

**PREVENTIVE LAW ON CAMPUS: REDUCING
INSTITUTIONAL LIABILITY THROUGH PRO-ACTIVE RISK
ASSESSMENT AND RISK MANAGEMENT¹**

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In recent years, the number tort claims and lawsuits filed against colleges and universities has been on the rise. At the same time, courts across the country have been increasingly less willing to exempt universities from legal responsibility for their actions, finding legal liability in numerous settings where courts a decade or two ago refused to tread. In addition to traditional areas of tort litigation such as premises liability (e.g., slip and fall cases arising on campus) and medical malpractice actions, in recent years there has been a marked increase in the number of reported trial and appellate court cases involving diverse new negligence issues such as the supervision and instruction of students, the duty of the university to control others, and the duty to warn students and others of foreseeable harm. Consequently, the amount of time and money spent in defense of claims by higher education institutions, administrators, in-house counsel and institutional insurers has skyrocketed. There is no sign of a reversal of these trends anytime soon.

To confront this harsh reality, college and university attorneys, risk managers, faculty,

staff and others must not only acknowledge and accept the trend but also begin to pro-actively examine, identify and assess areas of risk on campus with these cases in mind. They must then make wise responsive decisions to implement reasonable, measured and appropriate steps to help protect their constituencies from foreseeable harm and injury. Such pro-active steps represent wise and important investments in an institution's future. Their dividends are real. They include fewer accidents and injuries to students, faculty, staff and guests, both on and off campus, as well as reduced legal liability, and protection of the institution's reputation and assets.

In this session, we will identify some of the significant trends, developments and notable recent cases involving tort claims against colleges and universities. Using recent caselaw as a springboard for discussion, we will recommend various ways in which higher education administrators and their counsel can take steps, pro-actively, 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: our students, faculty, staff, alumni and guests on campus. Since it never will be possible to identify, assess or eliminate every risk, or to prevent every accident or injury, we also will discuss various strategies to help mitigate institutional liability in the unfortunate event of a claim or lawsuit while minimizing institutional costs.

Recent Decisional Law.

Three recent state appellate court decisions from various jurisdictions serve as excellent examples to highlight the growing trend away from exempting colleges and universities from legal liability for injuries occurring on their property or in connection with their academic and other types of programs. Each of these cases involved criminal or reckless conduct by a third

party who was not an employee or agent of the defendant university, but who caused injury to a University student or guest—either on campus or in connection with a university sponsored off-campus program.

Generally, in order to recover on a theory of negligence a plaintiff must establish the following elements: (1) a duty arising on the part of the defendant to conform its conduct to a standard of care arising from its relationship with the plaintiff; (2) a failure of the defendant to conform its conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff proximately caused by the breach. The existence of a legal duty is a question of law for the court to determine.

Traditionally, in the college and university context courts have been reluctant to impose a duty to anticipate and protect against criminal acts by third parties unless the facts of a particular case make it reasonably foreseeable that a criminal 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,² suggesting that they should be treated like business and other institutional defendants. Nevertheless, college and university administrators and their counsel (including the authors) have been slow to accept this shift in the law, continuing to embrace the ‘no-duty’ defense to the exclusion of other possible defenses, 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 or tortious 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 employees or agents of the institution, the plaintiffs allege a

negligent failure by the university to provide them with adequate security, protection, or warning of the potential danger. The defendants in these cases typically assert either that they are entitled to some sort of immunity (if they are state institutions), or that they did not owe the plaintiff a legal duty of protection or a warning 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. A discussion of 3 such cases, each decided in the past 2 years, follows.

Case 1: *Stanton v. Univ. of Maine System*, 773 A.2d 1045 (Me. 2001).

Facts: In 1997, Dolores Stanton, a 17-year-old student-athlete, attended a one week sleep-away pre-season soccer program at the University of Southern Maine. Dolores was a ‘special student’ at the University, which meant she did not have a high school diploma but took classes at the University. During her stay, Stanton was assigned to a dormitory room on campus along with 12 other students. Halfway through the program, Stanton 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.

Procedural history: Stanton and her parents filed a negligence action against the University alleging negligence, negligent infliction of emotional distress, and breach of an implied contract. 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 on the negligence and implied contract claims and reversed, 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.

Holding: 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.*

Reasoning: The court distinguished the case on which the lower court had based its holding. That case, *Brewer*, involved a motel and a patron who was sexually assaulted by a

person who entered her hotel room through an open window. *See id.* at 1049. 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. *See id.* at 1050. The court relied on an alternative case as support, *Mullins*. *See id.* 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.

