

UNDERSTANDING THE ANALYTICAL APPROACHES OF COURTS IN NEGLIGENCE CASE¹

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February 20, 2006
27th Annual National Conference on Law and Higher Education
Clearwater Beach, Florida

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Over the course of the last several decades, there has been a widespread and well recognized trend toward increased tort litigation involving higher education institutions. During that time, American courts seem to have become less and less willing to exempt colleges and universities from legal responsibility for their own negligent conduct. Today more than ever before, colleges and universities tend to be treated more like for-profit enterprises by the courts than the sacred cows they once were. In addition to traditional areas of tort litigation, such as personal injury, premises liability and property damage claims, there also seems to have been a marked increase in cases alleging the negligent supervision and instruction of students; intentional torts, such as defamation, misrepresentation and emotional distress claims; constitutional and contractual due process claims; and, failing to warn of, or protect against, reasonably foreseeable harm to students, guests, licensees and others caused by third parties.

To confront this reality, many higher education attorneys, risk managers, administrators and attorneys have felt compelled to consider various steps they might take, pro-actively, to help better identify, assess and manage critical areas of risk, both on and off-campus. In many

¹ The author would like to thank Courtney Ridge, a second year law student at Notre Dame, for her outstanding assistance with the legal research for this paper.

instances they find themselves in long queues, requesting allocations of scarce institutional resources for measured steps designed to help reasonably protect their students, faculty, staff and visitors from the greatest and most foreseeable risks of injury and harm. On some campuses, their proactive steps have included the formation of campus-wide risk assessment committees, which represent vital investments in an institution's future and can help better protect its people, its reputation and its assets.

In this seminar, we will identify and discuss several recent court decisions and attempt to identify some important trends in tort liability affecting higher education institutions. Using these cases as a springboard for further thought and discussion, we will examine various ways in which higher education administrators and their counsel can take steps pro-actively designed to help reduce the likelihood and severity of accidents and injuries in the first instance by identifying, assessing and mitigating unnecessary and foreseeable risks of harm to our most precious resources: our students, faculty, staff and guests on campus.

Recent Decisional Law.

The following recent court decisions serve as good examples to help highlight the ongoing struggle by courts across the nation concerning whether and to what extent they should exempt colleges and universities from legal liability and responsibility for injuries and harm occurring on their property or in connection with their many and varied programs and activities. These cases often involve conduct by third parties who are not employees or agents of the institution, but who cause injury or harm to a University student, employee or guest—either on campus or in connection with a university sponsored off-campus program or activity.

Historically, American courts were reluctant to impose a duty upon colleges and universities to anticipate and protect against unlawful acts by third parties. In recent years, though, many legal scholars and commentators have hinted that the so-called “no-duty rule” may be gradually eroding with respect to higher education institutions,¹ suggesting that they should be treated more like for-profit businesses. In many instances, the caselaw seems to support their hypothesis. Nevertheless, college and university administrators and their counsel have been slow to accept this shift in the law, continuing to embrace the ‘no-duty’ defense, particularly in those cases involving criminal or reckless conduct by third parties.

The most recent cases asserting a duty by universities to control others tend to involve third parties who commit criminal, tortious or other unlawful acts against faculty, staff, students or guests, either on campus or in connection with university sponsored off-campus programs. Even though the “bad actors” in these cases are not 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. It is not a jury question.

We 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 across the nation.

Case No. 1: Kerins v. Vassar College, 15 A.D.3d 623 (N.Y.A.D. 2 Dept., 2005).

Facts: The plaintiff's employer, Swiss Electric Enterprises, Inc., had a contract with Vassar College to install security equipment. Kirchhoff Construction Management, Inc., was the general contractor hired by Vassar to build a corridor in its building. A set of heavy double doors separated the corridor from an auditorium where Kirchhoff was performing additional construction work. Workers used the double doors to gain access from one work site to another. While following his supervisor through the double doors, one of the doors slammed shut, and the plaintiff impaled his hand on the door's broken pane of glass.

Procedural Background: After trial, the jury found that Vassar College and Kirchhoff both violated New York [Labor Law § 200](#) and were negligent, that their statutory violations and negligence were substantial factors in causing the accident, and that the plaintiff was not comparatively negligent. The jury apportioned liability 51% to Vassar and 49% to Kirchhoff. Vassar and Kirchhoff separately moved pursuant to [CPLR 4404 \(a\)](#) to set aside the verdict as against the weight of the evidence, on that cause of action. The trial court granted that portion of Kirchhoff's motion and denied that portion of Vassar's motion, finding that the defective condition existed for a sufficient period of time to permit the jury to conclude that Vassar had constructive notice of it.

