

**RECENT TORT LIABILITY CASES ON CAMPUS  
AS THE BASIS FOR STRATEGIC RISK MANAGEMENT INITIATIVES**

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Two hundred years ago, the very idea of a student suing a higher education institution for a personal injury or other tort claim arising on campus would have been unthinkable. Students were considered the minions of the academy. A student assaulted on campus by a drunken roommate, injured in a fall from a defective dormitory balcony or defamed by a professor in the campus newspaper had few, if any, real options for the redress of his or her grievances and little hope for justice or compensation. In fact, for the first one hundred and seventy-five years or so of formal higher education in the United States, tort claims against colleges and universities, much less against faculty members, staff members and administrators, were extremely rare. In those few cases which were brought to trial, courts tended to defer to colleges and universities. They were slow and reluctant to recognize duties owed by higher education institutions to their students, and in those few cases where courts did impose liability, the judgments and verdicts they entered on behalf of student claimants were typically isolated and small.

In the middle of the last century, though, a marked and now well recognized shift began to occur. With the eradication of the *in loco parentis* doctrine in *Bradshaw v. Rawlings* and other similar cases, and with the growth of institutional endowments on campus and the creation of the modern, corporate university, courts gradually began to view and treat higher education

institutions more and more like for-profit corporations in deciding student legal claims.<sup>1</sup> Today, more than ever before, colleges and universities tend to be treated more like for-profit enterprises than the sacred cows they were for many decades. As a result, in addition to traditional areas of personal injury and tort litigation, there has been a marked expansion in cases involving the negligent supervision and instruction of students, the duty of the university to control others, and the duty to warn of foreseeable harm.

To further complicate this trend, a sluggish U.S. economy over the past few years, when paired with the epidemic of State government budget deficits across the country, has dried up many resources previously available to higher education institutions to pay consultants and other experts to assist university risk managers, attorneys and administrators in the pro-active identification, assessment and management of risk on campus. Many of the resources needed to undertake basic inspections, repairs, renovations, maintenance, upgrades and modernization of facilities, and to fund other important pro-active steps to help mitigate the risk of injury (and thereby help minimize institutional liability) are no longer available. As of this writing, these trends seem unlikely to change in the short term.

To confront this harsh reality, many college and university attorneys, risk managers and administrators have been compelled to consider internal steps they can take, pro-actively and affordably, to identify, assess and manage areas of risk on campus. In most instances, they find themselves in long lines, requesting an allocation of scant, finite and ever-shrinking resources for measures needed to help protect students, faculty, staff and visitors from reasonably foreseeable risks of injury and harm, which, in turn, is the best way to reduce institutional legal liability and protect the assets, resources and reputation of the home campus.

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

Several recent court decisions from various jurisdictions serve as excellent examples to highlight the growing trend toward holding colleges and universities legally responsible for injuries and damage sustained in connection with their programs, activities and facilities. Some of these cases involve third parties who commit criminal, tortious or other unlawful acts against faculty, staff, students or guests, either on campus or in connection with university sponsored off-campus programs. Even though the “bad actors” in these cases are not always employees or agents of the institution, the plaintiffs often allege a failure by the university to provide them with adequate security, protection, or warning of the potential danger or harm. The defendants in these cases typically assert either that they are entitled to some sort of statutory immunity (if they are public institutions), or that they did not owe the plaintiff a legal duty to protect or warn because the criminal actions in question were not reasonably foreseeable and were committed by a third party who was not an employee or agent of the institution.

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.

We will next turn our attention to an examination of several recently decided tort liability cases involving colleges and universities, with an eye toward discerning the lessons they offer for higher education administrators and attorneys at other institutions.

**Case No. 1: *Hendricksen v. State*, 84 P.3d 38 (Mont. 2004)**

**Facts:** On November 2, 1995, a three-year-old child, Hunter, slipped between the stairway balusters of a second story open stairwell in the Montana State University library and fell 20 feet to the concrete floor below, landing on the left side of his head. He sustained three skull fractures in the fall, and an area of his brain tissue about the size of a golf ball atrophied. Within hours of Hunter's fall, his mother learned that another child had fallen through the same stairway just weeks earlier. The distance between the balusters was approximately 11 to 12 inches.

