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ABSTRACT

Matters of legal liability that are of concern to institutions of higher education are discussed in some detail in language for the layman. Among the subjects discussed are: the development of charitable corporations, and immunity prerogatives; the traditional bases of legal liability; liability for the new torts, including violation of constitutional rights, employment and promotion of academic staff, admission, student- and faculty-related liability and administrator and trustee problems, and other university practices involving discrimination; and forms of protection from liability, including immunity, idemnification, insurance, and legal counsel. Illustrations are drawn from recent and historical court cases. A bibliography is included. (MSE)

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# Governing Board and Administrator Liability

Robert M. Hendrickson and
Ronald Scott Mangum





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## Foreword

The issue of liability has become increasingly important in the daily activities of governing boards and administrators. As the higher education institutions have freed themselves from the philosophy of *in loco parentis*, they have had to assume a more delicate legal role with their students. The student activism of the late sixties and early seventies and the resulting court decisions made it all too clear that the leaders of an institution had to be very careful about the students' constitutional rights or the courts would not rule in their favor no matter how "educationally right" was their case. How and to what degree the institution contracts with the students through the normal communication channels of catalogs, rule books, and course syllabi is also coming under closer court scrutiny due to the efforts of the consumer movement.

The federal government's increasingly active role in social reform has increased the liability of higher education institutions and their administrative staff. Regulations concerning race, sex, and age discrimination, the privacy of student records, and the rights of the handicapped have made the daily decision-making of even the lowest-level administrator subject to the issue of institutional liability. The increasing number of institutions that operate under collective bargaining agreements with their faculty and staff has added a further dimension to the problem.

Since the issue of liability touches every member of an institution, it is vitally important for everyone concerned to know something about it. Questions such as: What are the bases for legal liability? What are the areas where the issue of liability is most likely to be concerned? Is there some form of protection against liability? need to be addressed in a manner that can be understood by the layman.

It is not possible to address legal liability without using legal terms and legal concepts; however, it is possible to handle these terms and concepts so they have meaning to the nonlawyer. This was the task of Robert M. Hendrickson, an assistant professor of higher education at Montana State University, and Ronald Scott Mangum of the Chicago law firm of Liss and Mangum. In their Research Report they have brought together the important legal theories and relevant court decisions so that lay readers will have a better understanding of the various liability issues and how these should be considered in the performance of their job.

Through the use of this monograph and prudent use of legal counsel, it should be possible for higher education institutions to minimize the issue of legal liability.

Jonathan D. Fife
Director, ERIC Clearinghouse on
Higher Education

## Contents

## Overview

The evolution of American higher education has resulted in the development of a hybrid type of institutional legal structure. Educational institutions, often referred to as charitable trusts, have some characteristics of a corporation and some characteristics of a trust. Because the public is the only class of persons having a beneficial relationship to the directors, similar to stockholders of a corporation, the attorney general in most states is responsible for policing the fiduciary relationship between the governing board and its public beneficiaries in both public and private sectors.

The position of trustee or director has evolved into a position of prominence in the life of the educational institution. As boards have assumed more duties with regard to operating educational institutions, they have increased the potential for liability claims against them: Their actions are judged against a standard of care based on what the prudent man would do in similar circumstances acting in the best interests of the institution. This definition of the fiduciary relationship of governing board members of educational institutions comes from both trust and corporate law.

Trustees and directors must become familiar with traditional bases of liability, as well as the so-called "new torts." Liability is applied to public and private institutions of higher education in different ways based on the nature of the liability claim and on the applicable immunity doctrine For example, constitutional claims may not be applied to private institutions without a finding of state action. On the other hand, state institutions can be shielded from claims through sovereign immunity, but responsibility may instead be shifted to individuals acting in their official capacity as trustees and administrators.

The two traditional categories of liability are civil and criminal. Civil liability is further divided into contract and tort liability. Contract liability claims will hinge on the nature of the contract, the individual's authority to enter into the contract, the institution's acceptance, either implied or written, of the authorized or unauthorized contract, and the institution's status as a public or private institution. Directors and trustees need to define their contracting authority and to develop procedures indicating those in the organization who are authorized to enter into contracts on behalf of the institution. Legal counsel should be involved in the review of contracting procedures.

Tort liability deals with civil wrongs as a result of which an individual must be compensated Governing board members of an institution should be aware of three types of torts—intentional, unintentional, and strict liability. Institutions and their agents have a duty to act in a manner free of negligence. The standard against which negligence is judged is what a reasonable man would do, in similar circumstances. Torts include such wrongs as deprivation of constitutional rights, injury to persons or property, improper decision making or financial dealings and other categories within the fiduciary relationship between corporate trustees and their beneficiaries. *Sibley Hospital* and *Wood v. Strickland* define the standard of care trustees and directors must observe while performing their fiduciary duties. These cases are described in the body of this report, with additional information provided in the appendix.

New torts have evolved in recent years as the Federal Government has enacted laws regarding discrimination, affirmative action, privacy rights, and others. Administrators and trustees should review new government regulations and current university policy with legal counsel to determine steps necessary to bring the institution into compliance. Where regulations go beyond the intent of the law and infringe on institutional autonomy, institutions and their legal counsel should be prepared to contest such regulation in the interest of protecting institutional integrity.

Criminal liability will result if actions taken are in violation of the criminal code of the state. Generally, actions that harm another person or deprive another of property may be in violation of the criminal statutes of the state. Such actions may also give rise to civil liability since they usually involve acts against an individual.

Sovereign immunity and charitable immunity may protect the institution or its employees from claims depending on the nature of the immunity and the type of institution involved. The immunity doctrines vary from state to state; consequently, there needs to be determined for each institution the extent of the immunity and the implications for its personnel.

The institution can protect its personnel from liability in two ways. One is through corporate indemnification. However, state laws regarding indemnification need to be looked at and appropriate institutional policies developed. Liability insurance may also be appropriate.

Finally, institutions must rely on legal counsel for advice in all areas of potential liability The institution's attorney must help administrators develop educational policies that do not subject the institution to undue liability risk but that are also based on sound educational principles.

## The Development of Charitable Corporations

The character of higher education today could be described as besieged. Financial considerations have resulted in cut-backs in programs and services, tenured faculty have been fired, and some graduates are unable to find jobs or realize career objectives through employment. At the same time higher education is still viewed as a path of upward mobility and education holds a prominent position in our society. All of these factors place demands on higher education.

Such demands have been translated into liability claims against trustees, directors, administrators, and faculty of institutions of higher education. Just as it was in the aftermath of *Dixon v. Alabama*[1] in the 1960's, higher education is now concerned with implications to the institution and its board that result from this new wave of litigation; and there is concern about how institutions can protect themselves, their boards, and their employees from the expense of liability suits. The granting of immunity to directors of charitable corporations is rapidly declining as an accepted practice in Maine, New Mexico and South Carolina, now the only states with full immunity statutes (Prosser 1971, p. 81).

The liability of directors and trustees of charitable corporations is a legal question of long standing. Yet most educators and members of boards of trustees of educational institutions and charitable corporations have just recently become concerned with the question of liability as they perform their functions. Only in the past several years have authors addressed the question of liability problems in higher education. This interest in liability has paralleled an increasing number of law suits centering on the issue.

This monograph will examine the issue of legal liability of governing board members and administrators of higher education charitable corporations in light of recent case law and will critically review current publications on the subject.

### *The Evolution of Charitable Corporations of Higher Education*

To understand current liability issues affecting directors and

1 161 F. Supp. 549 (E.D.N.Y. 1958); 294 F. 221 (1961); Cert. denied. 368 U.S. 930 (1961).

boards of trustees one must understand the evolution of the typical corporate structure for American institutions of higher education. A brief historical sketch will provide knowledge of the evolving corporate responsibilities now held by governing board members.

All of the colonial colleges patterned themselves after European institutions, in particular Oxford and Cambridge (Hofstadter and Smith 1961, p. 2). Hofstadter and Smith (1961) noted, however, that in one important aspect the conditions in the New World prevented the replication of the English college model.

> . . . the academic institutions in America ceased practically from the very beginning to be a body of self-governing scholars and fell under the control of non-resident laymen. The European universities had been founded by groups of mature scholars; the American colleges were founded by their communities; and since they did not soon develop the mature scholars possessed from the beginning by their European predecessors, but were staffed instead for generations mainly by young and transient tutors, the community leaders were reluctant to drop their reins of control . . (p. 3).

