TORT LIABILITY UPDATE:
PREMISES LIABILITY,
ALCOHOL-RELATED LIABILITY,
ACTIVITIES, SPORTS, CAMPUS
HEALTH FACILITIES AND INDIVIDUAL
LIABILITY, INDEMNIFICATION AND
JOINT DEFENSE AGREEMENTS

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INTRODUCTION

Quite apart from the primary concern arising out of dangerous situations -- the safety and well-being of students, faculty, staff, employees and invitees -- is the secondary concern about lawyers and lawsuits.

As far back as the twelfth century, lawyers’ reputations were questionable at best, as reflected by the epitaph of St. Ives, who is reported to have been the patron saint of lawyers before St. Sir Thomas Moore eclipsed him. It says:

Sanctus Ivus erat Brito
Advocatus sed non latro
Res miranda populo.¹

Small wonder that today the popular press, fiction writers, as well as many of our true life experiences, still assure us that there exists a multitude of attorneys willing to counsel a prospective client that "[i]f you’ve had an accident, somebody somewhere owes you money."²

The only thing worse than being embroiled in a lawsuit with such an attorney is being embroiled for years! This, too, has precedent -- witness Jarndyce v. Jardynce:

Jarndyce and Jarndyce drones on...Innumerable children have been born into the cause; innumerable young have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves parties to Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The

¹ St. Ives was a Breton/A lawyer but not a thief/
A thing of wonderment to the people.

² As so proclaimed on plaintiff attorney Kipper Garth’s billboards in Carl Hiasan’s book, Skin Tight, 1989, Ballantine Books, p. 22.
little plaintiff or defendant, who was promised a new rocking horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out;...but Jarndyce and Jarndyce still drags its dreary length before Court, perennially hopeless.


It is this concern which lies at the center of this discussion of tort liability.

**NOTE:** Since the applicable law varies from state to state, the discussion herein, including the sample provisions and forms, should be viewed mainly as vehicles for further consideration and investigation, and not as being controlling for actual matters that may arise.

I. **PREMISES LIABILITY**

Potential liability arising out of a condition on an institution's premises -- its grounds and buildings -- depends primarily on three things: (1) reasonable care; (2) foreseeability; and (3) the nature of the person injured.

**Reasonable Care**

Reasonable care is a relative term. To determine whether it has been observed in any particular situation requires a consideration of all the surrounding facts and circumstances.

**Foreseeability**

Conduct cannot be considered unreasonable if the risk is not foreseeable. Unfortunately, if reasonable people might differ as
to foreseeability regarding a risk the issue will be put to the fact-finder -- usually a jury.

The Nature Of The Person Injured

In most, if not all, states, workers compensation statutes bar employees from suing their employers (including colleges and universities) for injuries sustained in connection with their employment. In some states "charitable immunity" statutes preclude "beneficiaries of charitable works" from suing "charities" for negligence. (In New Jersey, this statute views students as "beneficiaries" and Princeton, Seton Hall, St. Peter's and other private colleges as "charities".) Thus, when looking at the sole issue of "Who might sue my institution?" it is important to assess the statutory framework in which a personal injury lawsuit will be prosecuted. (In New Jersey, a private university faces the greatest risk of personal injury suits from "invitees" to its campus, not from students, faculty or staff.)

A. Assessing Risk and Maximizing Safety -- Who Looks At The Campus?

The very nature of a college or university seems to assure decentralization in many areas. Assessing risk and maximizing safety are no exceptions. A typical institution may have campus police, occupational safety and health personnel, maintenance

3 However, the clever plaintiff's lawyer in New Jersey attempts to get around the "charitable immunity" protection of the institution by suing faculty and administrators in their individual capacity.
supervisors, assistant deans, athletics department personnel, and too many committees to count -- all having among their "duties" the avoidance of injury to students, faculty, staff and invitees.

But, does the institution coordinate this activity in any meaningful way? Chances are it does not. The result: things fall through the cracks; things are done inconsistently within the same institution; useful information is not shared. This could be minimized by an administrative position devoted to coordinating the assessment of risk and maximization of safety at the institution. (At some institutions there may be a "risk manager", but a careful look at the position is required to assess whether that person or office truly performs this function. Chances are that the "risk manager" is more of an insurance purchaser and claims processor, than a true "manager of risk".)

B. Campus Security.

With a bit of exaggeration, The Wall Street Journal reported on October 25, 1993 (p. B1) that "[c]ollege presidents now huddle with Federal Bureau of Investigation agents at crime conferences, and residence halls are being fortified in a way once reserved for nuclear-research laboratories." However, the most pervasive threats to students may be from within. A 1989 survey of 1,100 colleges and universities by Townson State University's Center for
the Study and Prevention of Campus Violence found that students are the perpetrators in nearly 80% of campus crime.⁴

This begs the question: At what point might a jury view aggressive (and even violent) student acts as foreseeable, and thereby assess liability against the institution (and perhaps its administrators and staff individually) for failing to take action to safeguard students against their peers? An even more thorny question: Might an institution be found liable for failing to remove (read: expel) a student with known violent tendencies who assaults another student?

At St. Augustine’s College in Raleigh, N.C., applicants are requested to provide a statement from their hometown police departments attesting to whether they have criminal records.⁵ Apparently, this information will be considered by the admissions department along with the high school transcripts, SAT scores, and the rest of the application package.