Hunter's mother filed suit on Hunter's behalf, and on her own behalf seeking emotional distress, loss of consortium and post-traumatic stress disorder damages. Hunter's claim was for medical expenses related to his injuries, loss of enjoyment of lifestyle, and pain and suffering. On February 23, 1999, the trial court granted partial summary judgment in favor of the plaintiffs and against the State of Montana on the issues of duty and breach. It also bifurcated the issues of liability and damages in the case for trial, as well as the claims of the mother and her son. In ruling on a pre-trial motion in limine, the trial court excluded any evidence of the prior fall from consideration by the jury. Nevertheless, following a 5-day trial, the jury entered a verdict against the State, but reduced it by 20% on the basis of the mother's comparative fault.

**Holding:** On appeal, the Supreme Court of Montana affirmed the trial court's finding that

the State owed the plaintiffs a duty to maintain the balcony and staircase at a state university library in a condition safe enough for ordinary and public use. According to the Court:

A duty of care is breached as a matter of law if a defect or dangerous condition exists of a sufficient magnitude to cause a reasonable person to conclude that an accident is likely to occur because of the condition and the person or entity exercising control over the condition had notice of the defect.

The court noted that the State knew the distance between the balustrades was “a gaping eleven to twelve inches,” and additionally, that “approximately two weeks earlier another child fell through the balusters at the library.” In the court’s own words: “[a]fter this first accident, the dangerous condition of the balusters could not be ignored. Yet the State did not act.” The court held that the plaintiffs’ accident was foreseeable regardless of the fact that the building was grand-fathered in (and compliant with) an earlier building code and had a relatively accident-free history.

Because the State has a policy interest in keeping the university library open to the public, the court concluded that it must be maintained in a condition that is reasonably safe for all users and their children.

#### **Examples of Pro-Active Steps Universities Might Carry Away From this Case.**

Some of the pro-active steps higher education institutions might consider taking on their own campuses in response to this case include, without limitation, the following:

- ◆ Conduct regular inspections of facilities and sites on campus in search of defects or dangerous conditions of sufficient magnitude to cause a reasonable person to conclude that an accident is likely to occur because of the condition. Keep kids-on-campus in mind with respect to facilities where children are likely or permitted to be present. Copy the

institution's counsel on all inspection reports and recommendations, and implement repairs in a time frame appropriate to the potential danger presented.

- ◆ Have a policy or protocol in place on campus such that upon notice of a potential defect or dangerous condition to anyone, the same is promptly referred to risk management or another office deemed appropriate on campus for prompt inspection and, if warranted, repair.
- ◆ In the event of an accident or injury on campus, or in connection with campus facilities, programs or activities, ask what steps might reasonably be taken in order to help prevent or reduce the likelihood of a similar or repeat accident or injury at the same location and/or in the same manner in the future. If necessary and appropriate, consider implementing temporary repairs immediately until a longer term solution can be found.
- ◆ With respect to older facilities, do not rely solely upon compliance with codes applicable when the facility was built. Undertake a nuanced review and analysis.
- ◆ In the event of an accident, injury or claim, or where litigation appears imminent, utilize the work product doctrine to help reasonably protect investigations from disclosure in the event of litigation. This may be more difficult at public institutions.

**Case. No. 2. *Molinari v. Tuskegee University*, No. 3:03cv1020-T, 2004 WL 2358273**

**(M.D. Ala. 2004).**

**Facts:** Plaintiff Monica Molinari was a veterinary medicine student who participated in clinical exercises on animals owned by the Defendant, Tuskegee University. As part of her course work, the plaintiff participated in a student surgical group . The cow on which she was assigned to perform a surgical procedure was resisting fellow students, so the supervising professor (Dr.

Jeannine Bellamy) was called on three occasions to assist. Each time, the professor either gave an additional sedative or took other measures to calm the animal, but did not restrain it. The final time, the professor noticed that the cow had previously suffered a spinal fracture and ordered plaintiff's group to perform a modified surgical procedure on the animal. The professor then left to supervise other students. While attempting to perform the modified surgical procedure assigned by her professor, the plaintiff was kicked by the cow and injured. She subsequently sued both the university and her professor, alleging that they negligently and wantonly allowed the cow to kick her, and that the university negligently supervised Professor Bellamy and failed to provide timely and adequate medical treatment after Molinari was kicked.