Issue Presented: May a college be held liable for a contractor's employee's injuries on campus because the College violated a State labor code provision and engaged in common-law negligence, irrespective of whether the College supervised the injured plaintiff's work?

Holding: Yes, a college can be held liable for a contractor's employee's injuries who was injured as a result of the existence of a dangerous condition on its property, under both the State labor code and for common-law negligence if the College had actual or constructive knowledge of the dangerous condition on its land.

The Court's Analysis: The trial court erred in setting aside the jury verdict as asserted against Kirchhoff, since there was a valid line of reasoning and permissible inferences which could lead rational people to the conclusion reached by the jury based on the evidence presented at trial. The evidence showed that Kirchhoff had actual notice of the dangerous situation and had control over the site where the injury occurred. Kirchhoff had actual notice of the broken pane of glass more than a year before the accident. Kirchhoff had previously done work on and near the doors, including barricading the doors with heavy timber, painting the doors, concealing a curved head and constructing an arch over the doors. With regard to Vassar, there was a valid line of reasoning and permissible inferences could lead a rational jury to conclude that it had constructive notice of the dangerous condition which caused the plaintiff's accident.

Disposition: Affirmed.

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. 2: Rudloe v. Karl, 899 So.2d 1161 (Fla.App. 1 Dist., 2005).

Facts: Jack Rudloe, an FSU alumnus, and his company, Gulf Specimen Company, alleged that a fellow alumnus, David Michael Karl, defamed Rudloe and Gulf Specimen Company (of which Rudloe was the president and “closely affiliated”) in an alumni newsletter. Rudloe alleged that in Karl’s article he insinuated that Rudloe had stolen a priceless Neopilina specimen from a lab because the rare specimen later showed up for sale in Rudloe’s Gulf Specimen Company catalog. Karl’s letter was published in paper form in the alumni newsletter and posted on the Internet. Rudloe and his company alleged that FSU was liable for publishing the allegedly defamatory materials and failing to verify the facts.

Procedural Background: Plaintiffs Rudloe and Gulf Specimen Company, Inc., sued defendants Karl and the Florida State University Board of Trustees, alleging defamation. The Circuit Court dismissed the university from the action. Rudloe and Gulf Specimen Company appealed.

Issue Presented: Does a public university have sovereign immunity for anything the editors of its alumni publication wrote, published or allowed to be published about an alumnus?

Holding: No, a university does not have sovereign immunity from a defamation claim.

The Court’s Analysis: For there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. Here, there is a common law duty that publishers owe non-public figures. According to the Court, the plaintiff’s amended complaint stated a claim against the trustees in alleging that the institution negligently published defamatory material about the individual and corporate plaintiffs. This was sufficient, the court held, for a private plaintiff to prove negligence in a defamation action. The

court deemed the defendant's alleged negligent fact checking tactical or operational. It did not involve law enforcement or "basic governmental policy making" of the kind occurring in "the discretionary planning or judgment phase" the court held. Because FSU's alleged role was operational, the court rejected the petitioners' argument in favor of sovereign immunity.

Disposition: Reversed and remanded.

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

- ◆ Orient editors and editorial staff of alumni newsletters and magazines, as well as University publications and student newspapers, concerning the laws of defamation in your State.
- ◆ Avoid publishing, or posting on the Internet, any material which, if false, would be defamatory. When in doubt consult with the University's counsel in advance of publication or posting.
- ◆ Explain to each author that the institution does not have any way to know whether the materials submitted are true or not, and that the institution lacks sufficient resources to independently verify all of the facts contained in materials submitted.
- ◆ Consider requiring that all authors and other individuals submitting letters and other materials for publication first sign a written license or other agreement that indicates, among other things, that the materials submitted are not defamatory of any person or entity.
- ◆ Consider requiring that the author agree, in writing, to indemnify, defend and hold harmless the University and its employees, agents, officers, trustees, affiliates and representatives with respect to any claim, demand, expense (including but not limited to

reasonable attorneys fees), action, cause of action, damage or judgment which arises out of or is related in any manner to the publication, re-publication or reproduction of the materials submitted for publication.

Case No. 3: Gomes v. University of Maine System, 365 F.Supp.2d 6, 2005 WL 827016 (D.Me., 2005).

