Chapter IV

FACULTY LIABILITY

I. Overview

INTRODUCTION

Faculty members are agents of their employers—the college or university. In that capacity, the college is liable or responsible for their acts that occur during the normal course of business. In some instances, faculty members personally will be named in a lawsuit. In almost every case, unless there is some egregious conduct or some particular statute on which to base liability, they will not be found personally liable. Of course, if liability is assessed, the college will have to assume responsibility and provide compensation. For example, inadequate supervision of students in laboratories or during athletic activities, or libelous statements by the student press may result in a college being liable for money damages.

Personal liability for damages due to negligence may exist for individuals, such as trustees, officers, faculty, and staff, if they (1) actually performed the negligent act or failed to take required

action; (2) participated in it; or (3) directed that it be done or not done. In other words, to be personally liable, a person must be directly involved. It is not enough merely to be in a chain of command, where, in fact, another person actually is responsible for the negligence. If the negligent action was beyond the person's scope of employment, the individual would be personally liable, but the institution probably would not be liable.

There are several areas in which faculty are most likely to participate directly in conduct that could give rise to a negligence claim. Some of these areas, such as defamation and failure to advise, are analyzed in other chapters of this manual. Failure to supervise students, educational malpractice, discriminatory conduct, and constitutional torts are discussed in this chapter.

NEGLIGENCE

Claims for damages for injuries are based on negligence and draw upon the legal theory of torts, from the Latin tortus meaning "twisted." Simply put, a tort is any civil wrong, except a breach of contract. There are four elements that must be proved in negligence actions: (1) failure to perform a legally owed duty; (2) actual damage; (3) the breach of duty caused the injury; and (4) the injury should have been foreseen. Most of the cases involving higher education deal with the first element: whether there was a duty owed to the person who brought the suit and whether the college breached that duty. If a college owes a duty, that responsibility requires the college to take only reasonable actions.

Negligence cases are decided under state law; and the facts of each individual case are critical in determining liability and, of course, damages. However, new torts, such as educational malpractice, often develop in a similar manner in the various state courts, creating discernible trends nationwide. In essence, a new tort is created when a claimant successfully pursues a new type of grievance through the courts.

DUTIES AND DEFENSES

Whether a college as an employer owes a duty to another is determined by the courts as a matter of public policy. In doing so, the courts explore a number of factors, such as the degree of certainty that the person suffered injury, the closeness of the connection between the college's conduct and the injury suffered, the availability of protection (insurance) for the defendant in the event liability is established, and the vulnerability of the defendant to excessive burdensome litigation.

Even if there is a duty, for example, owed to a student to provide safe equipment, medical help, or supervision of an athletic activity, there are several affirmative defenses that a college or university can raise in an attempt to defeat the claim. One defense is based on the argument that the student also was negligent by somehow contributing to the particular injury (contributory negligence). Contributory negligence might occur if a football player voluntarily entered a fight on the football field and subsequently was injured. He might allege that the coaches did not take adequate precautions, when in fact he contributed to his injury by entering the fracas.

The college also can argue that the individual assumed the risk by knowing of the specific risk involved in the sports activity (assumption of risk). Assumption of risk could occur, for example, when a hockey player understands the known risk that normal injuries can occur while playing hockey. However, this defense does not normally apply to injuries that result from inadequate coaching or defective equipment.

Some states have determined that a lawsuit should not be a win/lose situation and, therefore, have adopted a comparative negligence standard. Under these state laws, a party might be somewhat negligent but still be able to recover some damages if the jury or judge decides that the person was not the major contributor to the negligent activity.

Public colleges may be able to invoke a defense of immunity. The doctrine of sovereign immunity provides that a state may not be sued unless it consents. If a state has not explicitly waived its immunity through a statute, it cannot be sued or held liable for torts it has committed. Because a public institution is considered an arm of the state, it also is protected by the state's immunity. (Of course, independent institutions do not enjoy such immunity.) Most states, however, have waived state immunity for most negligence claims.

Finally, a college may try to transfer or shift the potential risk to the participant through the use of waivers, releases, and disclaimers. The effectiveness of these documents depends on public policy choices determined by case law and state law.