The lay board of control became unique to American higher education and is the dominant structure for institutional governance in the twentieth century in both public and private sectors.

Initially these boards did not hold the power they have today, nor did they play a central role in the life of their institutions. Brubacker and Rudy note that "the board lost touch with the day-to-day state of academic affairs," necessitating the establishment of an "immediate committee" to manage the institution (1958, p. 28). In an article entitled "Enforcement of College Trustees' Fiduciary Duties: Students and the Problem of Standing," Berry and Buchwald (1974) state:

> From the foregoing overview of higher education until the end of the nineteenth century, there emerges a clear picture of the social content in which the law of university governance originated. Its hallmark was the virtual absence of trustee discretion. Trustees were appointed, closely supervised, and removed by either religious institutions or groups of donors and alumni. Furthermore, the very donative character of college funding left only minimal opportunity for exercise of investment decisions. Limited in possibilities for free action by both budgetary restrictions and religious ties, the trustees served as little more than a titular board presiding over the daily educational affairs of the college (p. 9).

The founders and original donors kept tight control on the assets of the institution. Berry and Buchwald (1974) outline three methods of early funding for colleges—"private charitable subscription or donation," "public lottery or subsidy," which usually was used for the construction of buildings, and "the sale of perpetual scholarships in which the donor could acquire free education for himself and his descendants by donating a certain amount" (p. 5). All of these funds were earmarked for specific purposes. In addition to control through financial stricture, religious control of these institutions also weakened the powers of the lay directors. All of these factors applied checks and balances to the powers held by directors of educational institutions, reducing the need for supervision by lay society.

The issue of control of educational institutions not only was to be a significant issue in the infancy of our country, but also served to define the laws regarding charitable corporations through the Dartmouth College case.[2] That case involved the issues of the validity of the original charter, the nature of educational institutions in terms of public versus private control, and the catagorization and definition of educational institutions within the law of corporation.[3] The court not only recognized Dartmouth's charter as a binding contract that the state must honor, thereby giving control to a private group of laymen organized as a Board of Directors, but also characterized the colleges of the day as "charitable corporations" (Berry and Buchwald 1974, p. 3). Chief Justice John Marshall stated:

> From the review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founders, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation . . . (Hofstadter and Smith 1961, p. 216).

This case put control of private colleges into the hands of a board of directors for the charitable corporations. With the evolution of higher education, the board assumed more and more power and responsibility, building on the precedent of the Dartmouth College case. At the same time the case differentiated and thereby fostered the establishment of a public sector of higher education under the control of state government.

The evolution of the corporate structure and control of educational corporations is the result of environment and societal de-

[2] See 17 U.S. (4 Wheat.) 518 (1819).

[3] See Brubacker and Rudy 1958, p. 31; Hofstadter and Smith 1961, p. 202, 213; Berry and Buchwald 1974, p. 2.

mands. Henry (1975, p. 152) believes that "the central and more compelling feature [of American higher education] has really been continuous adaptation." The history of higher education in the United States continually reflects this premise. As original founders and donors died, the governing boards began to assume the responsibility of maintaining the goals, purposes, and financial stability of the colleges (Berry and Buchwald 1974, p. 11). At the same time socially acceptable attitudes of religious tolerance had the effect of changing institutional objectives from those that met the needs of a specific religious sect to those meeting the needs of the larger society (Hofstadter and Smith 1961, p. 189). The growth of public institutions subsequent to the Dartmouth College case also adversely affected sectarian influence (1961, p. 149). The decline of sectarian control of private colleges created a void effectively filled by the board, thus increasing their responsibilities for the well-being of the institution (Berry and Buchwald 1974, p. 11).

The growth of the colleges and the consequent increase in financial demands put the board in greater control of the institution. The demand for new financial resources resulted in the development of endowment funds, the earnings of which would provide operating capital for the institution. These funds by law were managed by the boards. Endowment funds lessened the dependency on ear-marked donations and other resources by building a permanent investment portfolio (1974, p. 11). It is obvious that with this development the board took direct control of the monetary resources of private institutions.

In the modern university, trustees or directors exercise considerable control. They are usually responsible for approving all contracts, establishing short- and long-range budgets, approving expenditures for new facilities, and maintaining the goals, purposes, and integrity of the institution. In some of these duties the trustees act in cooperation with faculty and administration, but ultimately the board is held accountable for the health and welfare of the institution (generally, Brubacker and Rudy 1958; Henry 1975).

The assumption of legal duties through the evolution of our system of higher education has moved boards into prominent and demanding positions controlling the very life of their institutions. Berry and Buchwald note:

> As is often the case with dramatic social change, the decline of religious sponsorship and the creation of permanent endowment has generated a significant legal problem—a unique opportunity for self-dealing on the part of trustees. . . [T]here is now a considerable part of university en-

dowment that stands outside the scope of informal donor supervision. University funding now vests in the trustees awesome financial power that may be exercised at their sole discretion. The mere existence of such financial power creates a much greater likelihood for trustee misconduct than was present under former extra-legal donor supervision (1974, p. 15).

Certainly the changes outlined above had a significant effect on resulting litigation in the liability area; however, other factors also must be considered. Federal interest in higher education has been increasing and new regulatory requirements have created new liabilities (Aiken 1976, pp. 276-297).[4] Also, as previously noted, the decline in immunity of charitable corporations has played some part. Another factor is the willingness of courts since the early 1960's to adjudicate cases involving higher education. Finally, affirmative action, a scarcity of jobs, and due process requirements create situations that have potential for liability suits.

The basis for liability litigation is the nonperformance of functions that fall within the legal requirements an institution must fulfill in its relations with persons. To understand the liability issue one must first have a knowledge of the corporate structure and the responsibilities imposed on directors.

### *The Educational Corporation*

One way the founders of organizations could establish and protect their donated real property was to establish a trust. Black defines trust as "a right of property, real or personal, held by one party for the benefit of another." A trust is "[a] fiduciary relation with respect to property subjecting person (sic) by whom the property is held to equitable duties to deal with the property for the benefit of another person. . ." (1968, p. 1680). The trust is created when the property is actually transferred to the other party as trustee. The trustees "own and manage the assets and affairs of the enterprise for the benefit (or use) of another . . . individual, group or class" (Aiken 1976, p. 167). The fiduciary relationship requires the trustee to act in a careful manner, and in good faith, subordinating his personal interests to those of the beneficiaries of the trust (19 Am. Jur. §1272).

[4] The Aiken and Adams-Hall articles appeared in the *Journal of College and University Law*, and also were published by the Association of American Colleges, copies of which were distributed to member institutions of the Association of American Colleges, the American Council on Education, the National Association of College and University Business Officers, the American Association of State Colleges and Universities, and the National Association of State Universities and Land-Grant Colleges. Textual references are to the journal citations.

The care taken must be that which a "normally prudent man" would take under similar circumstances while giving his best judgment.

Directors of corporations, on the other hand, differ from trustees in that their trust relationship is with the stockholders. Corporations, as opposed to trusts, are statutorily created legal entities that can sue or be sued and can enter into binding contracts (Black 1968, p. 409). Directors' responsibilities in corporations are quasi-fiduciary in nature and are elaborated in American jurisprudence: "the entire management [by the Directors] of corporate affairs is committed to their charge upon the trust and confidence that they will be cared for and managed within the limits of powers conferred by law upon the corporation and for the common benefit of the stockholders. They are required to act in the utmost of good faith and best judgment . . . to exercise power . . . in the interest of the corporation . . . not for their own personal interest." Stockholders of corporations or specific beneficiaries of trusts can bring suit for a breach of these fiduciary duties.