Facts: Two state university students were prosecuted for the sexual assault of a fellow student. As a result, university officials took disciplinary action against the students, who were expelled.

Procedural Background: The students filed a civil action against the university officials involved, alleging violations of their constitutional rights, contractual rights, and various tort claims (including negligence, defamation, negligent and intentional infliction of emotion distress and negligent misrepresentation). The defendants filed a motion for summary judgment. The plaintiff students resisted it, alleging that various constitutional, contract, and tort violations occurred in the underlying student disciplinary action.

Issues Presented:

- 1) Whether the University's procedures were fundamentally fair and complied with the fundamental due process requirements?
- 2) Whether the University's disciplinary proceedings complied with the Student Conduct Code?
- 3) Whether the University violated its contractual obligations to the students?
- 4) Whether the University officials named as individual defendants in the case were entitled to discretionary act immunity?

5) Whether the defendants' publication of the results of the student disciplinary proceedings constituted defamation?

6) Whether the University intentionally inflicted emotional distress on the plaintiff students?

Holding:

- 1) The disputed disciplinary proceedings were fundamentally fair;
- 2) The disciplinary proceedings complied with the requirements of the student code;
- 3) The University did not violate any of its contractual obligations;
- 4) The Defendant university officials were entitled to discretionary act immunity;
- 5) Publication of the results of the student disciplinary proceedings was not defamatory; and
- 6) The defendants did not intentionally inflict emotional distress on the plaintiffs.

The Court's Analysis:

1) The plaintiffs were students at a public university and were potentially subject to expulsion or suspension, so they were entitled to the protections of due process. In a public university setting, if a student has had an opportunity to answer, explain and defend, then the individual has been accorded the essential elements of due process. Specifically, this Court looked at the how the University dealt with issues of discovery during the disciplinary proceedings (e.g., including the police department records, the witness list, and the medical reports), exclusion of prior sexual history, partition, impartial tribunal, substantial evidence, and the appeals process. According to the Court, all the procedural requirements of a common law criminal trial need not to be imposed upon educational institutions conducting student disciplinary proceedings. The Court held that "although the University's disciplinary process was not ideal and could have been better, this Court concludes it was fundamentally fair and accorded the Plaintiffs the essential elements of due

process.” The amount of process due was directly proportional to the amount of deprivation that potentially existed.

2) The Student Conduct Code sets forth the procedures the University follows upon notice of a potential violation. The University designates an “officer” to investigate alleged violations of the Code, to notify respondent of his conclusions and impose sanctions. The Officer may refer matters to the Hearing Committee. The Hearing Committee, consisting of three to seven members, is charged with holding a hearing to receive evidence, determining whether the respondent violated the Code and imposing sanctions. The Code provides for two appeals. Here, the plaintiffs were suspended following a hearing before the Hearing Committee. The plaintiffs exercised the right of both appeals. On the second (and final) appeal, it was concluded that the procedures “were in substantial conformity with the requirements of the code and afforded the Respondents fundamental fairness.” Nothing in the record has convinced this Court otherwise.

3) “Because the Plaintiffs failed to demonstrate a genuine issue of material fact regarding their due process claims, they cannot show they were contractually denied a fundamentally fair hearing.” Similarly, the plaintiffs did not pass the “reasonable expectations” test on any of their breach of specific contractual provisions claims.

4) “Under well established law, individual defendants are entitled to qualified immunity for official action unless: (1) their conduct violated a constitutional right; and, (2) the law to this effect was “clearly established” under then-existing law so that a reasonable official would have known that his behavior was unlawful.” This Court found “the individual Defendants did not violate their due process rights; the individual Defendants are, therefore, entitled to qualified immunity.”

Under the Maine Tort Claims Act, employees of governmental entities are absolutely immune from personal civil liability for: 1) discretionary acts performed within the scope of their employment; and, 2) intentional acts or omissions occurring in the scope of their employment, provided that such immunity does not exist in any case in which an employee's actions are found to have been in bad faith. A defendant needs to be immune under only one provision. Because the individual defendants performed a discretionary function or duty under the Act, they are "absolutely immune" from personal civil liability.

5) Under Maine law, defamation requires four elements to be met. Even if the plaintiffs had met these elements, a statement from a University official that the plaintiffs were found to have violated the Code is "conditionally privileged." "A conditional privilege against liability for defamation arises in settings where society has an interest in promoting free, but not absolutely unfettered, speech." The Court concluded that none of the alleged defamatory statements came close to meeting the high definitional standards for abuse of the conditional privilege. There is no evidence the Hearing Committee issued its decision knowing it was false or in reckless disregard of its truth or falsity. Nor was their evidence that the defendants acted with ill will or spite.