What must an institution (particularly one in an urban area) do to minimize liability alleged to result from a lack of proper security or the physical make-up of the campus? A woman alleged that she had been raped on New Year's evening, 1989 at the University of Southern California when she came onto campus to slip a check under the university’s credit union door. A jury found USC negligent due to its lack of security, failure to properly prune


foliage in the vicinity of the attack, and inadequate lighting. The plaintiff was awarded $800,000 in compensatory damages (which the judge reduced to $300,000), and nearly $1 million in punitive damages. USC appealed the decision.

In a decision handed down June 9, 1993, California’s Second District Court of Appeals reversed, stating:

We think it comes down to this: When an injury can be prevented by a lock or a fence..., a landlord’s failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person....But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not have reasonably prevented.\(^6\)

Regarding the plaintiff’s contention that USC’s security force was inadequate, and that the campus was not maintained properly, the court said:

How many guards are enough? Ten? Twenty? Two hundred? How much light is sufficient? Are Klieg lights necessary? Are plants of any kind permissible or is USC to chop down every tree and pull out each bush? Does it matter if the campus looks like a prison?\(^7\)

**C. Ice -- Slips and Falls.**

Unfortunately, college campuses are not immune from a plaintiff’s lawyer’s "bread and butter" -- slips and falls. And, nothing makes people slip easier and fall harder than ice. The


\(^7\) *Id.* at 437.
standard of care expected on a college campus will depend, in part, upon where the campus is located.

In New Jersey, a jury assessed liability against Princeton University in an action brought by the husband of a University employee who lived in an apartment complex owned by the University. The employee slipped on a "thin sheet of ice" on his front stoop when he stepped off his porch to go to work at 8:30 am. Undisputed evidence established that (i) the "thin sheet of ice" was caused by sleet and rain which fell sometime between midnight and 7:00 am; (ii) the grounds crew sanded the location by 10:30 am that day; (iii) at the time of the fall it was "overcast, drizzling"; and (iv) there had been no precipitation for three days prior to the fall. The plaintiff also admitted on the witness stand that "the University usually keeps on top of icy conditions," and that his biggest problem in the past had been that the grounds crew threw down too much sand, causing it to be tracked into his apartment. In addition, Princeton Borough's ordinance regarding removal of snow and ice from public sidewalks (which was offered as evidence of reasonable responsiveness), states that removal is to be completed within twelve hours of daylight. Nonetheless, the jury found the University negligent. 8

On the other hand, in Ohio a judge sitting on the Court of Claims held that Ohio State University did not have a duty to remove natural accumulations of ice from a dining hall's steps

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since Ohio's climate precludes prevention and correction of such natural accumulations. Therefore, the institution was not liable to a student who slipped and fell on ice that had accumulated the previous week, even though the university customarily removes ice and snow, and had issued a work order to clear the steps in question two days before the accident.

D. Snow -- Sledding.

A 20-year-old student at Louisiana Tech was severely injured in a sledding accident. After a snow storm the housing office published a bulletin which was distributed to every resident student saying that:

We encourage snowmen, sledding, etc., in proper areas and using good judgment. We discourage sledding down the hills along Tech Drive into the path of oncoming cars -- not good judgement [sic] -- nor is being dragged behind a moving vehicle considered good judgement [sic]. Fifteen reported personal injuries were associated with such behavior during the last snow.

The campus police had an unwritten policy to prohibit sledding everywhere on campus, and enforced this policy.

The plaintiff, along with other students, went sleigh riding on a hill which ended in a parking lot covered with ice and contained several light polices with concrete bases. The campus police had twice directed students away from that area, telling them the activity was dangerous and specifically pointed out that they might hit one of the light poles and be seriously injured.

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The plaintiff went down the hill on a trash can lid lying on his back with his head pointed downward. At the bottom of the hill he went across the parking lot and struck the concrete base of a light pole. The plaintiff was paralyzed from his chest down.

He brought suit against the university alleging that it breached its duty to warn him of the likelihood of striking a light pole, failed to prohibit sledding in the area, encouraged sledding in an area known to be hazardous and failed to make the area safe.

The case was dismissed on summary judgment on the basis that the university had no duty to the student. On appeal, the appellate court held that the university did, in fact, have a landowner's duty to warn the student of unreasonably dangerous conditions on its property, and that sledding on the hill overlooking a parking lot which contained light poles with concrete bases was such an unreasonably dangerous condition.¹⁰

The appellate court viewed the bulletin published and distributed by the housing office warning students not to sled in one area, but encouraging sledding in another despite previous sledding injuries (and despite the fact that the campus police were stopping sledding) as evidence of knowledge or dangerous conditions.

The court also stated that the university had a duty to protect resident students from unreasonable risks of injury. The court held, "In attempting to regulate the conduct of its students,

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¹⁰ Pitrie v. Louisiana Tech University, 596 So. 2d 1324 Louisiana Court of Appeals, Second Circuit, 1992.
Tech was obligated to take some reasonable and necessary steps to protect these students from foreseeable harm. While the concept of *in loco parentis* has been abandoned and adult students must be accountable for their own conduct, parents, students and the general community have some expectations that reasonable care will be exercised by universities to protect students from foreseeable harm."

The court noted that the risk of harm could have been reduced easily and economically by placing signs at the top of the hill, using barricades or placing hay bales in front of the concrete bases on the light poles.