Educational corporations do not have stockholders nor do they have specific identifiable beneficiaries. Their beneficiaries are a number of groups such as students, alumni, faculty, donors and the public at large. Therefore, educational institutions along with non-profit charitable organizations have traditionally been classified as charitable trusts. Black (1969) defines charitable trusts as a trust having a class or the public as its beneficiaries and characterized by the uncertainty of identifying specific beneficiaries (p. 1680). Berry and Buchwald (1974) talk about the "hybrid law of charitable trusts" and note that both corporate law and trust principles are used by states in drafting charitable trust statutes. They further note:

> . . . some states adopted a *doctrine of absolute ownership* allowing colleges to directly own donated funds and apply them to any legitimate university purpose. Others enunciated a *theory of trust* which honored the donors' intent above all other considerations. A third view was the *doctrine of donor's intent* which treated the college as owner or trustee depending on the circumstances of each case (p. 16)

Under any of these theories, the state attorney general was viewed as the protector of the public in maintaining the director or trustees fiduciary relationship in the absence of a specific beneficiary who could originate a suit for breach of duty (1974, p. 16). The state attorney general, as an elected official, it was thought, could effectively represent the interests of the government and, therefore, the public in protecting the charitable trust from breach of duty by the trustees.

Charitable trusts define private institutions but public educational corporations are agents of state government organized to fulfill educational purposes. Directors with duties similar to those described in charitable trusts are established to form a corporate entity and insulate educational institutions from excessive political intervention. These corporate directors are responsible to state government for the performance of their duties (Wheeler 1976, p. 212).

*Immunity Prerogatives*

Before leaving the topic of the modern nonprofit educational corporation, we must briefly touch on the topic of immunity, a subject that will be analyzed in detail later. Immunity is based on the concept of sovereign immunity, or "the king can do no wrong." It was postulated that since the government is the people it would be wrong to allow the people to sue themselves (Prosser 1971, §131). Prosser states:

> An immunity . . . avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of particular facts, but because of the statutes or position of the favored defendant, and it does not deny the test, but the resulting liability (1971, §131, p. 970).

Immunity is granted to state governments through the 11th amendment to the U.S. Constitution, which prevents private citizens from filing suit in federal court against state governments. Since state institutions are agents of state governments, they come under its immunity privilege (1971, p. 9). Private charitable corporations received immunity in the past by state statute. It was reasoned that to subject charitable corporations to liability suits would injure the charity whose purpose was the public good (Prosser 1955, §109, p. 785). However, as shall be shown in later discussion, both immunities have proved to be surmountable.

*State Action*

Many educators do not understand the distinction between public versus private institutions in relation to the U.S. Constitution. Knowledge regarding the state-action doctrine is necessary to understand the liability issue, since some of the "new torts" involve constitutional protection (Aiken 1976, p. 163). Public institutions are agents of state government and, therefore, share the state's responsibility to protect those rights guaranteed to citizens under the 14th amendment (Hendrickson and Mangum 1976, p. 2). Private institutions are not responsible for the same level of protection as states or their agencies unless it can be shown that they are acting as agents of the state or involved in "state action." The state-action doctrine is used to analyze whether an interdependent relationship of significant proportion exists between the state and the private corporation, thus making it an agent of state government. A finding of state action in private corporations has traditionally been elusive. However, a recent decision, *Jackson v. The Statler Foundation*,[5] found state action based on the existence of tax-exempt status. Such a finding goes counter to other state-action cases and, therefore, will probably not develop into a new precedent in the state-action area (Hendrickson and Mangum 1975, p. 628). There are many unsettled legal issues in the muddied waters of state action; it is sufficient to say that private institutions are not held to the same level of protection of constitutional rights in their relationships with faculty, students, and the public as are state institutions. Their requirements are significantly less than public institutions.[6] This point should be kept in mind when evaluating liability issues that involve constitutional protections.

***Summary***

The evolution of American higher education has resulted in the development of a hybrid type of corporate structure that continues to evolve. It also has moved directors of educational corporations into positions of prominence in the life of the institution. As boards assumed more of the duties legally within their grasp, they heightened the potential for liability claims. They would be judged against a standard of care based on what the prudent man would do in similar circumstances acting in the best interests of the institution. This definition of the fiduciary relationship comes from trust law; however, as we have seen, educational corporations take principles from several areas of the law governing organizations. It would be wrong for the reader to categorize educational corporations as a corporation, a trust, or an agency in terms of directors' duties. The law reviewed below will show that educational corporations contain principles and characteristics of each of these areas.

5 496 F 2d. 623 (2nd Cir. 1974).

6 See Hendrickson 1972; Hendrickson 1973; Mangum and Hendrickson 1975; Mangum and Hendrickson 1975a.

## The Traditional Basis of Legal Liability

*Public Versus Private Institutions*

Legal liability may differ between public and private institutions. Public institutions, that is institutions created and managed by a state or county or an agency thereof, may be able to avoid certain types of liability by relying on the doctrine of sovereign immunity. At the same time, however, this doctrine may serve only to shift liability from administrators and trustees acting in their official capacities to those persons acting as individuals. Moreover, public institutions are required to provide to individuals the rights guaranteed by the United States Constitution; this requirement may serve to limit some areas of liability in public institutions. On the other hand, private institutions are generally not protected by any theory of immunity. The charitable immunity once afforded to private educational institutions is almost nonexistent today. Private institutions also are generally not required to provide the same constitutional protections required of public institutions, unless the private entity is deemed to be an agent of the state through the "state action" doctrine (see Mangum and Hendrickson 1975).[7]

While the distinction between public and private institutions affects the legal theories and liabilities imposed on trustees and administrators of higher educational institutions, this chapter will deal with basic categories of liability, and will discuss, where appropriate, how the liabilities differ between public and private institutions.

*Types of Liability*

"Liability" is defined in *Black's Law Dictionary* (third ed., 1933) as "the state of being bound or obligated in law or justice to do, pay, or make good something." Our concern here is the way in which one may become "bound or obligated" to do, pay, or make good some thing. Liability may be generally divided into two broad categories: civil liability and criminal liability.

*Civil Liability*—Civil liability is divided into contract liability and tort liability.

(a) *Contract Liability*

Contract liability arises out of an obligation voluntarily under-

[7] 63 Ill. Bar Journal, p. 628, July 1975.

taken, to do or refrain from doing something. A contract has been defined as a promise or set of promises for the breach of which the law gives a remedy or for the performance of which the law recognizes as a duty (Restatement, Contracts §1). The courts have traditionally treated the relationship between student and school as a contractual relationship (Aiken 1976, p. 234). Because of judicial recognition of this contractual relationship, and because of the multiplicity of express and implied obligations entered into by a college or university, it is important to understand what constitutes a binding contract and how contracts affect the possibilities for personal liability of trustees or administrators.

Contracts may be written or oral, express or implied. A contract is express when the parties to the contract have stated all the contract terms either orally or in writing. An implied contract arises when some or all of the contract terms are not stated and must be implied from the conduct of the parties. For example, where one party performs services at another's request, and there is no express agreement as to compensation for the services, a promise to pay for the reasonable value of the services rendered is implied (17 Am. Jur. 2d Contracts §1-4).

In order to have a binding contract, six elements must be present. First, the parties to the contract must have the capacity to enter into the contract. For an individual this generally means that he or she is mentally competent and is the requisite age to enter into a contract. For a corporation or institution, the subject matter of the contract must be within the authority of the institution to enter into. The institution's authority is generally found in its charter, articles of incorporation, or statute which created it. Second, every contract must be based upon an offer. The offer may be express, such as an institutional bulletin that offers certain courses to students who qualify and pay for the courses, or it may be implied, such as the implied offer to award a diploma or degree to students who complete the necessary courses. Third, a contract offer must be accepted. An offer may be accepted by a promise (express) or performance (implied). An express acceptance would be a student signing his enrollment application, which specifically states that the student will pay for all instruction given to him by the institution. Acceptance may be implied when the person accepting the offer begins performance under the contract without signing or expressly accepting the offer.

Fourth, the offer and acceptance must be mutual, or, in other words, there must be a "meeting of the minds" as to the terms and conditions of the contract. Again, the terms of the contract may be stated, such as a specific date for payment for services rendered, or implied, such as the implication that services rendered will be paid for within a reasonable time. Fifth, there must be performance under the mutually offered and accepted terms of the contract in order for one or both parties to be bound by the contract. For example, in order for a contractor to recover payment under a contract with an institution, he must have performed his obligations under the contract. Finally, in order to be binding, a contract must be entered into for a legal purpose. A contract for gambling in a state where gambling is illegal will not be enforced by the courts of that state.