6) Under Maine law, intentional infliction of emotional distress requires four elements to be met. The plaintiffs did not establish these elements. "The Plaintiffs admit the Hearing Committee found that they sexually assaulted the Complainant; the Plaintiffs' disagreement does not transform this finding into an intentionally false statement."

The plaintiffs also failed to meet the elements for negligent manifestation, which fits "awkwardly, if at all, to this case;" negligent misrepresentation is typically applied to commercial transactions.

The plaintiffs' claim for punitive damages was denied. .

Disposition: The college officials' motion for summary judgment was granted.

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

- ◆ Adhere to your institution's published hearing procedures and student disciplinary code provisions in all student discipline cases, providing fundamental fairness, notice of the charges and an opportunity to be heard.
- ◆ Consider consulting with your institution's counsel to help ensure that your institution's student disciplinary code and hearing procedures comport with applicable due process requirements (for public institutions) or contractual due process requirements (for private institutions). Note the differing due process standards and requirements applicable to public vs. private institutions.
- ◆ See the model student conduct code and accompanying article by E. Stoner and J.W. Lowery, "Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Code with a Model Hearing Script," Vol. 31, *The Journal of College and University Law*, No. 1, at pp. 1-77 (2004).
- ◆ In serious cases (e.g., those which could result in suspension or dismissal), consider having your institution's counsel review the charging letters and decision letters in advance, and consult with counsel when any procedural irregularities arise, when procedural objections are received, when threats of litigation are made, and before departing for any reason from the institution's usual hearing procedures or student disciplinary code provisions.
- ◆ When complaints of sexual misconduct, sexual harassment or sexual assault are received, immediately inform the victim of available options (e.g., law enforcement, student disciplinary proceedings or both) and contact your institution's counsel. Take swift and

appropriate to investigate and, as you and your institution's counsel deem appropriate under the circumstances, take remedial action. In these cases, discuss with your institution's counsel your institution's potential obligations under Title IX in this context.

Case No. 4: Laskey v. University of Toledo, 2005 WL 1837124 (Ohio Ct.Cl.).

Facts: Laskey sustained property damage to the bumper of their automobile while parking the vehicle in a lot owned and operated by the University of Toledo. The car was damaged when it caught on a piece of rebar protruding from a parking block located at the end of the parking space. No one was injured. The university submitted an investigation report, wherein it allegedly admitted liability for the owners' property damage. Damages to the car totaled just \$560.58. The Laskeys maintained auto liability insurance coverage for their car, but they had a \$500.00 deductible.

Procedural Background: Vehicle owners filed a complaint against the defendant state university, seeking recovery of automotive repair costs that resulted from an incident that occurred while they were parking their vehicle in the university's parking lot.

Issue Presented: May a university be held liable for damages sustained to a car while parking in a lot owned and operated by the university? Will the recoverable damages be limited to the owner's insurance deductible?

Holding: The University was negligent. The owner's recovery of damages is limited to the owner's stated insurance deductible.

The Court's Analysis: The University had a duty to exercise reasonable care for the protection of the plaintiff's property. The University was negligent in letting a piece of rebar

protrude from a parking block located at the end of a parking space on their lot. In regard to damages, Ohio Rev. Code Ann. § 3345.40(B)(2) entitles plaintiffs to benefits for loss incurred from an insurance policy, this amount shall be disclosed to the court, and the amount of benefits shall be deducted from any award against the state university recovered by plaintiff. Thus, compensation shall be limited to the plaintiff's stated insurance deductible.

Disposition: The court entered judgment in favor of the vehicle owners for the amount of their insurance deductible, together with the filing fee.

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 the following:

- ◆ Conduct regular inspections of parking lots, sidewalks and facilities on campus in search of potential 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. Copy the institution's counsel on all inspection reports and recommendations, and implement repairs in a time frame appropriate to the risk 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 property, 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.