Examples of Pro-Active Steps Universities Might Take in Response to this Case:

Although many college and university attorneys might disagree with the outcome and rationale of the Court’s decision in *Stanton*, especially in light of the court’s conclusion that having dormitory security measures in place is evidence that a crime was foreseeable, a more difficult and productive question may be what steps, if any, should higher education institutions take in the future in order to help protect guests (especially minors) on their campuses from the type of attack suffered by Ms. Stanton, while at the same time reducing the risk of institutional liability? Certainly the presence of minors on campus for summer camps and other similar events during the summer and throughout the academic year is common at many academic institutions. The legal duty owed to minors by educational institutions is and for many years has been higher than the duty owed to adults. In fact, the doctrine of *in loco parentis* has not been abrogated with respect to minors. As a result, it is well settled that educational institutions stand

in the shoes of parents in the eyes of the law with respect to their students who are under the age of 18. In light of the court's holding in *Stanton*, and the higher duty generally owed to minors, here are some steps that colleges and universities might consider taking as a pro-active risk management tool, not because they are required by law:

- *Preparing brochures on the subject of safety and security on your campus and in your dormitories and distributing them to all guests who come on campus and stay in dormitories or other residential facilities (e.g., overnight athletic camps, academic programs, elderhostels). The annual campus crime statistics and report may provide a good place to start.

- *Conducting a brief and informal orientation session (or distributing a video presentation to individuals staying in dorms) on the subject of safety and security on the campus, as well as any rules, regulations or recommendations on the subject. Existing materials already provided to residential students during the academic year may suffice or be easily adaptable for this purpose.

- *Having program sponsors outside the University sign indemnification agreements in favor of the institution and provide proof of adequate liability insurance coverage to cover injuries and property damage caused by participants or sustained by participants.

- *Make sure minors staying in dormitories are adequately supervised, day and night, and that those supervising are qualified to do so.

- *Screen those on campus who work with minors using the sex offender registry and perform criminal background checks on them as allowed by law in advance of hiring them.

Case 2: *Nova Southeastern Univ., Inc. v. Gross*, 758 So.2d 86 (Fla. 2000).

Facts: Bethany Jill Gross, a twenty-three year old graduate student in psychology at Nova Southeastern University, was abducted at gunpoint while leaving the parking lot of Family Services Agency (“FSA”), an off-campus internship site. She was then taken to a second location by the gunman where he sexually assaulted and robbed her. The 11-month internship or “practicum” was required by the University as part of Gross’ academic program. The internship site had been approved by the University and was on a list of possible sites from which each student was allowed to select 6 preferred locations. The FSA was on Gross’ list of preferred locations, and she was assigned to it by Nova. There was record evidence that Nova had been made aware of a number of other criminal incidents which had occurred at or near the FSA parking lot prior to Gross’s attack.

Procedural history: The trial court entered summary judgment in favor of Defendant Nova. An intermediate appellate court reversed. The Supreme Court of Florida accepted the case on a certified question from the lower court regarding whether the university owed a duty of care to Gross. *See id.* at 87.

Holding/Reasoning: The court held that the university did owe Gross a duty of care while she was participating in an off-campus school activity. *See id.* The court based its holding on a principle from its prior decision in *Rupp*: “the extent of the duty a school owes to its students should be limited by the amount of control the school has over the student’s conduct.” *Id.* at 89. The University had mandated the internship as a graduation requirement and Gross did not have the final say in the location of where she would perform her internship. *See id.* Therefore, the court found that the university had sufficient control to owe a legal duty of care to

Gross. *See id.* The plaintiff alleged the university was negligent in assigning her to perform an internship at a facility which Nova knew was unreasonably dangerous, and in failing to warn plaintiff of the danger. Critical to the court's decision was the fact that Nova had been made aware of a number of other criminal incidents which had occurred at or near the FSA parking lot. The court recognized that while generally a person has no duty to take precautions to protect another against the criminal acts of third parties, exceptions to this rule have emerged where a 'special relationship' exists between the parties. Although the Court of Appeals' decision was vague concerning the existence of a special relationship between the plaintiff and Nova, it ruled the criminal attack against the plaintiff was foreseeable, writing:

. . . appellant has stated a cause of action in negligence against Nova based on her allegations that the university assigned her, without adequate warning, to an internship site which it knew was unreasonably dangerous and presented an unreasonable risk of harm.

The court refrained from making any specific findings as to the scope of the duty Nova owed Gross or whether the University acted reasonably in assigning Gross to a location that it knew was "unreasonably dangerous." *Id.* The court stated that such determinations should be left to the jury.