Recognizing the changing nature of the student/college relationship, courts have acknowledged that the college is not an insurer of the safety of people who participate in certain activities on and off campus. This theme was restated by a court in a 1979 case involving the liability of a college for injuries related to the consumption of alcohol at an off-campus party:

> *Our beginning point is a recognition that the modern American college is not an insurer of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. (Bradshaw v. Rawlings,* 1979*)*

However, several major duties arise in connection with classroom teaching: to provide safe equipment, to supervise, and to develop adequate instruction for students.

II. Application

SUPERVISION OF STUDENTS

Colleges and universities have been held liable, along with the individuals directly involved, when professors or administrators failed to exercise reasonable supervision over students. People given the responsibility of serving as supervisors should have the proper qualifications, training, and experience necessary for preventing injury to those whom they supervise. Two areas of critical importance are laboratories and athletic activities. Many laboratories contain dangerous substances and equipment requiring special care in its use. Physical education classes and team sports involve both training and monitoring of students; such athletic activities as football, hockey, fencing, diving, and gymnastics are particularly hazardous.

In determining whether given precautionary measures were reasonable, courts take into account the expertise and experience of students and supervisors. In general, the degree of supervision should be commensurate with the risks involved in the student activity. For example, when a thirty-four-year-old student with previous training stayed after class to practice a surface dive and injured his head on the pool bottom, the student's age, background, and previous swimming experience were such that the instructor was not negligent in failing to provide personal supervision. (*Perkins v. State Board of Education*, 1978)

In a case in which an appellate court acknowledged that a "close question" was presented, a university was held liable for the failure of one of its faculty members to supervise adequately an organic chemistry laboratory. Yvonne LaVoie, a second-year student at the State University of New York at Albany, was burned on her face and upper chest when ether ignited during a chemistry experiment.

After heating a mixture of chemicals with a Bunsen burner, LaVoie brought a flask of ether back to her laboratory table from

the fume vent hood where it was stored. She used some of the ether and set the flask containing the remaining ether on her laboratory table about two and a half feet from the lighted Bunsen burner. Very shortly, fumes from the ether flask caught on fire, burning LaVoie.

LaVoie sued the university, claiming that the professor supervising the class failed to provide adequate warnings about the flammability and volatility of ether. (*LaVoie v. State*, 1982) During the trial, testimony indicated that in a previous course, LaVoie had received oral and written instructions that flammable substances, including ether, should not be used near a flame. Also, her organic chemistry book contained a warning about flammable substances.

However, LaVoie did not receive any warning from the laboratory instructor on the day of the experiment, nor was their any information included in the detailed text of the experiment itself. Moreover, the instructor was “only three or four feet away” from LaVoie when the accident happened. A lower court awarded LaVoie damages of $45,000.

An appeals court sustained the damage award based on various professors’ testimony that the burners were not turned off at the beginning of the class, that other professors always gave instructions at the beginning of every lab session, and that LaVoie “had little or no prior experience with ether.”

EDUCATIONAL MALPRACTICE

We are seeing today the creation or evolution of a new tort—the failure to educate. The gravamen of an educational malpractice suit is a student’s allegation of injury to intellect or career caused by incompetent or careless teaching practices. In elementary and secondary education cases, claimants have sought to prove that the negligence of the total school system resulted in a failure to educate. Such claims are broad challenges of the end product of a public school education and are grounded upon the fact that there is a duty owed to the student. However,

public elementary and secondary schools are distinguishable from institutions of higher education in that a duty is more easily established when the institution operates under statutory obligation to provide compulsory education.

Failure to Educate

Well known among school cases is *Peter W. v. San Francisco Unified School District* (1976), in which an eighteen-year-old high school graduate sued the school system for failure to provide an adequate education. Although enrolled in public schools for twelve years, he read at approximately the fifth-grade level when he was graduated from high school. Peter alleged that the school district negligently and carelessly failed to apprehend his reading disabilities, assigned him to classes inappropriate to his reading level, allowed him to advance from a grade level with knowledge that he had not achieved its completion or the skills necessary to benefit from subsequent courses, assigned him to classes in which the instructors were not qualified to deal with him, and permitted him to be graduated although he was not able to read above the fifth-grade level.

The California court set forth the traditional elements that a plaintiff must allege and prove in order to sustain a successful negligence suit:

- the school system owed the plaintiff a **duty** to exercise reasonable care in the instruction and supervision of students;

- there was a **breach** of that duty;

- the breach **caused** the claimant injury—his failure to learn to read and write; and

- there was **damage** to the student.