- ◆ In the event of an accident, injury or claim, or where litigation appears imminent, utilize the work product doctrine and the attorney client privilege to help reasonably protect investigatory materials and internal memos from disclosure in the event of litigation. This may be more difficult at public institutions.
- ◆ Consider putting in place informal claims handling procedures on your campus (especially for smaller claims) aimed at attempting to resolve claims quickly and amicably where the institution is likely at fault. This can help avoid time, expense and uncertainty of litigation. Notably, such an approach may not be possible at public institutions, where the procedures are mandatory and are statutory or regulatory in nature. Often, though, at private institutions such procedures can result in quick and affordable settlements for the amount of the claimant's out-of-pocket expenses. Always obtain a written, signed release of claims approved by your institution's counsel.

Case No. 5: University of Texas at El Paso v. Moreno, 172 S.W.3d 281 (2005).

Facts: Football game attendee brought action against state university and university system under Tort Claims Act for injuries suffered when he went onto the field after the game and hung from the goal post. After unknown third parties shook the goal post, causing it to fall down, the game attendee hanging from the post was injured.

Procedure: University of Texas at El Paso and University of Texas System (UTEP/UTS) appeal from the trial court's order denying their plea to the jurisdiction and motion to dismiss. UTEP/UTS appeal raising one issue.

Issue: May the university be held liable for injuries sustained by a football game attendee under the Tort Claims Act when a goal post was torn down following a football game?

Holdings: (1) No; football field and goal post did not themselves cause injuries to attendee, such that university and university system had waived immunity under Tort Claims Act. (2) University and university system were immune from liability for alleged breach of ministerial duty to control the crowd. (3) The university and university system were immune from liability for intentional torts committed by the crowd.

Analysis: (1) A cause of action based upon the negligent use of real property or a cause of action involving a condition of real property does not exist separately from a cause of action for a premises defect. The attendee did not state a cause of action for premises defect because he has not alleged a defect, shortcoming, or physical imperfection of the property which was a proximate cause of his injuries. In order to state a claim for which immunity is waived, usage of the property itself must have actually caused the injury. At best, the attendee's petition alleges that the property is merely involved. Thus, the trial court erred in not granting UTEP/UTS's plea to the jurisdiction with respect to these claims. (2) The government is not liable for any injury or death resulting from a government's decision to use only minimal police efforts to control a riot or to control crime in a particular area of a city. Only if an officer or employee acts negligently in carrying out the policy may government liability exist. (3) The State is immune from liability for intentional torts committed by third parties.

Disposition: Reversed and remanded in favor of UTEP/UTS.

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

Even though the University was not found liable in this case, it is capable of repetition on other campuses, and other courts might reach a different result in a similar case, based upon differences in state immunity laws involving public institutions and based upon the fact that private institutions would not enjoy immunity from such claims. Some of the pro-active steps higher education institutions might consider taking on their own campuses in response to the issues presented in this case include:

- ◆ Consider having protocols in place on campus for crowds rushing the field after athletic events and fans climbing on goal posts. Notably, some institutions have installed collapsible goal posts that can be lowered at the end of the game, while others have opted for prohibitions on fans climbing goal posts or pursued other approaches.
- ◆ Orient event security staff, campus police, ushers and others on duty in the stadium to the protocols in place on your campus.
- ◆ Train event security staff, campus police, ushers and other relevant personnel concerning the protocols in place on your campus.
- ◆ Consider working with student leaders and others on campus to educate them concerning your institution's protocols and the dangers that can accompany crowds rushing the field inappropriately and fans climbing goal posts.

Case No. 6: Autry v. Western Kentucky University, 2005 WL 497193 (Ky.App.).

Facts: In the early morning hours of May 4, 2003, Katie Autry, a freshman at Western Kentucky University (WKU), a public institution located in Bowling Green, Kentucky, returned to her dormitory alone following a fraternity party. The dormitory, Poland Hall, was owned by Defendant Student Life Foundation (SLF) (a non-profit corporation formed solely to acquire, finance and own dorms at WKU) and managed and operated by Defendant WKU. WKU had established safety regulations for all of the dormitories it managed, which required outside doors to be locked and all non-resident guests to check-in with the desk clerk, leave identification with the desk clerk and be escorted by a resident to their dorm room. Despite these regulations, two men entered Katie's dorm room after she returned alone from the party, assaulted her, raped her and set her on fire. Katie suffered third-degree burns and died three days later. The two men accused of raping her were not residents of the dorm or students at WKU at the time of the attack. One pled guilty to the assault, rape and murder of Katie, and the other was tried and acquitted.

Procedural Background: The administrators of the estate of Katie Autry appealed the order dismissing WKU, WKU Student Life Foundation and WKU employees, in their official capacities only, from the wrongful death action alleging negligence in failing to provide safe campus housing to their decedent.