E. *Lakes, Ponds, Streams, Etc.*

Many institutions have bodies of water on their properties which, like other parts of campus, are accessible to (and used by) the local community, as well as the students, faculty and staff. (At Princeton, for example, Lake Carnegie actually is an "athletic facility", as it was created for the crew team's use at the turn of the century by damming a river. However, it is unlikely that the local population would ever suspect that it is owned by the University since non-University properties border it in many areas.)

At the State University of New York at Albany, the parents and estate of a deceased student successfully sued the school for negligence after the student was electrocuted when he stepped on an
electrical conduit in a lake on campus. (The University conceded liability, and the case was tried only on the issue of damages.)\footnote{Higgins v. State of New York, 596 N.Y.S.2d 479 (3d Dept. 1993)}

Some "in charge" person at an institution containing such bodies of water should have an educated comfort level regarding at least:

(1) The scope of the institution's ownership of the body of water, and surrounding property;

(2) Signage and safety equipment (or perhaps call boxes) in heavily used or inhabited portions of the body of water;

(3) The impact of pollution upon activities involving emersion;

(4) The role surrounding municipalities and organizations play concerning the body of water, including security patrols;

(5) The procedures and safety information concerning ice skating (if applicable);

(6) Rules and regulations for use of the body of water, including use by student groups who may want to sponsor activities on the lake; and

(7) Alcohol use on and around the body of water.

II. MINIMIZING LIABILITY -- PERSONS OR GROUPS USING UNIVERSITY FACILITIES OR PROVIDING SERVICES TO THE INSTITUTION

A. Setting The Ground Rules.

Obviously, the best way to minimize liability is to prevent injuries from occurring. Presumably, compliance with federal, state and local laws, as well as a college's rules and regulations, will help to prevent injuries. Therefore, when permitting individuals or groups to use university facilities, make it absolutely clear that the individuals and groups have
responsibility for abiding by all applicable laws, regulations, ordinances, and rules, including university rules and regulations.

Sample provision (adapted from a facilities use agreement):

User will comply with all applicable laws and regulations of the United States and of the State of New Jersey, all ordinances of the Borough and/or Township of Princeton, and all rules and requirements of the police and fire departments or other municipal authorities of the Borough and/or Township of Princeton, and will obtain and pay for all necessary permits and licenses, and will not do or allow to be done anything on the premises during the term of this Agreement which is in violation of any such laws, regulations, ordinances, rules or requirements. If the attention of User is called to any such violations on the part of User or of any person employed by or admitted to the premises by User, User will immediately notify the University Contact Person identified on the attached specification sheet (or that person’s representative), and desist from or correct such violation.

User shall abide by all University policies applicable to conduct of persons on the University property.

User hereby assumes full responsibility for the character, acts and conduct of all persons entering the premises with the knowledge or consent of User, or by or with the knowledge or consent of any person acting for or on behalf of User. User shall take all necessary steps to assure that no persons engage in harassment or intimidation relating to personal beliefs or characteristics of anyone on the premises.

The University shall have the right to suspend or terminate the use of facilities by User immediately upon determining that there is reasonable belief of noncompliance with this provision.

A party hiring a contractor or letting someone do work on its property may be held liable for injuries arising out of the work if the party controlled the "manner and means" of doing the work. For example, Princeton University allowed the State of New Jersey to dismantle and remove from its property an abandoned warehouse-type structure that had been used for sponsored research. (The
State wanted to reassemble the building and use it as an aircraft hanger for firefighting equipment.) A State worker fell from the roof of the building during the dismantling process. Despite the fact that numerous witnesses testified that the University had no direct involvement in the project, a jury found the University liable and awarded in excess of $150,000. The case is now on appeal.

It is important that when contracting for services (including construction and maintenance) the institution make it clear that the contractor has control of the project.

**Sample provision (adapted from a construction contract):**

Contractor has complete responsibility for the manner and means of doing the Work. Subject to and in accordance with the terms and provisions of this Agreement, Contractor shall perform all the Work required by and reasonably inferable from the Contract Documents for the construction of the Project. In performing its obligations under this Agreement, Contractor shall be deemed an independent contractor and not an agent or employee of the University. Contractor shall observe, abide by, and perform all of its obligations hereunder in accordance with all Legal Requirements, including but not limited to the Federal Occupational Safety and Health Act. Without limiting the foregoing, it is expressly agreed that the Contractor is responsible for compliance with, and penalties for violations of, any OSHA requirements applicable to the University in connection with the activities of anyone other than University personnel on the Project.

B. Indemnification.

Wherever possible, include an indemnification provision in all contracts for services and for use of university facilities.
Sample provision (adapted from an agreement allowing an advertising "shoot" on University property):

User agrees to so conduct its activities upon the University's Premises so as not to endanger any person thereon or damage any property and further agrees to indemnify, defend (with counsel reasonably acceptable to the University), and hold harmless the University, its trustees, officers and employees (the "Indemnitees") against any and all claims for injury to person or damage to property (including claims of employees of User or of any contractor or subcontractor of User) arising out of the presence of and activities conducted by User, its agents, members or guests.

Without limiting in any way the foregoing, User specifically agrees to pay the costs and expenses of whatever nature for the defense of any action or proceeding at law which may be brought against Indemnitees upon any such claim, and to pay on behalf of Indemnitees, upon demand, the amount of any judgment that may be entered against them in any such action or proceeding.