The defendants moved for summary judgment, asserting that with respect to the plaintiff's negligence and wantonness claims against both Tuskegee and Bellamy, they were not liable because: (1) Molinari failed to present substantial evidence of negligent or wanton misconduct; and (2) Molinari assumed the risk that she might be injured when she attempted to perform the surgical procedure. With respect to Molinari's negligent supervision and willful-failure-to-provide-medical-treatment claims against the University, Tuskegee argued that it is not liable because (1) Molinari failed to present substantial evidence that the university negligently supervised Bellamy; and (2) the university had no legal duty to provide Molinari with medical treatment after she was kicked, or, even assuming that it did, Molinari had failed to provide evidence that the university willfully failed to provide medical treatment..

**Holding.** On the question of whether the plaintiff failed to present substantial evidence of negligent or wanton misconduct, the court found substantial evidence that the defendant university and Professor Bellamy knew the cow possessed a vicious propensity but negligently or wantonly

failed to exercise due care. Of particular importance to the court was the fact that Professor Bellamy had been summoned to Molinari's surgical procedure site 3 times and had twice attempted to sedate the cow prior to the plaintiff being injured. According to the court, the professor had knowledge of facts from which she could infer that the animal was likely to commit an act of the kind complained of. Because there was a fact question between the parties regarding whether or not the use of leg restraints on the cow or a hydraulic chute during the procedure would have reasonably protected from harm, the court denied the defendants' first motion for summary judgment. Summary judgment was also denied on the defendants' joint assumption of risk defense, because, the court held, Tuskegee did not meet its burden of showing that the plaintiff was conscious of and disregarded a known risk. Specifically, the defendants failed to prove that Molinari voluntarily consented to bear the risk of harm and there was a factual dispute between the parties regarding whether or not the professor told Molinari she would fail her if she refused to perform the assigned surgical procedure on the cow.

With respect to the defendant university's claim that Plaintiff Molinari failed to present substantial evidence that the university negligently supervised Professor Bellamy, the court denied summary judgment, holding that "Tuskogee is not absolved of its duty to provide adequate cattle restraints merely because, given its large class enrollment, doing so would have required the purchase of additional equipment." According to the court, "Molinari has presented substantial evidence to support a reasonable inference that, given Tuskegee's failure to provide sufficient cattle-restraining equipment, it was foreseeable that [Professor] Bellamy would instruct Molinari to perform the assigned surgical procedure while the cow was inadequately restrained.

Finally, with respect to the defendant university's argument that it had no legal duty to

provide Molinari with medical treatment after she was kicked, or, if it did, that Molinari had failed to provide evidence that the university willfully failed to provide medical treatment, the court agreed that Molinari had not presented substantial evidence that the university willfully failed to provide her with medical treatment. According to the court, the record was “devoid of evidence that would support the conclusion that Bellamy acted with a purpose or intent or design to injure Molinari, or that with knowledge of the danger or peril to Molinari, Bellamy consciously pursued a course of conduct with a design, intent, and purpose of inflicting injury on Molinari. Thus, the case was ordered to proceed to trial on all of plaintiff’s claims except for her willful failure to provide medical treatment claim, on which summary judgment was granted for the defendant university.

**Examples of Pro-Active Steps Universities Might Carry Away From this Case.**

Some of the pro-active steps higher education institutions might consider in response to this case include, without limitation, the following:

- ◆ With respect to the supervision of clinical programs, as the potential for injury or danger to students or others increases, the level of supervision and precautionary measures should increase accordingly, or the exercise should be stopped.
- ◆ With respect to clinical programs, have in place adequate equipment that is appropriate for the number of students in each clinical program. Confirm that the equipment being used is available to all students in the program and adequate to help reasonably protect the students from reasonably foreseeable harm.
- ◆ Establish emergency protocols to be followed in the event of a personal injury accident or incident. Train all clinical faculty, staff and students concerning those emergency

protocols and post and publish them prominently.