As stated above, a contract may be written, but an oral offer and oral acceptance can also create a binding contract obligation. Further, if the contract is written, it may be comprised of one piece of paper signed by both parties to the contract, or it may be comprised of several pieces of paper, each defining some term of the contract. The enrollment contract between a student and an institution generally is comprised, on the one side, of one or more bulletins published by the institution and given to the student to induce him to enroll, and, on the other side, by the enrollment application signed by the student. The basic contract might be supplemented each semester by a course catalog offering specific courses and the student's enrollment in each course Room-and-board agreements, undertakings to pay laboratory fees, and library fines may all add terms and conditions to the contract between school and student.[8]

Generally, only those persons who are express parties to a contract, or the persons for whom they are expressly acting, are bound by the terms of the contract and may enforce any breach of contract. However, if the contract contains promises that benefit a third person, the "third party beneficiary" may sue to enforce the agreement. It has been argued, for example, that the federal tax exemption granted to a hospital as a "charitable" institution benefits indigent members of the public and gives the indigents the right to sue a hospital to provide free hospital services to them (*Simon v. Eastern Ky. Welfare Rights Assoc.*, 96 S. Ct. 1917, vacating and remanding C.A.D.C. 505 F. 2d 1279 (1975))

The general rule is that trustees or officers, acting within their authority to contract, will not be held personally liable for the failure of the institution to perform its obligations under a contract (Aiken 1976, p. 231). Aiken points out further that

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[8] *People ex rel. Tinkoff v. Northwestern University*, 33 Ill. App. 224, cert den 335 U.S. 829 (1949); *Steinberg v. Chicago Medical School*, 354 N.E. 2d 586 (1976).

This is true even in cases in which the same institutional officer or agent who made the contract for the institution subsequently is responsible, through his act or neglect, for the institution's failure to perform its part of the agreement. In terms of legal responsibility for *breach of contract,* it is the institution which must respond, not the individual (p. 231)

The key concepts in discussing personal liability of trustees and administrators for institutional contracts is whether the contracts were entered into by the trustee or administrator in his official capacity for the institution, and whether the trustee or administrator had the authority, actual or apparent, to enter into the agreement on behalf of the institution. If the trustee or administrator entered into a contract as an individual to personally benefit from the agreement, and the individual's status in entering into the contract is clear to the other contracting party, then it is clear that the individual is personally responsible for the obligations to be performed under the agreement. To protect a trustee or administrator from the implication that the contract is personal to him, the contract should, by its terms, state that it is between Institution X and Contractor Y, and should be signed "Institution X by John Doe, President."

The second issue to be resolved before personal liability can be avoided is whether or not the trustee or administrator was acting within the scope of his authority. A well considered institutional contract will be entered into only after the governing board of the institution has authorized the transaction and has authorized an officer of the institution to execute a contract on its behalf. In that case, the officer who executes the contract will have actual authority to sign the contract document. In other instances, an officer or trustee will be granted general authority to enter into a type of contract; for example, a business manager may, by governing board resolution, be authorized to sign leases on behalf of the institution.

Finally, a trustee or officer may have "apparent authority" to enter into a contract that will bind the institution. An example of apparent authority might be an institutional treasurer who would have apparent authority to sign checks for the institution; that is, it would *appear* to a person conducting business in a reasonable manner that a treasurer's duties would include signing checks on behalf of the institution. A trustee or administrator may gain apparent authority by entering into an unauthorized transaction, which would appear to an outsider to be within the scope of the officer's authority, and by having the institution proceed to honor the transaction, thereby apparently confirming the officer's authority. If, in our example, the treasurer signed a check in an amount that exceeded his authorized limit, and the institution honored the check, the person to whom the check was issued would have reason to believe that the treasurer was authorized to sign checks in the amount of the honored check. Even though through apparent authority the institution and not the officer is liable to the other contracting party to the agreement, the institution may have recourse against the officer for exceeding his authority and improperly binding it to an agreement into which it may not have wished to enter.

The liability of a trustee or administrator who enters into a contract that is clearly beyond the scope of his authority differs between public and private institutions. Generally, an agent who exceeds his authority, and thereby fails to bind his institution, is personally bound on the agreement, and that is the case with agents of a private institution. On the other hand, trustees and administrators of a public institution have a qualified "good faith" defense to actions beyond the scope of their authority. The authority of public institution administrators generally derives from statutes creating the institution, and therefore this authority is presumably known to all. If a public institution administrator believes in good faith that he is acting within the scope of his statutory authority, he will not be held liable for his act. The rationale behind this limited protection is that a public official should not be afraid to act because of shifting court interpretations of public statutes that convey his authority. This protection may have been further limited by the decision of the U.S. Supreme Court in *Wood v. Strickland*, discussed below in the chapter entitled "Some New Forms of Protection."

(b) *Tort Liability*

A tort is broadly defined as any civil wrong that does not arise out of contractual liability. More specifically, "tort" is a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract, for which a court will afford a remedy in the form of an action for damages. The law of torts is thus concerned with the compensation of losses suffered by private individuals in their legally protected interests through the conduct of others that is socially unreasonable. For example, a personal injury such as might be suffered in an automobile accident could give rise to a law suit in tort by the injured person. Torts are divided into three categories: intentional, unintentional, and strict liability.

The basis of liability for tortious conduct is the existence of a legally protected right and a legally enforceable duty (74 Am Jur

20 Torts §8). In other words, for a person to be liable in tort, he must, by his action or inaction, violate a right another person has; he must perform, or fail to perform, a duty that he owes to the other person; and his violation of that right must cause damage to the other party. Common law recognized the primary right of individuals not to be harmed or injured. That right flows naturally from the duty not to cause harm. Another maxim of the law of torts is that whenever the law gives a right, it also gives a remedy for invasion thereof (74 Am Jur 2d Torts §8).

A general rule of the law of torts is that there exists a duty to avoid causing harm or injury to another. The degree of care to be exercised in observing that duty varies with each situation and with the particular legal right of the injured party who is protected.

Until the nineteenth century, a person whose actions caused injury to another was held responsible to the injured person simply because he acted (74 Am Jur 2d Torts §14). The duty of care was therefore absolute, and resulted in strict liability. Today strict liability is reserved for those occupations or situations that are so inherently dangerous that social policy requires the person acting in those situations to pay for any resulting damage. An example of situations in which strict liability has been imposed are blasting and demolition activities, manufacture of explosives, and crop dusting. The most common application of strict liability today is in products liability cases, where the manufacturer of a product intended for public use or consumption may be strictly liable for any inherent defect in the product.

Another type of duty that may be imposed is a duty created by statute. An example of a statutorily created duty is the right-of-way statutes enacted to control the flow of traffic. In the absence of such statutes, a driver would only be required to act reasonably to avoid harm or injury to ~~drivers~~ traveling on cross streets or to pedestrians. Statutes that proscribe that pedestrians at crosswalks or drivers approaching intersections from the right have the right-of-way establish a duty to yield, which, if violated, and injury results, will create a cause of action in tort.

The most common duty imposed by the common law of torts is the duty to act in a manner free of negligence. Negligence is the failure to act in a "reasonable" manner to avoid harm or injury to others. A person acts in a reasonable manner when he does what a reasonable man would do, or does not do what a reasonable man would not do under the circumstances. No intent to do harm is necessary to find liability for negligent actions. Negligence and the "reasonable man" theories are among the most elusive doctrines of modern law. The circumstances dictate what type of reasonable man is required. A university trustee who is on the finance committee of the board of trustees of a university is charged with acting as a "reasonable trustee" when handling financial affairs. The same trustee, acting as president of his construction firm, is required to act as a reasonable contractor in providing safeguards at a construction site. When he is driving to the movies with his family, the trustee is required to drive as a "reasonable driver" and exercise the care of a "reasonable father" toward his family. A. P. Herbert has humorously defined the reasonable man as one who

> invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trap-doors or the margin of a dock; who records in every case upon the counterfoils of cheques such ample details as are desirable. . . . who never mounts a moving omnibus and does not alight from any car while the train is in motion; who investigates exhaustively the bona fides of every mendicant before distributing alms, and will inform himself of the history and habits of a dog before administering a caress; who believes no gossip, nor repeats it, without firm basis for believing it to be true; who never drives his ball till those in front of him have definitely vacated the putting green which is his own objective; who never from one year's end to the other makes an excessive demand upon his wife, his neighbors, his servants, his ox, or his ass; who in the way of business looks only for that narrow margin of profit which twelve men such as himself would reckon to be "fair," and contemplates his fellow merchants, their agents, and their goods, with that degree of suspicion and distrust which the law deems admirable; who never swears, gambles, or loses his temper, who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious creature stands like a monument in our Courts of Justice, vainly appealing to his fellow citizens to order their lives after his own example (in McNamara 1967).