Sample provision (adapted from a construction contract):

1. To the extent permitted by law, Contractor hereby assumes responsibility and liability to the University for any loss or damage which the University may suffer, due to any damage (direct or consequential) or injury (including death) to persons or property, sustained or alleged to have been sustained in connection with (i) the Work, including the performance, intended performance, or nonperformance of the Work by Contractor or its Subcontractors; or (ii) the Contractor's performance of or failure to perform its obligations as set forth in this Agreement. The term "loss", "damage", and "injury" shall include all costs and expenses of whatever nature or type, including judgments, arbitration awards, settlements, court costs, litigation expenses, and attorneys' fees in connection therewith.

2. To the extent permitted by law, should any such loss, damage, or injury referred to in Paragraph 1 be sustained, suffered, or incurred by the University, or should any claim for such loss, damage, or injury be made or asserted by anyone against the University, or its agents, partners, employees, consultants, affiliates and subsidiaries (hereinafter collectively referred to as "Indemnitees"), Contractor shall indemnify and hold harmless the Indemnitees of, from and against any and all such damages, injuries, and claims, and, from and against
any and all such damages, injuries, and claims, and from and against any and all other loss, cost, expense, and liability, including without limitation, legal fees and disbursements, that any Indemnitee may directly or indirectly sustain, suffer or incur as a result of such damages, injuries and claims.

3. Contractor agrees to assume, or cause the appropriate Subcontractor, if any, to assume, on behalf of any and all Indemnitees, the defense (with counsel satisfactory to the parties indemnified) of any action at law or in equity, or other legal proceeding, which may be brought against any Indemnitee alleging such loss, damage or injury, and to pay, or cause its subcontractors to pay, on behalf of every Indemnitee, the amount of any judgment, decree, award, or order that may be entered against each said Indemnitee in any such action or proceeding. Contractor agrees to provide such defense and make such payment pending resolution of any dispute as to whether Contractor is obligated to provide such defenses or make such payment.

4. Without limiting the foregoing, should any Subcontractor make a claim against the University relating to a subcontract or the Work, the Contractor shall indemnify and hold harmless the University against all costs, expenses, awards, judgments, and the like, and shall defend the University and the Architect against all such claims with counsel reasonably acceptable to the University.

NOTE: Depending upon the laws of the particular jurisdiction, indemnification for an indemnitee's own negligence may have to be specifically stated in the provision.  (The provision above does not contain such specificity.)

C. Obtaining Indemnification From Companies Or Organizations Sending Their People To The Institution.

Many institutions make their educational facilities available to members of the local or business community on a tuition-free

12 In New Jersey, for example, "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." Ramos v. Browning Ferris Industries, 103 N.J. 177, 191 (1986).
basis. For example, visiting fellows who are employed by small businesses might use equipment and labs at an institution through a small business assistance program, but with no direct compensation to the institution for the use of those facilities. Under such circumstances, an indemnification agreement makes sense.

**Sample agreement:**

Dear __________:

The [Name of Company], in consideration of [Name of Institution] providing facilities, equipment, and staff for conduct of an educational experience at [location], in the field of __________, for your employee [Name of Employee], during the period __________ to __________ under the mutual cooperation, direction, and supervision of [Name of Company and Name of Institution], [Name of Company] does hereby agree to indemnify, hold harmless, defend (with counsel reasonably acceptable to [Name of Institution] and release [Name of Institution], from and against all claims, demands and actions, or causes of actions, for damage to personal property, personal injury, or death arising out of [Name of Employee]’s presence on [Name of Institution]’s property and participation in the training experience, no matter what the cause may be, or who may be the cause of it.

Please acknowledge your acceptance by executing the attached copy and returning it to my attention.

Very truly yours,

(Institutional Representative’s Signature)

(Printed Name)

ACCEPTED:

(Company Representative’s Signature)

(Printed Name)

(Date)
D. Backing Up The Indemnification With Insurance.

An indemnification is only as good as the money that backs it up. Often, in the case of individuals or groups using university facilities, and small contractors providing services to the institution, that means insurance money. Therefore, include a provision requiring insurance in all contracts for use of university facilities, and contracts for services -- particularly where indemnification is expected.

**Sample provision (adapted from a facilities use agreement):**

User is required to maintain and keep in force at User's expense, during the period of use pursuant to this Agreement, a policy of General Liability Insurance with the following minimum requirements:

Evidence of Comprehensive General Liability insurance with coverage for bodily injury and property damage of at least $1,000,000 combined single limit each occurrence.

The evidence of insurance must contain the following provisions:

1. Name "[institution] and its agents, servants and employees as additional insureds" with respect to any liability arising out of the use of any premises or facilities owned and/or operated by [institution].

2. State that "the insurance afforded is PRIMARY insurance as to any other valid and collectible insurance in force".

3. State the following if the facilities will be used for any contest, exhibition or any athletic or sporting event: "The insurance afforded includes coverage for Participants Legal Liability."

4. The insuring company must be licensed in New Jersey and rated at least "A" in Best's.

5. A duplicate copy of the policy or certificate thereof must be received in the [designated office at the
institution, with address]. AT LEAST THIRTY (30) DAYS PRIOR TO THE FIRST DATE OF USE.

Any questions regarding these insurance requirements should be referred to the [designated office at the institution, with phone number].

E. What If The Group Desiring To Use The Facilities Truly Can't Get Insurance?

If an institution wishes to make its facilities, such as ball fields, available for use by groups under reasonable conditions, it may not want to preclude the use of the fields by otherwise acceptable groups that are truly unable to obtain insurance. However, it seems reasonable to say that if the insurance industry won't take the risk of an activity, we won't either.