One of the reasons that this case has been received with shock and surprise in the higher education legal community is that, unlike primary and secondary schools, in the eyes of the law higher education institutions generally do not stand in the shoes of parents vis-a-vis their students. The seminal case in this area was *Bradshaw v. Rawlings*,³ where the Third Circuit Court of Appeals discussed at length the trend in the law away from the doctrine of *in loco parentis*, commenting as follows concerning the relationship between modern universities and their students:

Our beginning point of recognition is that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administration has been notably diluted in recent decades College students today are no longer minors; they are now regarded as adults in almost every phase of community life There was a time when college administrators assumed a role in loco parentis A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and , reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. . . . Regulation by the college of student life on and off campus has become limited.⁴

The Court in *Beach v. University of Utah* echoed this sentiment, writing:

Colleges and universities are educational institutions, not custodial It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students. . . . Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education.⁵

In the past, as a general rule colleges and universities have not had a recognized legal duty to supervise their students or to protect individuals from unforeseeable harm caused by their students.⁶ However, the *Gross* case, the *Stanton* case and other similar recent court decisions appear to be eroding the general rule and recognizing a higher duty owed by colleges and universities to their students, invitees and guests. As noted above, although many in higher education have attempted to deny this sea change in the law of higher education, recent decisional law has made it increasingly difficult to do so.

Examples of Pro-Active Steps Universities Might Take in Response to this Case.

What steps, if any, can higher education institutions consider taking to help protect students participating in university mandated internships off campus, while at the same time

reducing the risk of institutional liability?

*If lists of internships are provided to students by the University or a department, include a disclaimer on them stating that the University is not recommending any of the sites on the list, that the University is not knowledgeable of or warranting the level of security or safety at any of the internship sites on the list, and that the internship and any travel to or from the site are solely the responsibility of the student.

*For required internships, consider having students identify and propose intern sites to their academic department for approval, rather than providing students with a list of possible internship sites compiled by the University. If students do select from a University generated list, have them select the specific site they want themselves, rather than having the University “assign” the site from a list of student preferences.

*Have each internship participant sign a liability waiver form in favor of the University before participating in the internship.

*Avoid assigning students to required internships in known high crime areas or areas known to be unreasonably dangerous.

*Warn students in writing of any known dangers at the internship site or in the neighborhood where it will be undertaken.

*Consider having interns work in teams and report to and from the internship site in teams or as a group. Also, utilize the internship site’s existing security precautions for the benefit of your students, both in terms of informing students and helping them stay safe (e.g., if the staff has security personnel walk them to their cars, then insist that you students receive the same treatment as a condition of the internship agreement).

*Provide an on-site orientation for interns which addresses issues of personal safety and security at the internship site.

*Enter an agreement with the internship provider which includes indemnification for the University supported by adequate insurance and which spells out responsibilities for security and safety.

Case 3: *Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999).

Facts: William and Letitia Hayden, were season ticket holders in the south endzone of the University of Notre Dame's football stadium for many years. Their seats were always behind the goalpost in the south endzone. During an intercollegiate football game on September 16, 1995, one of the teams kicked a ball that landed near their seats when it was not stopped by the existing net behind the goalpost. Mrs. Hayden was knocked out of her seat and injured her shoulder when a unknown fan dove out of a seat several rows behind her in an attempt to catch the football. The court assumed that the unidentified fan who knocked Letitia Hayden out of her seat committed an intentional criminal act. *See id.* at 605 n.1.

Procedural history: The trial court granted Notre Dame's motion of summary judgment on the grounds that the University did not owe Mrs. Hayden a duty to protect her from the intentional criminal act of an unknown third person. *See id.* at 604. On appeal, however, the Indiana Court of Appeals reversed. *See id.* at 607. A petition to transfer the case to the Indiana Supreme Court was denied.

Holding/Reasoning: The parties agreed that Letitia was an invitee of the University at the time of the incident. The issue before the court was whether the third party's actions which resulted in her injuries were foreseeable and, therefore, whether Notre Dame owed Mrs. Hayden

a legal duty. The court applied a “totality of the circumstances test” to establish foreseeability, writing: “a court considers all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents.” *Id.* at 605. According to the court, “the lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable.” Applying this test, the court held that “Notre Dame should have foreseen that injury would likely result from the actions of a third party in lunging for the football after it landed in the seating area.” *Id.* at 606. Thus, the court held that the university owed Letitia a duty of care to protect her from such injury. *See id.*

The court supported its holding by noting that Mr. and Mrs. Hayden claimed to have witnessed several prior incidents where fans were jostled or injured by efforts of other fans to retrieve the ball. *See id.* There was no record evidence that Notre Dame was aware of or had notice of any of these prior incidents, though, and the plaintiff testified that she had not reported the incidents of which she was aware to the University. The court noted that Notre Dame benefitted from fan enthusiasm and had taken efforts in the past to retrieve footballs but no longer did so. *See id.* at 607.