Another means of assessing reasonable conduct is to ascertain the standard of care to be exercised in a particular situation. Because of the development of most educational institutions in this country from the English concept of charitable trusts, members of the governing boards of those institutions are often referred to as "trustees." However, most educational institutions are corporations and the governing board members are, in fact, directors of nonprofit charitable corporations. The confusion between the status of governing board members has created confusion in the standard of care to be applied to their actions. Trustees are held to a higher degree of care than are corporate directors. A trustee is liable for his simple negligence, while a corporate director is not liable for loss unless he has committed gross or willful negligence (76 Am Jur 2d Trusts §314). There has been a paucity of cases dealing with the liability of nonprofit corporate board members, especially in their fiduciary roles, and the standard of care is therefore unclear. The confusion is compounded by the fact that some educational institutions may, in fact, be trusts under local law, and their governing board members may therefore be trustees in the technical sense.

A recent federal court decision has given some guidance to the applicable standard of care. The "Sibley Hospital"[9] case will be discussed in detail below under the topic of fiduciary torts, but its holding with regard to standard of care is informative. The court pointed out that in financial affairs trustees have an affirmative duty to maximize trust income by prudent investment and that they cannot delegate that duty even to a committee of fellow trustees. Corporate directors, on the other hand, may delegate their investment functions to other directors, corporate officers, and even outsiders as long as the directors maintain general supervision over the actions of their delegates. The court noted that corporate directors are responsible for a broad range of management decisions, while trustees are generally charged only with the management of funds. Trustees, therefore, can presumptively devote more of their time to their single functions and should be charged with a high degree of care in fulfilling that function. On balance, the court found that as far as financial and fiduciary matters are concerned governing board members of charitable, nonprofit corporations are held to the same general degree of care as directors of business corporations.

The third element in assessing tort liability is that an injury must occur. A mere violation of a protected right will not give rise to a tort unless actual damage results. A failure to yield the statutorily imposed right-of-way may be an offense against the state, but unless it results in an accident where the driver who has the right-of-way is damaged or injured, no tort will result. Even if an injury does result it must be the proximate cause of the breach of duty owed to the injured party. For example, the owner of a building may fail to exercise reasonable care in fencing an excavation in the building. However, if A is injured falling into the excavation because B shoved A toward the hole, it may be held that the injury resulted proximately from B's act, not from the owner's failure to fence the area,

[9] *Stern v. Lucy Webb Hayes Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974).

(c) *Types of Tort Liability*

(1) *General*—Tort liability may be divided into injury to the person, injury to property, and injury to intangible rights. Injury to the person, or physical injury, is easily comprehended. It may arise out of a criminal act, such as assault and battery, or injury may be caused accidentally, as in a traffic collision. In any case, the general principles of tort liability apply to determine if the injured party may recover from the person causing the injury. Property damage may similarly cause observable physical injury to property, such as collision with an automobile. It may also take the form of an invasion or deprivation of property rights. Trespassing on property may cause damage to the property owner through his inability to use the property while it is occupied by the trespasser. The owner may be able to sue the trespasser for the rental value of the property. In the same manner, a lien improperly filed against property may deprive the owner of the ability to sell the property and may give rise to a tort action for damages.

(2) *Supervisory Torts*—This category of torts relates to the responsibilities and liabilities of directors and trustees to administer an educational institution. Supervisory torts are those wrongs that are not committed in a personal or physical sense by a director or trustee but which arise out of the director or trustee's responsibility to supervise the employees, property, and operation of the institution. This group of torts also includes wrongs to the intangible rights of an individual. In this category, Aiken (1976) includes "intentional" torts such as "assault and battery, libel and slander (defamation), false arrest and imprisonment, malicious prosecution, abuse of process and infliction of emotional distress" (p. 137). Aiken follows Professor Sam B. Dobbs's classification of these "'affronts to the 'dignatory personality' of the victim" as "dignatory torts," a classification under which is also grouped the various civil rights violations discussed in the next chapter.

Supervisory duties require directors and trustees to pay reasonable attention to the management of the institution, to use reasonable care in selecting faculty and staff employees, and to use reasonable care in the construction and maintenance of the institution's physical plant. Supervisory duties, as defined in this monograph, are owed to specific individuals who are injured or damaged on institutional property or by institutional employees. Supervisory duties are distinguished from fiduciary duties that are owed to a broad, indefinite class of past, present, and potential beneficiaries of an institution's bounty.

Supervisory torts occur when a director, trustee, or an entire board fail in their responsibility to properly govern institutional affairs. For example, in the case of *Gamble v. Vanderbilt University*, 138 Tenn. 616 (1918), members of the private institution's board were held personally liable where a student was injured in an elevator fall in a university building. The court found that the executive members actually knew that the elevator was in an unsafe condition and were negligent in allowing it to be operated. At least one commentator believes the fact that the private institution was immune under the state law of charitable immunity, and therefore not liable for damages itself, impelled the court to hold the board members personally liable (Porth, 1973, p. 85). In another case, the managers of a private normal school were held personally responsible for maintaining a nuisance that polluted an adjoining landowner's water supply even though the managers did not purposely commit the wrong (*Love v. Nashville Agricultural and Normal Institute*, 146 Tenn. 550 (1921)). The *Love* case involved an area of traditional, strict liability, but directors and administrators have been held liable for tortious conduct of employees or injury on institutional property because they "should have known" of the danger to the other.

It is apparent that no general rule pertaining to supervisory torts may be formulated. The best guidance available to trustees and directors in this area of liability is to remain as fully informed and alert as reasonably possible when managing institutional affairs.

(3) *Fiduciary Torts*—Another class of wrongs that are comprehended by the term "tort" is the action of directors and trustees in their capacities as managers of institutional funds and assets. Fiduciary torts are distinguished from supervisory torts in that a wrong is done by the management of corporate assets rather than through harm to a specific individual. The plaintiff in these cases is the public at large, represented either by an individual suing in a "class action," or by the attorney general as representative of the people of a state.

Members of the governing board of an institution, whether they are called directors or trustees, share a fiduciary responsibility for the assets of the institution. The standard of fiduciary care of these governing board members will be discussed in detail below; the general responsibilities of directors and trustees is akin to the responsibilities of directors of a business corporation, and will be discussed here. "The directors and officers of a corporation in charge of its management are, in the performance of their official duties, under obligations of trust and confidence to the corporation or its stockholders and must act in good faith and for the interests of the corporation or its stockholders, with due care and diligence, and within the scope of their authority" (19 Am. Jur. 2d Corporations §1271). If the "general public" were substituted for "stockholders" in the quotation, it would apply fully to institutional trustees or directors in the performance of their official duties. While the general rule is easy to enunciate, the fixing of responsibility turns on the facts of each case.

Generally, the management responsibilities of directors fall into three categories: diligence, the duty to affirmatively manage the corporation; prudence, the duty to make informed decisions with regard to corporate management; and loyalty, the duty to avoid profiting personally from corporate transactions. The duty to affirmatively manage the corporation simply involves the responsibility not to undertake a director's job and then fail to perform it. Directors of business corporations are generally charged by statute with the responsibility of managing corporate affairs. Failure to diligently partake in corporate management decisions will subject a director to liability for losses of corporate assets due to mismanagement.

A corollary to the duty to actively manage the corporation's affairs is the duty to make informed decisions in the course of that management. Directors are expected to act prudently, with reasonable intelligence, and exercise ordinary skill in their management duties (19 Am Jur 2d §1278). Directors are not excused from liability due to ignorance if they had a duty to obtain facts before acting. Once the facts are obtained and judgment is exercised with reasonable care and diligence and in good faith, directors are not liable from resulting losses to the corporation (19 Am Jur 2d Corporations §1279). Only if directors are grossly negligent in performing their duties will they be held personally responsible for loss. In addition, directors may delegate their responsibilities to manage the corporation. For example, an institution's board of directors may delegate its responsibility to oversee the management of endowment funds to a professional investment advisor. Here again, the advisor must be selected with reasonable care, and the directors have the responsibility to remain reasonably informed of the investment advisor's actions. Some institutional attorneys feel, however, that the responsibility to manage institutional funds can never be fully delegated, and the board should always retain the power to remove an investment advisor if the board feels the advisor is not performing properly. This feeling may come from a confusion of the "trustee" standard of care, with the corporate director standard normally applied.

