999).

<sup>138</sup> See, eg., Peter F. Lake, Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations, 34 San Diego L.Rev. 1503 (1997).