Examples of Pro-Active Steps Universities Might Take in Response to this Case.

What steps, if any, might higher education institutions take moving forward in order to help protect fans attending athletic events on campus from harm while at the same time reducing the risk of institutional liability?

*Print a notice on all event tickets for sports in which fans could be injured (e.g., football, baseball, hockey) indicating that the sport is an inherently dangerous one, that fans could be injured by flying balls or persons diving for them, and that the spectator assumes all

risk of injury or harm.

*Raise the net behind the goal post to prevent the possibility of errant footballs flying over it.

*Announce at the beginning of each game that balls may be kicked over the net at times, and that it is not only the fan's responsibility to give back the ball but that fans should stay in their seats when it occurs and not dive for it.

*Train and orient event staff, buildings and grounds, and maintenance personnel on campus to engage in pro-active risk management. Reward them for identifying problems and bringing forward good suggestions to make the campus a safer place.

Caselaw Analysis.

On balance, although there are exceptions, the above cases and others like them seem to indicate that the no-duty defense is increasingly eroding in higher education tort cases, especially those involving criminal conduct against students or guests of the University and premises liability. Unless or until the defense is completely abrogated, college and university attorneys will no doubt continue to defend allegations of negligent supervision and instruction using the absence of a cognizable legal duty as one defense. Even so, present circumstances and the state of the law on this issue today would seem to warrant coupling that approach with pro-active risk assessment and management—both on campus and in connection with university sponsored programs off campus--as a hedge against the continued erosion of the no-duty defense. 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 campuswide 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 should be knowledgeable of the greatest areas of potential liability exposure and risk facing the institution. In addition, a representative from the University's business operations area (preferably someone with budget authority to help fund 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. It must, however, have the endorsement of the institution's senior administration in order to be effective. 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, for an academic year the Committee might decide to focus its efforts on one or two of the following major issues: international study abroad 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 details surrounding them, identifying the specific risks they pose, asking key players from campus to meet with the Committee to discuss them, determining which risks are inherent and necessary to the institution's educational mission and which are less so. 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 an 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.

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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, Please!** 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.
1. **Utilize the Attorney-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.

2. **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.
3. **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.
4. **Kill 'em With Kindness.** When accidents or injuries do occur on campus, 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.

5. **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.
6. **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.
7. **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.

8. **Involve Invested 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.
9. **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 brief examination of tort litigation involving colleges and universities illustrates, the volume, breadth and diversity of claims being litigated continues to increase. As a result, higher education institutions find themselves spending increasingly large portions of their limited budgets on legal fees, court costs, insurance premiums and related expenses. 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 higher

education institutions in the United States. If recent history is any guide, the courts are likely to continue to have increasingly higher expectations vis-a-vis 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 appears to have been their fault.

In the final analysis, the best institutional hedge against increased litigation is improved risk identification, assessment, and management on campus. In this context, the best defense to the proliferation of tort claims would seem to be 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 resources in preventative law, risk assessment, training, orientation and educational programs for faculty and staff. These steps are time consuming, but not nearly as time consuming or expensive as protracted litigation. Moreover, they do not tend to carry with them much risk of bad publicity or damage to reputation. Furthermore, with an investment in preventative law, the funds go to the direct use and benefit of the institution and its core constituencies, instead of to lawyers and law firms. Like most good investments, this type of institutional investment can pay huge dividends. In fact, often avoiding even one major piece of litigation can save a college or university hundreds of thousands of dollars and untold damage from the accompanying negative publicity and reputational damage. A litigation strategy focused on settling at an early stage those cases which seem most likely to result in institutional liability, while litigating those claims without merit or involving key institutional principles to a satisfactory conclusion, can result in

substantial overall savings. 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 their claim. Such an approach also allows the institution to choose its battles wisely, fighting only those battles it thinks 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 the risk of injury or harm on a university campus or in connection with University programs. With careful planning, however, the financial, institutional and human costs of protracted tort litigation can often be avoided, or at least significantly mitigated.

ENDNOTES

1. I would like to thank Notre Dame law student, Jason Manning, for his research assistance with this outline. His help was invaluable to the final product.
2. 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.").

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3. 612 F.2d 135, *cert denied*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 261 (1980).
 4. 612 F.2d at 139.
 5. Id.
 6. *See, e.g., McNeil v. Wagner College*, 667 N.Y.S.2d 397, 123 Ed.Law.Rep. 854, 1998 N.Y.Slip.Op. 00129 (App.Div. 1998), where the court held that a college had no duty to supervise a student's medical care following a slip and fall personal injury accident in Austria, which occurred while the student was participating in the defendant's international study abroad program. The court noted that New York has rejected the doctrine of in loco parentis at the college level.