- ◆ Train faculty and staff to exercise due care when dealing with animals having vicious or potentially violent propensities.

**Case.No. 3 *Geiersbach v. Frieje*, 807 N.E.2d 114 (Ind.Ct.App. 2004).**

**Facts:** On February 5, 2000, William Geiersbach, a baseball student-athlete at Tri-State University, was participating in a practice in the University's gymnasium. The players were positioned to mimic their respective positions on the field during a game. The pitcher and a volunteer assistant coach each had a ball. The pitcher would deliver his ball to the catcher. The catcher was then supposed to discard it. At the same time, the volunteer assistant coach, standing in the batter's box, would introduce his ball into play by hitting it in whatever direction he chose. In this instance, there were runners placed at 1<sup>st</sup> and 3<sup>rd</sup> base. The pitcher delivered the ball to the catcher, but the catcher mistakenly thought he was supposed to deliver the ball to second base to cutoff a potential steal. At the same time, the assistant coach hit his ball down the 3<sup>rd</sup> base line. The second baseman moved to cover second, keeping his attention on the third baseman fielding the ball and ready to receive it. He was struck in the left eye by the ball thrown by the catcher. He suffered severe and permanent eye damage.

**Procedural History:** The injured second baseman filed suit against the University, the head coach, the volunteer assistant coach and the catcher, alleging negligence. The defendants filed a motion for summary judgment in the case, which was granted by the trial court. The plaintiff appealed to the Indiana Court of Appeals.

**Holding:** On appeal, the court affirmed the granting of summary judgment to the defendants, noting that "athletes who choose to participate in sports must accept that those sports

involve a certain amount of inherent danger.” According to the court: a participant in a sporting event “does not owe a duty to fellow participants to refrain from conduct which is inherent and foreseeable in the play of the game, even though such conduct may be negligent and may result in injury absent evidence that the other participant either intentionally caused injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport.”

The court went on to hold that:

when a person sustains an injury as a result of risks inherent in sporting activities in which the person voluntarily engages, there is no occasion to invoke comparative fault principles because there has been no breach of the duty of care and accordingly no conduct that would warrant the imposition of liability.

Importantly, the court extended this protection not only to players on the field, but also “to any person who is part of the sporting event or practice involved.” This includes participating players, coaches, and even players sitting on the bench during play. The court held that “those participating in the event or practice should be precluded from recovering for injuries received resulting from dangers or conduct inherent in the game, unless they prove that the conduct was reckless or the injury was intentional.” In other words, simple negligence is not enough to recover; the injured party must prove reckless or malicious behavior or intentional injury.

Notably, the court’s decision only applies to injury-causing events arising out of “inherent or reasonably foreseeable” parts of the game. Because the plaintiff was injured during a common drill which had been used before by the team, because being hit by a ball during a practice or game is an inherent danger in baseball, and because there was no evidence of recklessness or intent to injure, the plaintiff was not allowed to recover damages from the defendants.

This case will make it much more difficult for injured plaintiffs to successfully sue not only their college or university but also their teammates, coaches and other participants, especially since cases involving malicious, reckless or intentional conduct are rare. It will not, however, likely apply with respect to claims against trainers and other university medical personnel for post-accident conduct.

**Examples of Pro-Active Steps Universities Might Carry Away From this Case.**

Even though the Court in *Geisersbach* was reluctant to find liability against Tri-State University, it only protects colleges and universities in Indiana. Moreover, no institution will want to use the absence of a finding of legal liability as justification to avoid taking steps that might help prevent or mitigate serious injuries to their student-athletes during practice and in games. Some of the pro-active steps higher education institutions might consider in response to this case include:

- ◆ Athletics administrators could re-examine their policies, procedures and protocols for having trainers or medical professionals on-site or readily available during practices and games.
- ◆ Athletics administrators review the steps to be taken in the event of an accident or emergency during practice or during games, including communications systems to be used in emergencies and protocols immediately post-accident.
- ◆ Coaches, student-athletes, trainers and other athletic department personnel can be oriented or trained concerning post-accident protocols and emergency procedures.
- ◆ Risk managers, athletics administrators and coaches might review with head and assistant coaches the drills they undertake in practice and discuss any unique risks

or dangers they pose and how best to mitigate them.