A suggestion:

(1) Have a facilities use agreement signed by both the group (as an entity) and 6-7 of its members, which states that the club and the members individually will indemnify the University and hold it harmless. (Some of the members homeowners' policies might cover their individual liability. But even if they didn't, the potential for individual liability might discourage any injured group member from suing the University, since it would result in the 6-7 players being brought into the suit as well.)

(2) Have those 6-7 people, as well as the group (as an entity), agree in writing to have a waiver signed by every member of the group. Make it a condition of use that if the waiver is not signed and sent in to the appropriate office at the institution, the use of the field will terminate forever. No second chances.
Do unannounced spot checks every so often make sure that the waiver was signed by everyone on the field before the event began.

III. STUDENT ACTIVITIES\CLUBS\RECREATION\SPORTS

* * *

SITUATIONS TO CONSIDER AND DISCUSS:

A university on a campus in the corner of a mid-sized city has an active student volunteers program, which receives various levels of assistance from the Dean of Student's Office, such as stationary allocation, telephone use, and access to two University vans. Among the volunteers' programs is an inner-city tutoring program, which has been in existence for over fifteen years without incident, and has enabled children under twelve years old to be tutored once per week by approximately eighty university students.

Four nights per week approximately 20 students travel in the two vans to a townhouse project in the inner-city. Each student tutors one or two children in the children's own homes for one hour, and then the students get into the vans and head back to campus.

In addition, each spring the entire group of eighty tutors and approximately one hundred and twenty children take a field trip outside the city on buses to expose the children to something they might not otherwise be able to enjoy -- such as a national historic site or a museum.

Q: What are the risks of this program?
Q: Do they outweigh the benefits?
Q: Who should be involved in the decision-making process?
Q: If the program is to continue, what safeguards should be in place, and who should monitor compliance?

* * *

A. Usage of Vehicles and "Nonprofessional" Drivers.

The National Law Journal reported in its September 6, 1993 issue that the Board of Regents of the University of California agreed to pay $7.15 million dollars in connection with a brain
injury suffered in an automobile accident during a 4-H Club trip.\textsuperscript{13} A bit of investigation revealed that the settlement arose out of the following facts:

(1) 4-H Clubs are sponsored by the U.S. Department of Commerce and administered by the States. In California, the administration is done through the Regents. An employee of the Regents oversaw the planning of this trip, which was a one week camping trip.

(2) The Regents conceded liability for the accident at trial (and only disputed the amount of damages) because

(i) the Regents, and in turn its employee, were responsible for the quality of the drivers they used;

(ii) the victim in the case was placed in a car with a graduate student volunteer whose driving record had not been checked out, and who had previous speeding tickets (but no record of accidents); and

(iii) the graduate student driver made a wrong turn en route to the campsite, then did a U-turn 75 feet in front of an 18 wheel truck and trailer which was going 45 mph in a 55 mph zone.

(3) The graduate student driver (who was killed) had an insurance policy with a $100,000 limit, leaving the Regents as the only "deep pocket" defendant.

This case underscores the risk institutions run when putting people in vehicles for "sponsored trips" of any kind -- getting intercollegiate athletes to games or practices; other extracurricular activities, including volunteer and outreach programs which require transporting students to off-campus locations (and, sometimes, transporting children onto campus); class field trips and research; etc. Obviously, institutions

cannot suspend these activities, as they often go to the heart of the college experience. However, there is a need to control the risk.

Ideally, an office or working group within the institution should identify all student organizations and activities that have any affiliation with the university, identify the nature of the affiliation (including facilities, funds, etc. provided by the university), identify each organization’s or activity’s contact or point person within the university, and prioritize the organizations and activities regarding liability concerns. At the minimum, this exercise (which could be quite labor-intensive at even the smallest of institutions) should result in an increased understanding of the nature of the institution’s risk arising out of student organizations and activities, as well as a sharing of health and safety practices and procedures, waiver forms, etc. among the organizations and activities.

B. Acknowledgement By Students Of Risks Involved, And Release.

The laws varies regarding the enforceability of acknowledgements, releases or waivers of liability. However, as a general rule the institution and the individuals involved in planning and supervising an activity will be better off in any subsequent lawsuit arising out of a personal injury occurring during that activity if the injured student really knew what risks (s)he was taking, and freely chose to take those risks. Better
still, the student should have agreed that (s)he would not hold the institution or any individuals responsible if an injury occurred.

Sample Document (which may be enforceable in New Jersey):

RELEASE AND ACKNOWLEDGEMENT OF
ASSUMPTION OF RISK
FOR OFF CAMPUS ACTIVITIES

In consideration of being permitted to participate in [name of activity] (hereinafter the "Activity"), I, the undersigned, in full recognition and appreciation of the dangers and hazards inherent in the Activity (including but not limited to transportation associated with the Activity), which I have had a full opportunity to investigate through any questions I wished to ask of the responsible persons, I agree to assume all the risks and responsibilities arising out of my participation in the Activity and any other activities undertaken as an adjunct thereto; and, further, I do for myself, my heirs, and personal representative(s) hereby release, hold harmless, and forever discharge [name of institution] and all its officers, agents and employees from and against any and all claims, demands, and actions, or causes of actions, on account of damage to personal property, or personal injury, or death which may result from my participation in the Activity.

In witness whereof, I have caused this release to be executed this _____ day of ______________, 19__.