Finally, a director may not profit personally from his official position. Since he is a fiduciary, he cannot serve two masters; that is, he cannot loyally serve the institution while working for a competing interest or for his own personal profit.

The attorney general of the State of Michigan has issued several opinions illustrative of the issue of conflict of interest. Excerpts from three of those opinions hold that:

> An officer or member of a governing board of a state institution of higher education who simultaneously serves as an officer or director of a private corporation doing business with that institution is involved in a substantial conflict of interest contrary to law (Opinion No. 4587, September 25, 1967).
>
> A vice president for business and finance and treasurer of a state university is prohibited from having a personal pecuniary interest in a contract with his institution which might require him to choose between advancing his own interest or that of the public (Opinion No. 4646, June 18, 1968).
>
> Under the authorities that have been listed, it is abundantly clear that there would be a substantial conflict of interest violation of Article IV, Sec. 10 if a terminal degree candidate at a state institution of higher education were to be elected to and serve upon that institution's governing board during the time he was a candidate for the degree (Opinion No. 4679, December 2, 1969).

Liabilities arising out of conflicts of interest should be easily avoided if a director or trustee is reasonably circumspect in his direct or indirect dealings with his institution.

The "Sibley Hospital" case illustrates both the application of the corporate standard of care and the types of fiduciary responsibilities of an institutional director or trustee. In *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D.C. D.C. 1974), the plaintiffs sued the school and its trustees for alleged mismanagement of the funds of Sibley Memorial Hospital, which was owned and operated by the school. The complaint charged that the "trustees conspired to enrich themselves and certain financial institutions with which they were affiliated by favoring those institutions in financial dealings with the hospital, and that they breached their fiduciary duties of care and loyalty in the management of Sibley's funds." The facts of the case showed that the hospital's finances were handled almost exclusively by two trustees from the early 1950's until 1968; the Finance and Investment Committees failed to meet from the time of their creation in 1960 until 1971; and substantial hospital funds were invested in financial institutions of which hospital trustees were directors or officers on terms favorable to the financial institutions. In addressing the questions of the appropriate standard of care to be imposed, the court stated:

> Basically, the trustees are charged with mismanagement, nonmanagement and self-dealing. The applicable law is unsettled. The charitable corporation is a relatively new legal entity which does not fit neatly into the established common law categories of corporation and trust. As the discussion below indicates, however, the modern trend is to apply corporate rather than trust principles in determining the liability of the directors of charitable corporations, because their functions are virtually indistinguishable from those of their 'pure' corporate counterparts.[8]

The court found that a director will be held liable for breach of fiduciary duty if:

> (1) he fails, while assigned to a particular committee of the Board having stated financial or investment responsibilities under the by-laws of the corporation, to use diligence in supervising and periodically inquiring into the actions of those officers, employees and outside experts to whom any duty to make day-to-day financial or investment decisions within such committee's responsibility has been assigned or delegated; or
>
> (2) he knowingly permits the hospital to enter into a business transaction with himself or with any corporation, partnership or association in which he holds a position as trustee, director, partner, general manager, principal officer or substantial shareholder without previously having informed all persons charged with approving that transaction of his interest or position and of any significant facts known to him indicating that the transaction might not be in the best interests of the hospital; or
>
> (3) he actively participates in, except as required by the preceding paragraph, or votes in favor of a decision by the Board or any committee or subcommittee thereof to transact business with himself or with any corporation, partnership or association in which he holds a position as trustee, director, partner, general manager, principal officer, or substantial shareholder, or
>
> (4) he fails to perform his duties honestly in good faith, and with reasonable diligence and care;

Based on its analysis of the standard of care, the court found the trustees individually liable for breach of fiduciary duty. The result was tempered in that no financial penalty was imposed on the individual trustees. The court ordered the board of trustees to develop stringent policies to disclose and eliminate conflicts of interest and to follow those policies for at least five years. The court also noted that *Sibley* is a case of first impression in so far as it defined the nature and scope of trustee obligation in a nonprofit, nonmember, charitable institution. The implication is clear that the court will not be so lenient in a second such case to arise in its jurisdiction. Likewise, the widespread publicity of the *Sibley* case should forewarn directors and trustees of charitable institutions nationwide. The full text of the district court's order is provided in the appendix.

*Criminal Liability*—Criminal liability is simply the obligation that arises from committing a crime. Under the English common law, crimes were generally defined by the courts as actions that disturbed the orderly function of the state. Even if a criminal act, such as theft, was directed by one individual against another, it remained a breach of order within the state and, therefore, an affront to the authority of the king, or an offense against the sovereignty of the state (21 Am Jur 2d Criminal Law §§1-2). Upon the founding of the United States, the English common law, criminal and civil, was adopted by the Thirteen Original States and has been adopted by all other states except Louisiana (15A Am Jur 2d Criminal Law §14). Subsequently, however, many states have abolished common law crimes and have substituted a criminal code or statute. Consequently, in order to commit a crime, generally a state statute that declares the act a crime, and which prescribes a penalty for committing the act, must be violated (21 Am Jur 2d Criminal Law §§10-13).

Criminal acts are divided into two types: those acts that must be coupled with a criminal intent (mens rea) to be classified as a crime, and those acts, which, if committed, are criminal without any specific intent. An example of the type of crime that requires criminal intent is theft. To commit theft, a person must take the property of another with the intent of permanently depriving the owner of the use and possession of the property. If money is taken with the intent to return it, the taking may not constitute theft. If the money is, in fact, not returned, the taker would be liable in tort to the owner for the loss of his property. Also, if the money is not returned, a *presumption* of intent to permanently deprive the owner of the money may be implied. In addition, if the money were taken with the intent to return it to the owner, and the taker was "willfully and wantonly" negligent in handling it so that the money was lost, the taker may be criminally negligent on the theory that by acting so negligently he is presumed to have known that the money would be lost. In some states a person who is jointly involved with one in a criminal act such as theft is deemed to have committed theft even though he had no specific criminal intent. The necessity for specific intent to commit certain crimes has given rise to the defense of insanity. Insanity does not excuse the crime, but a person who is insane may lack the necessary intent to have committed the crime.

Certain acts may constitute crimes even though the actor lacks the intent to commit a crime. For example, the possession of a controlled substance such as marijuana is typically a crime even though the person possessing the substance is unaware that the substance in his possession is marijuana or that it is an illegal drug. Similarly, possession of stolen property or contraband is a crime even though the possessor does not know that it is stolen and has no criminal intent in keeping the property.

Crimes are also divided into crimes against the person, crimes against property, and crimes against society. An example of a crime against the person is assault and battery, while a crime against property is the theft or embezzlement of money. A crime against society may be as serious as treason or as localized as the "victimless" crime of gambling.

For a trustee or administrator to know if he has committed a crime, he must refer to the criminal code or common law of the state in which his actions are taken, or to the federal law that may govern his conduct. An action taken legally in one state may be a crime in another. For example, a police officer legally possessing a firearm in his home state may cross into a neighboring state, where he is a common citizen without police power, and be guilty in the neighboring state of illegal possession of a firearm. Because he has crossed a state line he may also be guilty of transporting firearms in interstate commerce without a permit—a federal offense.

Generally, a trustee or administrator who knowingly takes action to harm another physically, or to deprive another of property, may have violated a criminal statute of the state where the action is taken and may be subject to criminal liability. Because a crime is ultimately directed against the state, the penalty associated with the crime flows to the state—a fine, confiscation of property, or imprisonment. Some criminal statutes may collaterally require restitution of property or payment of damages to an individual harmed in the commission of the crime. In this light, it should be apparent that an act against the state, which is a crime, may also be an act against an individual, which is not a crime but will give rise to liability.

*Conclusion*

The law is not settled with respect to the personal liabilities or standard of care of trustees and directors of either private educational institutions or public educational institutions. Directors and trustees should act as reasonably as possible in attending to their responsibilities of running an educational institution, and should seek the advice of competent counsel skilled in legal matters affecting higher education whenever doubt arises as to the propriety of any proposed action.