**Case No. 4: *Murphy v. Columbia University*, 773 N.Y.S.2d 10 (N.Y. App. Div. 2004)**

**Facts.** Plaintiff was a welder employed by a subcontractor at a job site on the campus of Columbia University in New York City. An area under the supervision of the general contractor caught fire as the plaintiff was welding. He ran to a nearby janitor's closet to fetch a pail of water, where he tripped in the dark over debris and was severely injured. At trial, it was determined that the area was improperly lit and debris was scattered throughout. It was the general contractor's responsibility to clean up debris and provide lighting for the site. The general contractor's documents relating to the day of the accident and the previous day were missing, so the jury was given a missing documents charge, allowing it to infer that these papers might well have contained evidence of notice to the general contractor about accumulated debris or inadequate lighting conditions. Additionally, the evidence indicated that flammable material was used in the welding area. From this the court concluded that the jury could have concluded that the general contractor had either created the unsafe condition on the job site (by installing the flammable material which caught fire) or had actual or constructive notice of the defect. The welding subcontractor was found 25% at fault for failing to provide a 'fire watch' during the welding operation, which the testimony indicated was a dual responsibility between the subcontractor and the general contractor. The general contractor was found 75% at fault for the plaintiff's injuries, because it was either responsible for the negligent conditions on-site or at least had notice of their existence. Columbia University was found vicariously liable, as the owner of the property, for the unsafe working conditions under New York Labor Law Section 241(6), and, specifically, for failing to keep the subcontractor's work area illuminated and free of debris. The testimony indicated that

the janitor's closet where the accident occurred was "pitch black" and that lighting was "nonexistent" there.

**Holding and Rationale.** Notably, though, the Court upheld the indemnification agreement between Columbia, the general contractor and the subcontractor, which provided for indemnity "to the fullest extent permitted by law." At issue in the case was whether the total indemnification agreement between Columbia, the general contractor and subcontractor was void as violative of public policy. According to the Court, the evidence supported a finding that both Columbia and the general contractor had violated New York law with regard to site conditions. However, the indemnification agreement requiring the subcontractor to indemnify both the general contractor and the owner for actions in connection with its work was not void as a matter of public policy because the obligation was to the "fullest extent permitted by law." The indemnity agreement called for the subcontractor to indemnify Columbia and the general contractor for "any and all claims . . . arising in whole or in part and in any manner from injury . . . resulting from the acts [or] omissions ... of [the subcontractor] . . . in connection with the performance of any work by or for [the subcontractor] pursuant to the construction contract." According to the court, "Plaintiff, as the subcontractor's employee, began the chain of events leading to his injuries while welding pursuant to the contract. [The subcontractor's] failure to provide a fire watch was a proximate cause of plaintiff's injuries, a link in the chain leading to Columbia's liability, thus entitling Columbia and [the general contractor] to indemnification under the agreement."

Since Columbia was only vicariously liable, and not actively negligent, the court held that it was entitled to full indemnification from the subcontractor under the parties' indemnification agreement, including Columbia's legal fees and other costs of defense. Because the general

contractor was actively negligent in the maintenance of its working conditions, the court found that it was only entitled to indemnification to the extent that it was not liable for the total damages. That is, because the general contractor was found to be 75% responsible at trial, it was only entitled to indemnification for 25% of the judgment from the subcontractor.<sup>2</sup>

### **Examples of Pro-Active Steps Universities Might Carry Away From this Case.**

Some of the pro-active steps higher education institutions might consider in response to this case include, without limitation, the following:

- ◆ Educate appropriate staff on campus that, even though a construction job site on campus is under the control of a general contractor or construction manager, the University retains statutory and other legal obligations relative to health, safety and legal compliance for facilities.
- ◆ Help protect the University's interests with owner-friendly construction contracts containing, *inter alia*,
  1. Broad indemnification provisions that include obligations to pay damages, judgments, governmental fines, legal fees, costs, etc, to the fullest extent allowed by law.
  2. Insurance provisions requiring that the University be named as an additional insured on the contractors', subcontractors' and architects' policies of insurance.
  3. Obligations that the general contractor and subcontractors comply with all applicable statutes and regulations throughout the construction project.
  4. A requirement in the University's agreement with the general contractor

that the latter's contract with each subcontractor pass through identical obligations to the subcontractor vis-a-vis the general contractor and owner.