(Signature)

(Printed Name)

(Co-signature of parent or guardian if student is under 18 years of age.)

C. The Athlete With A Medical Condition -- To Play Or Not To Play?

Often an institution's medical staff refuses to clear an intercollegiate athlete for practice and competition, yet the student-athlete gets a "second opinion" to the contrary. What to do? When deciding whether a student-athlete with a physical
condition should be permitted to engage in intercollegiate sports (even if (s)he is willing to sign a waiver and release), an institution’s medical staff will consider the type of sport, its physical demands, and the risk of bodily harm. The American Academy of Pediatrics (AAP) has categorized sports into the following groups: nonstrenuous; moderately strenuous; strenuous; limited contact/impact; and collision/contact. At Princeton, for example, our medical staff would adamantly refuse to permit participation in any sport above the moderately strenuous level for a student with a history of hypertrophic cardiomyopathy (the most common cause of sudden death in young athletes).

If there truly is a reasonable difference of opinion between the institution’s medical staff and an independent physician, the institution might consider allowing participation by the student-athlete in the sport providing

(1) the independent physician has relevant expertise;

(2) the opinion is held by the independent physician despite being informed by the institution’s staff of its reasons for its opinion;

(3) the independent physician, the student and his/her parents are fully informed regarding the nature of the activity and the reasons why the staff recommends he/she not participate;

(4) the independent physician summarizes his/her opinion and the basis for it in writing;

(5) the medical condition is of a type that reasonable physicians with appropriate training could differ regarding the appropriateness of the student engaging in the activity; and

(6) an appropriate waiver and release is obtained.
MEDICAL WAIVER AND RELEASE

(student) (Princeton University, Class of 199__) and his parent(s) have been advised by and on behalf of The Trustees of Princeton University that it is the opinion of the appropriate University trainer and physicians who provide services and advice to the University’s (sport) team that, in their opinion, (student) should not engage in (sport) practice or competition [until (date)]. (student) and his parent(s) have consulted independently with Dr. (doctor), a physician who has relevant expertise. (student) and his parent(s) have granted permission to Dr. Gregory Gastaldo of the University’s Isabella McCosh Infirmary to speak to Dr. (doctor), and Dr. Gastaldo has explained to Dr. (doctor) the University staff’s medical opinion regarding (student). Dr. (doctor) has told Dr. Gastaldo that he respectfully disagrees with that opinion. It is the opinion of Dr. (doctor) that (student) is physically capable of engaging in (sport) team practice and competition [as of (date)]. Dr. (doctor) has told (student) and his parents of this opinion, and the basis for it, and has summarized his opinion and basis for it in the attached letter.

(student) and his parent(s) acknowledge that they have asked all questions and made all inquiries they wish to make regarding his medical condition; that they have been advised of the University’s recommendation and have decided to reject that recommendation after receiving conflicting advice from physicians they have consulted, including Dr. (doctor). (student) and his parent(s) also acknowledge that they understand completely the nature of the activity he will engage in, and have had an opportunity to ask all questions and make all inquiries they wish to make regarding that activity.

Due to the representation of (student) and his parent(s) that they wish to reject the University’s recommendation and instead accept the opinion of Dr. (doctor) that (student) is physically capable of engaging in (sport) team practice and competition as of (date), the University will permit him to do so under the condition that (student) and his parents hereby take full responsibility for the consequences of participating in the activity [prior to (date)], and hereby release the University, its trustees, officers, employees, and agents, including coaches (paid and volunteer), trainers, and physicians, from any and all claims and rights they may have, now and in the future, arising out of (student)’s participation in the activity.

(student) and his parent(s) have read this Medical Waiver and Release, understand its contents, understand their right to consult physicians and/or an attorney prior to signing it, and agree to its terms.

(Date)
Witness: _________________________          (student)

Witness: _________________________          (parent)

Witness: _________________________          (parent)

Unfortunately, even when an institution decides not to let the student-athlete engage in the athletic activity it may face a lawsuit. Arizona State University recently was sued by a baseball recruit after the school refused to let him play due to a heart valve problem. In its December 15, 1993 issue, The Chronicle of Higher Education reported (on page A31) that the student-athlete has asked the court to order ASU to let him practice and play with the baseball team despite the fact that he underwent heart surgery last summer and has been advised by physicians not to participate in competitive sports.

ASU told the plaintiff's lawyer that "refusing to permit Mr. Hagins to needlessly expose himself to the very real risk of serious or even fatal injury is clearly more important than winning baseball games." (ASU's position was not swayed by the student-athlete's offer to sign a waiver absolving the university of any liability.)

IV. ALCOHOL-RELATED LIABILITY

A tension exists between the 21-year-old legal drinking age and the practical reality of alcohol use (and abuse) by
undergraduates. This situation presents potential opportunities for plaintiffs' lawyers seeking compensation for alcohol-related injuries to look to the educational institutions, fraternities, clubs and the like as potential defendants, as well as individual faculty, staff, and students.

As administrators and counsellors, we may take some comfort in the view repeatedly quoted from a federal appellate decision in Bradshaw v. Rawlings, 612 F.2d 135, 138-40 (3d Cir. 1979):

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. The authoritarian role of today's college administrations has been notably diluted in recent decades.... Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in the college life.

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Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interest of the student and of the institution of higher learning are much different today than they were in the past.

For example, Washington State's Supreme Court held that its Constitution precludes the warrantless entry by a police officer into a student dormitory room at the University of Washington following the student's arrest for possession of alcohol as a minor.