## Liability for the New Torts

Previous chapters have outlined the nature of the liability problem and case law related to issues in higher education. That discussion showed that liability problems are expanding into a number of new areas. This expansion is due in part to recent court cases but also is a result of federal legislation and government regulation, which have a significant impact on higher education. This chapter will identify some areas of new liability problems. The purpose of this chapter is not to undertake a detailed analysis of legal theory and case law in each of these areas. but rather to point out areas where liability problems exist so that administrators and faculty will know when due care is necessary and when to consult legal counsel.

As the areas of potential liability are outlined, the encompassing nature of these problems becomes obvious. Indeed, there are few areas of higher education administration where administrative or faculty decisions are not affected by liability concerns, other legal issues, or federal regulatory provisions. The process of developing sound educational policy for an institution may be impeded by the need to conform to legal and regulatory requirements. In light of federal regulations and recent court decisions, it is with fear of total administrator frustration that the "new torts" are presented.

*Violations of Constitutional Rights*

As previously noted, some questions of liability turn on whether or not the institution is public or private. Public institutions are held responsible for protection of constitutional guarantees through the application of the 14th amendment and federal statutes. Specifically, 42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute provides that all public institutions, and private institutions operating "under color of state law" (state action), must not deprive citizens of the rights, privileges, or immunities provided in the

Constitution and laws. This statute affects institutional processes such as employment, promotion, admission, discipline, housing, financial aid, and others. Any of the new torts arising out of federal law or Constitutional protections are applicable to public higher education through §1983 and apply to private institutions where state action is found. Hopkins and Roha (Blummer 1975) state:

> Thus, it has become clear that trustees and administrators of colleges and universities can suffer personal liability for action which denies a student, faculty member, or any other person the rights and liberties guaranteed by the Constitution, even where he does so under color of his official position . . . Similarly, action by college or university officials which attempt to deprive an individual of life, liberty, or property without due process of law could be attacked under §1983 (p 24)

*Employment and Promotion of Academic Staff*

Federal statutes concerning discrimination have significant implications for liability of trustees and administrators. An example would be the Equal Pay Act of 1963, which states:

> Sec. 3 (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex, Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee (29 U.S.C. §206 (d)).

This law requires that pay scales may not be differentiated on the basis of sex. Acceptable criteria to differentiate employee salaries would be job skill requirements, level of responsibility, seniority, incentive or other non-sex factors (Aiken 1976, p. 279).

Another federal statute affecting employment is the Age Discrimination in Employment Act of 1967, which states:

> It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to

reduce the wage rate of any employee in order to comply with this Act 29 U.S.C. §621-34 (1970).

This Act prohibits the use of age as a criteria for hiring, firing, salary award, or other benefits except where age is a necessary qualification for job performance.

A third piece of federal legislation is Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunities Act of 1972. This Act states:

> (a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin (42 U.S.C. §2000e).

This statute prohibits discrimination in employment based on race, color, religion, sex or national origin, including employment procedures or tests that serve to maintain prior discriminatory practices, even if they appear to be nondiscriminatory or neutral in intent (Aiken 1976, p 162).

Title VI of the Civil Rights Act of 1964 states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (42 U.S.C. §2000d).

This statute not only has implications for public higher education, but also for private institutions receiving federal money. In both cases one class of individuals must not be denied benefits granted to another class of individuals if criteria used to determine the awarding of benefits are based on race, color, or national origin. This statute not only has significance for employment and promotion, but also in admissions.

The primary agency that enforces affirmative action requirements in employment is the Equal Employment Opportunities Commission or EEOC. The Department of Labor is responsible for enforcing the Equal Pay Act and the Age Discrimination in Employment Act (Aiken 1976, pp. 280-281). The bureaucracy responsible for enforcing these statutes is charged with writing regulations to further define the statute and to bring institutions into compliance with the law. Huitt, president of the National Association of State Universities and Land Grant Colleges, stated in a speech to faculty and administration at Montana State University, May 18, 1977, that these regulations are written from an attitude of mistrust—a mistrust that presupposes university administrators will attempt to violate the law. In an effort to remove any possibility of violation, the regulations have gone beyond the intent of the law.

Aiken notes that EEOC and their enforcement of affirmative action statutes are a case in point and discusses past court rulings (Aiken 1976, p. 229). The review of this case law indicated a belief by the courts in the strong necessity for academic autonomy in the selection, dismissal, and promotion of faculty as long as the criteria used were not based on sex, race, creed, or national origin (Aiken 1976, pp. 214-226). However, he notes that the question is unsettled and cites *Mecklenburg v. Montana State Board of Regents.*

In *Mecklenburg,* the plaintiff filed a Title VII class-action suit, charging that Montana State University discriminates against women in its promotion policies and underutilizes women on committees and in top administrative positions. The court found that statistics alone will establish a *prima facie* case of discrimination against a class; the fact that Montana State University admits to underutilization of women in their master plan for affirmative action along with the statistics prove discrimination. The court states:

> The evidence shows discrimination against women as a class by the defendants at Montana State University in that females are underutilized as deans, vice presidents, department heads, and as instructional faculty in many departments of the University. Women have also been discriminated against as a class in the areas of promotion, tenure, salary, and appointment to important University committees.

The court ordered the university to grant back pay, award promotions, and submit for court approval an appropriate scheme for determination of salaries and promotion.

This decision reinforces the EEOC position in the matter. However, Aiken (1976) notes:

> The logical, if not the legal, validity of these conclusions depends entirely upon the premise, that, if processes of academic evaluation have so operated as to result in women as a class standing less favorably than men as a class, the result may be generally presumed to arise from an invidiously discriminatory cause, and alternative explanations are merely pretextual. The counterpremise, which will generally produce an opposite conclusion, is that facially legitimate processes of academic evaluation produces the same statistical result by weighing, correctly or incorrectly, the professional strengths of a succession of male and female applicants against an academic standard of judgment, and reliance upon statistical evidence to invalidate those processes is merely pretextual (p. 227).

He also points out that "[T]he Mecklenberg case turned the policy of affirmative action back against itself" by using statements acknowledging past wrongs in the institution's master plan as evidence of discrimination (Aiken 1976, p. 229). This case does not investigate the actual promotion and tenure practices nor does it look at the school's current process of hiring new staff members. In effect a court of law will be deciding what standards should be applied in evaluating promotion-tenure of faculty and hiring without determining whether previous methods set by faculty were in compliance with federal statutes. If *Mecklenburg* is considered good law, then current faculty must be fired and demoted to bring institutions into compliance, thus making Title VII a retroactive law (See Aiken 1976, p. 230).

In terms of liability, the implications for trustees and administrators of public institutions or private institutions that receive federal money are clear. Discrimination suits against institutions will continue; however, it appears that university officials are not personally liable (Aiken 1976, p. 228). The liability concerns in employment and promotion are similar in all categories of discrimination. Institutions should be careful to comply with the intent of the law but also should protect institutional and faculty rights to make judgments regarding academic credentials so as to protect academic excellence and institutional integrity.

### *Admission Practices*

Federal statutes governing admission policies of public institutions and private institutions receiving federal money or where state action is found are §1983, Title VI of the Civil Rights Act, both previously discussed, and Title IX of the Education Amendments of 1972, which states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to dis-

crimination under any educational program or activity receiving Federal financial assistance (20 U.S.C. §1681).

Certain institutions were exempt from these provisions, including private undergraduate colleges and those public undergraduate colleges that were founded and have been operated as single-sex institutions (Aiken 1976, p. 284). Administrators and trustees should become familiar with the guidelines defining what constitutes discrimination in admission procedures. Factors discussed in the federal guidelines include the sex of the recruiter, describing programs as being for a particular sex, and the design of the application (Sec. 45 C.F.R. 86).

*Other University Practices Involving Discrimination*

A number of other areas of higher education are affected by Title IX. The most prominent of these is athletics and intercollegiate sports. Traditionally, athletic departments and intercollegiate sports have been male-oriented. Title IX raised two issues in athletics. One is whether equal opportunity requires programs to be offered in either intercollegiate sports or in intramural programs (in the contact sports separate programs are allowed). The second centers on the granting of athletic scholarships that must be awarded based on criteria other than sex. Athletic scholarships may be awarded to one sex who participates in a team sport. These scholarships must be available to both sexes in proportion to the number of each sex interested and participating in intercollegiate sports (see Aiken 1976, p. 287).