- ◆ Conduct regular inspections of facilities and other sites on campus in order to help provide for institutional compliance with applicable codes, statutes and regulations.

**Case No. 5: *Rhaney v. University of Maryland Eastern Shore*, 858 A.2d 497**

**(Md.Ct.Spec.App. 2004).**

**Facts:** Anthony Rhaney was an 18-year-old freshman student at the University of Maryland Eastern Shore. On October 29, 1998, he was assaulted in his dormitory room on campus by his roommate, Ennis J. Clark, a 21-year-old freshman at the University. Mr. Clark punched Rhaney in the face, which required surgery in which the plaintiff's jaw had to be wired shut. The plaintiff finished the semester, but later withdrew from the University. The incident was not the first assault that Clark had committed. He was suspended by the University during the Spring semester of 1998 because of his alleged involvement in a series of fights that began on March 13<sup>th</sup> and continued until the 14<sup>th</sup>. Clark was told then that he could return to campus for the Fall semester "on probation," providing that he furnished documentation that he had completed *professional counseling* on conflict resolution. Before returning to campus, Clark successfully completed a "conflict resolution" program, but he did not receive *professional counseling*.. Plaintiff Rhaney filed suit in a four count complaint against Clark, the State of Maryland and the University. The two counts against the University and the State alleged they were negligent for failing to disclose to Rhaney that his assigned roommate (Clark) had "dangerous and violent propensities" which were known to the defendants, and for assigning Clark to be a roommate of Rhaney when it knew or should have known that Clark had dangerous propensities, including a

history of assault. The plaintiff alleged that Rhaney was a tenant and a business invitee on the defendants' premises, and that the defendants failed to maintain the premises safely for Rhaney, and to protect him against injury caused by unreasonable risks which Rhaney, exercising due care, could not discover.<sup>3</sup> The State and the University filed a motion for summary judgment, arguing that under Maryland law there is no duty to control a third person's conduct so as to prevent personal harm to another unless a special relationship exists between the actor and the third person or between the actor and the person injured. Notably, the State and the University pointed out that the Code of Federal Regulations prohibited the University from disclosing Clark's discipline record; however, the court noted that there is a 'safety of ... other individuals' exception to the general prohibition. *See* 34 C.F.R. Section 99.36(a)(allows disclosure of FERPA protected information to appropriate parties in an emergency if knowledge of the information is necessary to protect the health or safety of others).

At trial, a jury verdict was entered in favor of the plaintiff for \$74,385.00 in compensatory damages against all of the defendants, plus \$25,000 in punitive damages against defendant Clark only.

**Holding on Appeal.** Applying the relevant *Tarasoff* factors, the court held that the University did not breach its duty of care to the plaintiff, Rhaney, by assigning him and defendant Clark to the same dormitory room. The court wrote, in pertinent part: "the mere fact that Mr. Clark had previously been suspended for fighting at locations other than a dormitory did not establish the foreseeability that he would assault his roommate." According to the majority, the defendant university did not breach its duty of care by assigning the plaintiff to share a room with another student who it knew had previously committed assault. Significant to the court's decision

was the fact that Clark's previous fights did not occur in a dormitory (they were outdoors at an off-campus party), did not involve weapons, and did not result in criminal charges. Nor was there any evidence of assaults or threats to previous roommates by Clark. Under the circumstances, the court found it was not foreseeable to the University that Clark would assault his roommate in their dormitory room, and the University did not breach its duty of care to the plaintiff by failing to require that Clark reside by himself off-campus.