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14 In a publication from the Core Institute entitled, Alcohol and Drugs on American College Campuses: Use, Consequences and Perceptions of the Campus Environment, Vol. I, 1989-91 (which is available from the Center for Alcohol and Other Drug Studies, Student Health Program, Southern Illinois University, Carbondale, Ill. 62901), it was reported that 42% of the students surveyed nationally said they had "binged" at least once in the last two weeks, and nearly 19% said they had "binged" three or more times in that time period. (Students in the northeast reported "binging" the most with students in the west having the lowest "binge" rate.)
unless there is a "compelling need".\textsuperscript{15} Under the court's analysis, the rooms are considered private residences which are not under the control of the University. Following similar logic, an intermediate appellate court in Washington held that the University has no duty to prevent students from drinking alcohol in student dorm rooms.\textsuperscript{16}

However, this evolution of relationships has not meant the end of lawsuits arising out of student drinking. Colgate University was sued by a student who alleged that she was raped by three students at a fraternity party while all of them were drunk. The litigation, in which the student claimed that Colgate had not sufficiently enforced its rules against underage drinking, was settled last summer.\textsuperscript{17}

Since tort liability is a creature of individual state law, which often varies widely from state to state, no truly applicable generalities can or should be made in the context of this overview except, perhaps that "[t]he 'deep pocket' principle is an unpleasant reality".\textsuperscript{18} Plaintiffs' lawyers will look to the institution, fraternities, clubs, and individuals as potential defendants in the hope that operating funds, indemnity agreements or insurance policies might provide a source of funds. Compounding


\textsuperscript{17}\textit{The Chronicle of Higher Education}, September 1, 1993.

the problem is the fact that damage verdicts "are frequently the product more of sympathy for an injured person and comparison of the parties' resources than of conscientious weighing of the evidence and the legal rules of fault", and the "unrealistic expectations about a school's ability to supervise and control the conduct of students who are regarded as adults for most legal purposes."\textsuperscript{19} Even though the doctrine of \textit{in loco parentis} technically no longer applies to colleges and universities,\textsuperscript{20} tort liability concepts of "foreseeability" and "duty" nonetheless creep into personal injury actions against institutions arising out of alcohol use in collegiate settings.\textsuperscript{21}

A. Being Sued -- The Big Fear.

"We didn't do anything wrong!"

The fact that someone or some entity in the chain of distribution or provision of alcohol may not ultimately be liable, as a matter of law, for injuries that result following the consumption of alcohol can have little to do with whether that

\textsuperscript{19} Id.

\textsuperscript{20} See, e.g. \textit{Bradshaw v. Rawlings}, 612 F.2d 135 (3d Cir. 1979); \textit{Whitlock v. University of Denver}, 744 P.2d 54 (Colo. 1987); \textit{Beach v. University of Utah}, 726 P.2d 413 (Utah 1986).

\textsuperscript{21} \textit{Turek v. University of Delaware}, 594 A.2d 506 (Del. 1991) (New trial ordered by Delaware Supreme Court where trial judge overturned jury verdict against a university relating to injuries suffered by a student during a hazing incident in a fraternity house on university property which involved alcohol consumption by students below the drinking age).
person or entity is named as a defendant in a lawsuit. Personal injury lawsuits are often based on contingency arrangements between the lawyer and the injured client. This means that the lawyer is compensated based on a percentage of recovery, and not on the number of hours spent on the matter. The motivation is to get as much money as possible, with as little effort as possible, and the best way to do that is to get as many defendants named as possible. This increases the likelihood that some or all of the defendants will pay a "settlement" to get out of the case early rather than stay involved for years until it gets to trial; and increases the likelihood of finding "deep pockets", such as a well endowed club, a profitable company, and insurance companies, including those insurance companies that have written homeowners' policies to faculty, staff, and parents of students.

B. Individual Liability.

A plaintiff's lawyer might attempt to prove culpability of individuals (such as fraternity officers, student group heads, and assistant deans) by things like:

-- Server routinely ignored instructions not to serve minors;

-- Place of service open to minors and had characteristics which encouraged little else except the service of alcohol;

-- No attempts by server to inhibit minors, who were reasonably expected to be present, from drinking alcohol;

-- "Looking the other way" while rules routinely circumvented; or

-- Inviting those under 21 to events where no alternatives for alcohol are present.
C. Political Climate

Reflecting the current views regarding alcohol use and abuse, within the last year state legislators in New Jersey have proposed laws which would (i) prohibit all "hazing" activities at fraternities, including "forced or excessive consumption of alcohol", and (ii) extend criminal liability for the service of alcohol to minors to those people who "manage" the places where the alcohol is served. Presumably, this would include officers and directors of fraternities, as well as hired on-site managers.

VI. CAMPUS HEALTH FACILITIES

An institution's potential financial exposure arising out of the provision of student health services may include not only negligence claims against the institution, but also a consulting physician's potential exposure on a medical malpractice claim which has more to do with follow up care off campus than what actually took place on campus. Consider this hypothetical:

(1) A child with birth defects is born to a graduate student who had prenatal care at the institution's on-campus health center.

(2) The parents sue the physician (who is a consultant to the institution and performed the prenatal care, along with the institution's staff nurses), the hospital where the baby was delivered, etc., but do not sue the institution.