Issue: Is the university, a state agency, entitled to governmental immunity for any negligence in providing, managing, and operating dormitories for its students? Is a non-state corporation that owned a dormitory also entitled to governmental immunity for such negligence?

Holding: (1) Yes, the university was entitled to governmental immunity. (2) No; non-stock, non-profit state corporation which owned the dormitory was not entitled to governmental

immunity.

The Court's Analysis: The university managed the dormitory. The university's function of providing, managing, and operating dorms for its students was a governmental function, and providing affordable on-campus housing was an essential function of the public university. The existence of alternative housing off campus did not destroy the essential role of this function in the university's providing of higher education. As Ky. Rev. Stat. Ann. § 164.300 required a state university to provide dormitories, and as the dormitories served an educational purpose by providing affordable housing to its students, under Ky. Rev. Stat. Ann. § 44.073(1), the university had governmental immunity from a wrongful death suit filed after a student was murdered in a dormitory. Even though WKU was the manager and operator of the dormitory, all its actions were under the ultimate authority of SLF. SLF was not entitled to any type of immunity as it did not show it was the university's agent. Katie, as a resident of the college dormitory, was an invitee and a tenant. If SLF was the possessor of the dormitory and if the injuries to Katie were foreseeable, then SLF owed a duty to Katie to protect her from criminal acts of third persons. The jury, on remand, will determine whether the security measures at the dormitory as actually carried out by the employees prior to, during, and following the attack on Katie were reasonable under the circumstances, and if not, whether the breach of duty owed to Katie was a substantial factor in causing Katie's injuries.

Disposition: Affirmed in part (dismissing WKU and WKU employees in their official capacities); reversed in part and remanded (claims against Student Life Foundation).

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

Even though the University was not found liable in this case, SLF was, and this case is capable of repetition on other campuses. The courts might reach a different result in a similar case based upon differences in state immunity laws for public universities, and based upon the fact that private institutions would not enjoy immunity from such claims. Some of the pro-active steps higher education institutions might consider taking on their own campuses in response to the issues presented in this case include:

- ◆ Consider preparing a brochure, a security handbook or similar materials on the subject of safety and security on your campus and in your dormitories and make them available to all students who live in dormitories on campus. The annual campus crime statistics and report may provide a good place to start.
- ◆ Consider conducting a brief and informal orientation session (or distributing a video presentation to individuals living or staying in your dorms) on the subject of safety and security on the campus, as well as any recommendations on the subject. Existing materials already provided to residential students during the academic year may suffice or be easily adaptable for this purpose.
- ◆ Consider having third parties that manage dormitories on campus sign indemnification agreements in favor of the institution and provide proof of adequate liability insurance coverage to cover injuries and property damage sustained by dormitory residents or others on or about the property.
- ◆ Consider holding mandatory meetings for dormitory residents concerning security.

- ◆ If your institution does not do so already, consider requirements regarding locking of dormitory doors and prohibiting things like propped doors or letting persons other than students and their known guests into dormitories.
- ◆ Consider a requirement that all guests provide identification and be escorted through the dormitory by a resident at all times while in the Hall.
- ◆ Consider rules prohibiting visitation at the dormitory by members of the opposite sex at specified times of day.
- ◆ Consider reviewing with campus security, risk management and/or facilities staff your dormitory building access and security measures.

Conclusion

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

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

The best institutional tool against litigation is improved risk assessment and pro-active management of risk on campus. In this context, the best defense to the proliferation of tort claims is a good offense, in the form of reducing the risk of injury and harm to students, faculty, staff and guests. To that end, college and university administrators and their counsel should invest greater thought, time, energy and resources in preventative law, risk assessment, training, orientation and educational programs for faculty and staff. These steps are 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. Like most good investments, this type of institutional investment can pay huge dividends. In fact, avoiding even one major piece of litigation can save a college or university hundreds of thousands of dollars (or more) and untold damage from the accompanying negative publicity and reputational damage. When mistakes are made by the institution, which is inevitable, it is generally much more cost effective and efficient to spend the institution's resources at the beginning of the dispute to pay the injured party reasonable compensation for his or her claim. Such an approach allows the institution to choose its battles wisely, fighting only those it reasonably believes it can win and defending only those claims which are deemed justified: on principle, on the merits or otherwise. With careful planning, though, the financial, institutional and human costs of protracted tort litigation can often be avoided, or at least significantly mitigated.

FOOTNOTES

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.").