**Examples of Pro-Active Steps Universities Might Carry Away From this Case.**

Even though the Court in *Rhaney*, like the Court in *Geisersbach*, was reluctant to find liability against the University of Maryland in this case, it is not clear whether courts in other jurisdictions would reach the same result on similar facts. In any event, few, if any, institutions would want to use a finding of non-liability in this case as justification to avoid taking steps that might help prevent serious injuries to their students by roommates with a history of violence. Some of the pro-active steps higher education institutions might consider in response to this case include, without limitation, the following:

- ◆ Admissions officers should consider asking on the institution's application for admission whether the applicant has ever been convicted of a crime. If an applicant answers in the affirmative, then the admissions office can request additional information from the applicant and third parties concerning the prior criminal conviction and discuss the findings with counsel and the University's administration prior to admission.
- ◆ When students are placed on probation by student affairs professionals on campus, or when conditions are placed upon a student's return to the institution, campus

officials should verify that each of the conditions has been satisfied before a student is re-admitted to the college or university or permitted to return.

- ◆ Housing officials should discuss with other administrators on campus, as appropriate, what information, if any, should or may be shared with students concerning prior offenses or violent incidents committed by the roommate with whom the institution is assigning the to live on-campus.
- ◆ The institution's counsel should be consulted prior to sharing background information involving one student with his or her roommate, due to FERPA and other possible privacy issues.
- ◆ Institutions should discuss their approach to the issue of assigning roommates to individuals with a history of violent propensities and their policies concerning warning roommates of the same.

**Case. No. 6: *Webb v. University of Utah*, 88 P.3d 364 (Utah Ct. App. 2004).**

**Facts:** Plaintiff was a student at the University of Utah and was required to attend an off-campus field trip. While on the trip, students were directed to walk through a particular condominium complex in order to examine a fault line that ran inside it. The sidewalks within the private residential area were covered with snow and ice. One of the students lost her footing on the slippery surface, grabbed the plaintiff for support, and caused him to slip and fall to the ground. The plaintiff was injured in the fall. He argued that the university was negligent in directing students into a "dangerous area" as part of a school-organized field trip. The trial court granted the university's 12(b)(6) motion for dismissal for failure to state a claim upon which relief could be granted, holding that no 'special relationship' existed between plaintiff and university

sufficient to give rise to a legal duty to the university to protect the plaintiff from reasonably foreseeable harm. He appealed.

**Holding:** On appeal, the Utah Court of Appeals held that the university owes its students a duty of ordinary and reasonable care in providing instruction, including when giving directions during a school-sponsored field trip. Because the plaintiff was acting pursuant to the instructor's instructions, the court rejected the defendant's argument that it did not have a duty to protect plaintiff from conditions on off-campus private property. In actively giving the plaintiff student directions as part of his instruction, the court found, the university has a duty not to act negligently. The appellate court held that the trial court erred in granting the defendant's motion to dismiss, and remanded the case for a determination of whether directing the plaintiff down an icy and snow-covered path actually constituted a breach of that duty.

#### **Examples of Pro-Active Steps Universities Might Carry Away From this Case.**

Some of the pro-active steps higher education institutions might consider taking on their own campuses in response to this case include, without limitation, the following:

- ◆ Orient faculty and staff conducting field trips as to the institution's expectations and the employee's responsibilities vis-a-vis students during the field trip. Often, the faculty or staff member conducting the field trip is unaware of the university's expectations and may or may now know his or her legal obligations.
- ◆ For optional (not required ) field trips, have students execute liability waivers in favor of the university and its involved faculty or staff members prior to the field trip, provided that the institution's counsel has approved the same and to the extent permitted under applicable state law.

- ◆ Be clear with students concerning what field trips are required as part of an academic program and what field trips are optional. Limit the number and type of required activities and, when and to the extent practicable, allow students (not the institution) to select the manner, means and methods of undertaking field trips, internships and other activities off-campus.

### **Analysis of Caselaw**

A careful reading of each of the above cases would seem to suggest that, in order to help avoid accidents and injuries and reduce liability therefor, colleges and universities are well advised to engage, pro-actively, in the identification, assessment and reduction of risk on campus and in connection with university sponsored programs and activities. Ultimately, this is the best institutional hedge against unnecessary injury and, ultimately, institutional legal liability. It also is one of the most effective ways to demonstrate to a court, following an accident and the filing of a lawsuit, that the institution discharged any duty it owed by exercising reasonable care to help prevent reasonably foreseeable harm from occurring in the first instance.