(3) The physician's malpractice carrier relies upon something in the complaint or uncovered during discovery to argue that the alleged malpractice against the physician involved, in part, the physician's care during the prenatal stage.

(4) Therefore, the malpractice carrier brings the institution into the case as a third party defendant.
At the minimum, the institution’s malpractice insurance and consultancy agreements should have clear language which makes the physician’s own malpractice insurance primary if his or her insurance may be reached on the basis of any aspect of the pleaded claims against the physician.

VII. INDEMNIFICATION AND DEFENSE OF FACULTY AND STAFF

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SITUATION TO CONSIDER AND DISCUSS:

For ten years incoming students at a university have had the opportunity to participate in overnight camping, canoeing, bicycling, and hiking trips as part of freshman orientation. These trips are administered by one assistant dean (who has other duties, of course), with the assistance of a secretary and (occasionally, student interns).

One of the trips involved canoeing down a small river for a few days with trip leaders -- upperclass students who have been trained by the assistant dean. The trip took the identical route, and used the same campgrounds, as approximately thirty trips over the previous ten years. (After each of those trips, the leaders filled out reports of their trips, which were reviewed and maintained by the assistant dean. However, he did not make it a practice to go on the trips himself or personally check out the routes.)

At approximately 7:00 pm on the third day of the trip, three freshman walked down a state park’s dirt road leading from a dock along the river and attempted to cross a county road to get to their state park-designated campsite on the other side of the road. The spot where they were crossing was on a curve with limited visibility.

A truck going at excessive speed with an intoxicated driver came around the curve and swerved into the opposite lane, killing one of the students, who did not step completely off the road upon hearing the truck. (The other two students did get out of the way.)

The parents and the estate of the deceased sue the assistant dean of students in his individual capacity, alleging that he is directly and vicariously liable for allowing the student to cross the road in a dangerous location without appropriate safeguards.

Q: Should the university defend and indemnify the assistant dean?
Q: Should the indemnification depend upon whether he is found to be negligent by the jury?
Q: Should it depend upon an "independent" evaluation of his attention to trip safety?
Q: Should these trips continue in the future?
Q: If so, what changes, if any, should take place?
Q: Did the assistant dean do his job adequately?

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What is the nature, scope, and implementation of indemnification policies by universities toward their employees? What are the circumstances under which the university will retroactively step back from its promise of indemnification, and how are those circumstances communicated in advance to the indemnitees? What about conflicts of interest, and what rights do university employees have to request that the university fund their retention of individual attorneys in the event of such conflicts?

This area is more complex that it might first appear, and very timely, particularly in a state like New Jersey where a charitable immunity statute protects a private institution from negligence claims, but not its employees. The practical reality of the effect of such a statute is that plaintiffs' lawyers sue the university (expecting that it will be dismissed as a defendant) and faculty or staff, who rightly expect to be defended and indemnified.

The trend in corporate America seems to be to distance the entity from the employee in cases where they both are sued, so as to protect the entity. This seems to be bad business, and plain wrong. An employer -- particularly a university -- should not do this unless (i) it determines through early investigation that the employee was doing something grossly negligent, illegal, outside
the scope of employment, or not in the best interests of the university, or (ii) it learns as the action progresses that the employee was not fully forthcoming regarding the relevant facts.

The comfort of an indemnification letter, provided to the faculty or staff member as soon as possible after the complaint is served, will pay dividends both in terms of defending the lawsuit, and reinforcing (or perhaps creating) institutional loyalty.

**Sample letter (confirming indemnification and defense for faculty in a claim of defamation by a student):**

Dear Professor __________:

You may recall that during our initial telephone conversation shortly after the complaint was served, I mentioned to you that I expected that the University would, in the normal course, provide defense counsel to you and indemnify you in the event of any adverse results in this action. I am pleased to now confirm this in writing.

As we have discussed by telephone, the University’s Bylaws permit the University to indemnify and defend faculty members against claims arising out of a faculty member’s duties, so long as the faculty member acted in good faith and in a manner reasonably believed to be in the best interests of the University. Based upon a review of all the information currently in the possession of our office, indemnification will be extended to you by the University, and we intend that the University and you will be jointly represented by counsel.

It is our present intention that attorneys in our Office of General Counsel will act as counsel for you, as well as for the University. As we have discussed, we are, and will remain, concerned about minimizing the time commitment and other burdens which this litigation may impose upon you. Nonetheless, your input and involvement in the defense in this case will be crucial, and it is likely that you will, in fact, be inconvenienced at one time or another. For that, you have our thanks and apologies in advance.

The ability of our office to provide a joint defense for the University and you should yield a number of advantages: we will have the benefit of a unified defense; management of the case will be greatly facilitated; and, perhaps most significantly for you, you will not have to be put to the expense of retaining your own attorney (although, as I mentioned to you during our initial
telephone conversation, you are certainly free to do so if you believe it would better meet your needs).

As in all litigation in which there is a joint defense, there exists the possibility that during the course of this litigation facts may be developed through discovery and investigation which may create a conflict situation necessitating that attorneys in our office withdraw from the representation of you. We have no reason to believe that this is likely to occur, but I am required by the New Jersey Lawyers' Rules of Professional Conduct to bring the potential for such a conflict to your attention. (In such an event, the University would pay for your reasonable defense costs and continue to indemnify you so long as the "good faith" and "best interests" criteria discussed above remain applicable.)

Should you have any questions concerning this joint representation or wish to discuss this matter further, please do not hesitate to contact me.

Very truly yours,