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

In the wake of the above court decisions and others like them, there are a number of more general and systematic steps university administrators and their counsel can consider taking, pro-actively, to help identify, analyze and mitigate risk on their campuses and in their programs and activities.

### **The Risk Assessment Committee.**

First and foremost, is the formation of a campus wide risk assessment committee. At a minimum, the Committee should include an attorney from the University's legal staff (in order to

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

The purpose of the Risk Assessment Committee is to identify areas of potential legal liability and activities posing the greatest risk of injury or property damage, on and off campus, in connection with the University's activities and programs. Having the Committee address one or two major issues at a time seems to work best. For example, in an academic year the Committee might decide to focus its efforts on one or two major issues, such as (by way of example only): international programs, transportation, fire safety, kids on campus, or major special events on campus. The Committee also might decide to identify as priorities for an academic year any recent incidents or activities that have resulted in injuries or deaths to students, faculty, staff or

guests (e.g., a bus accident, a dormitory fire). Incidents which have led to litigation or institutional liability are excellent candidates for topics to be addressed by a Risk Assessment Committee. Once the Committee has identified one or two major topics to address, it can begin researching the detailed facts and circumstances surrounding them, identifying the specific risks they pose, asking key players from campus to meet with the Committee to discuss them, and determining which risks are inherent and necessary to the institution's educational mission and which are not. For example, if the Committee is examining international study abroad programs and discovers that one of the program sites sponsors an annual bungee jumping field trip, the Committee might conclude that while the international program itself is extremely valuable in numerous ways and should continue, the bungee jumping field trip presents 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.

### **Conclusion**

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

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

The best institutional tool against litigation is improved risk assessment and pro-active management of risk on campus. In this context, the best defense to the proliferation of tort claims is a good offense, in the form of reducing the risk of injury and harm to students, faculty, staff and guests. To that end, college and university administrators and their counsel should invest greater thought, time, energy and resources in preventative law, risk assessment, training, orientation and educational programs for faculty and staff. These steps are time consuming and expensive,

especially with the current budget crisis and economic strain facing most colleges and universities. They are not nearly as time consuming, expensive, stressful or destructive to institutional reputation and morale, though, as protracted litigation. Furthermore, with an investment in preventative law, the funds the institution expends go to the use and benefit of the institution and its core constituencies, instead of to lawyers. Like most good investments, this type of institutional investment can pay good dividends. In fact, avoiding even one major piece of litigation can save a college or university hundreds of thousands of dollars (or more) and untold damage from the accompanying negative publicity and reputational damage. When mistakes are made by the institution, which is inevitable, it is generally much more cost effective and efficient to spend the institution's resources at the beginning of the dispute to pay the injured party reasonable compensation for his or her claim. Such an approach allows the institution to choose its battles wisely, fighting only those it reasonably believes it can win and defending only those claims which are deemed justified: on principle, on the merits or otherwise.

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## ENDNOTES

\*The author offers a special note of thanks to Richard Schwartz, a Notre Dame Law School student, for his assistance in researching recent tort cases involving colleges and universities and for preparing drafts of case summaries for this paper.

1. R. Bickel & P. Lake, "*The Emergence of New Paradigms in Student-University Relations: From 'In Loco Parentis' to Bystander to Facilitator*," 23 J.C.U.L. 755 (Spring 1997)("Courts are increasingly willing to apply traditional tort law notions of duty to the university.").
2. Notably, the court ordered a new trial in the case on the issue of damages, due to the trial court permitting plaintiff's expert to testify to the contents of an MRI report without any evidence as to the reliability of the report; and, because the trial judge improperly denied defendants' request to charge the jury on plaintiff's obligation to mitigate damages, especially since the plaintiff did not contest his capability of working and earning as much as \$35,000 per year.
3. Plaintiff did not alleged that the student-college relationship is a 'special relationship' that imposes upon the University and the State different duties than are imposed upon the defendants in premises liability and business invitee litigation.