Another area to be examined carefully is financial aid and the procedures used to award aid monies. Title IX applies to all forms of financial aid and such awards must comply with Title IX. However, there are two exceptions. One is where a scholarship was established by will or trust and is restricted to a single sex. Such scholarships may continue as long as the institution provides an equal amount of scholarship money to members of the opposite sex. The other exception is athletic scholarships discussed above (see Aiken 1976, p. 286).

Title IX also affects sex stereotyping in textbooks, sex-stereotyping in career counseling, and making facilities or programs available only to one sex. The law, however, does not require institutions to integrate dormitories but must allocate those facilities equally (see Aiken 1976, p. 289). In each of these areas, institutions should evaluate procedures, practices, and publications to ensure compliance with Title IX.

One final area of discrimination concerns the Rehabilitation Act of 1973. This act states:

No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (29 U.S.C. §701).

The guidelines for implementation of this law have just been released. The cost for implementation in higher education has been estimated at $1.5 billion by the Chronicle of Higher Education in its May 9, 1977 issue (p. 3). Although most colleges favor the intent of the law regarding the handicapped, they feel the price tag is too high for individual institutions to bear. Liability suits could follow noncompliance with the regulations (see also Aiken 1976, p. 293).

Finally, it should be noted that the application of all of these regulations to private institutions depends on one of two factors: compliance would be required if the institution received federal financial aid or if the institution was found to be involved in state action.

*Student-Related Liability*

*Student activities*—This is an area that exposes institutions to potential liability. Aiken (1976) states:

Student Activities, because of their bewildering variety of forms and functions and more importantly because of their uncertain placement in the structure of institutional administration and governance, generate potential liability exposures which often tend to defy classification or estimate . . . (p. 243).

One of those activities is student publications. Public institutions must strictly enforce the first amendment freedom-of-speech rights; therefore, they may not control or use "prior restraint" on the editorial content or policies of student publications. The exception to this requirement would be unusual circumstances necessitating the maintenance of order. Even though the public institutions may not control the content of the publications, public and private institutions may be liable in defamation suits for material appearing in student publications. Private institutions must share greater responsibility in this regard than public institutions (see Aiken 1976, pp. 244-246). Aiken (1976) states.

. . . Certainly there is something amiss with a legal construction which forces an institution effectively to insure the public liability of students who, in the assertion of their rights to publish or broadcast whatever they choose, implicate public trust endowments in claims of defamation. The only apparent alternative, for the private institution, is to exercise the 'prior restraint' which Wallace [Wallace v. Weiss, 372 N.Y.S. 2d 416

(1975)] suggested is available to them but which educators are reluctant to impose (p. 246).

Another area of potential liability is student-endorsed travel tours. Aiken (1976) states:

> The risk is perhaps not so much one of negligence in protecting the personal safety of the student, although, if the institution's responsibilities are not carefully and clearly limited, there is a substantial risk factor even in that respect. A more substantial problem arises with respect to the contractual responsibility of the institution to meet the glamorized (or even the essential) stipulations of promotional materials (p. 247)

Another broad area of potential liability is the social, cultural, recreational, or organizational activities sponsored by students on campus. In some cases, university staff are present. The question is one of the level of supervisory responsibility and potential liability the university must share for these activities. Institutions should establish policies defining types of activities that are solely the responsibility of the sponsoring organization and requiring those organizations to accept such responsibility in writing (Aiken 1976, p. 247).

Finally, liability for unauthorized activities can be imposed. The question here is whether the act is unauthorized. Aiken (1976) states:

> . . . Before an act can properly be determined to be 'unauthorized,' however, it must be demonstrated either that it was expressly forbidden; or that the authority actually given did not include, either expressly or by reasonable implication, authority to represent or bend the institution in the particular respect in question. Further, it must appear that no indicia or appearances of such authority arose from institutional practices, statements, or even silence, under circumstances supporting a reasonable supposition that the authority existed (p. 248).

In all of these areas involving student activities, policies and practices should be reviewed with legal counsel to implement effective risk management and eliminate unnecessary liability risks.

*Student Discipline* — Potential liability for the institution clearly exists in the area of discipline. Again there is a distinction between public and private institutions. Public institution officials subject themselves to liability when they expell students for exercising rights protected under the Constitution (Blummer 1975, p. 17). Liability risk is also present for violations of due process rights in disciplinary cases. Such liability may extend to the trustees, as discussed below in *Wood v. Strickland*. Liability also exists for invasions of privacy.

The Buckley amendment or The Family Rights and Privacy Act of 1974, states:

> Sec. 438 (a) (1) No funds shall be made available under any applicable program to any . . . institution of higher education . . . which has a policy of denying . . . parents . . . the right to inspect and review any and all official records, files, and data directly related to their children. . . .

This law has implications for the keeping of student records and recommendations for future employment or admission to graduate school. Institutions need to develop policies regarding types of records kept, removal of information from student files, location of student files, student access to their personal files and release of information on students. The HEW guidelines should be consulted in this regard (41 Fed. Reg. 9062 (1976)). Concerning letters of recommendation, Shur and LeBlanc (Blummer 1975) note that references from teachers are part of their responsibilities to students and "should not be abrogated by fear of potential personal liability." They state:

> So long as a faculty member acts in good faith and without recklessness or malice, he or she is protected to a great degree from any student who wishes to challenge in court the contents of a recommendation or references (p. 38).

*Student Housing*—The failure to properly supervise a residence hall could cause liability for the institution and the staff member in charge of the dormitory (Blummer 1975, p. 36). For example, failure to take proper security measures at all entrances to the building could result in liability for the institution and the staff. If a staff member fails to follow a university-established procedure regarding security, he would personally be liable. When the institution operates residence halls for students it has a duty to protect the persons and property of students. The degree of responsibility will depend on the location of the residence in relation to crime rate and may depend on whether students are required by the institution to live in residence halls (Blummer 1975, p. 37).

*Faculty Related Problems*

There are several areas where faculty and the institution may be subject to liability Professors, like any other citizen, may not make defamatory statements against another person. The Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 251 (1964) held that statements against public officials are not defamatory, even if false, when made without knowledge of the error or when acting in good faith. The term public official has been expanded by some courts to mean those in the public eye (Blummer 1975, p. 31). Most defamatory statements are the responsibility of the speaker, and he has sole liability;

however, any employee statements of a defamatory nature printed in a university document or publication or made by a staff member officiating at a university event will implicate the institution in the claim (Blummer 1975, p. 32).

Another area of liability for both the institution and the faculty results when humans are used in experiments and research. George M. Shur and Richard P. LeBlanc (Blummer 1975) state:

> However, should a professor attempt to conduct experiments using human guinea pigs, the institution (and that professor) would do well to assure that all possible and conceivable safeguards were followed. An institution or individual failing to follow these safeguards might be responsible for the physical or emotional trauma suffered by students or any other volunteers . . . (p. 37).

They recommend that researchers conduct human experiments within their area of expertise. Both the researcher and institutions should be satisfied that adequate safeguards have been implemented.

Faculty may face liability claims for their grading procedures or for failure to submit grades. Failure to submit grades would subject faculty to liability. The procedures used to give grades or the judgments of faculty in assigning specific grades have been respected by the Court. The court has upheld these practices as long as they don't involve constitutionally unacceptable criteria such as race, sex, religion, or age.

*Administrator and Trustee Problems*

Hopkins and Roha note several types of administrator and trustee liability in relation to the Internal Revenue laws (Blummer 1975, p. 20). Colleges and universities must withhold money for income tax purposes and forward the money to the government as stated in Section 3402 of the Internal Revenue Code. Penalties for failure to withhold can equal 100 percent of the amount not withheld and the penalty is assessed against the college official responsible for conforming to the Code (Blummer 1975, p. 21). They state:

> Administrators and trustees of colleges and universities, therefore, who are involved in the paying of wages to employees and the payment of withheld taxes to the government, should assure that they carefully remain within the confines of the law in this area (p. 21).

Aiken also mentions the Internal Revenue Code (see 26 C.F.R. 601.201). These procedures govern requirements to show that private schools applying for tax-exempt status have racially nondiscriminatory policies as to students (Aiken 1976, p. 295).

The final liability, as discussed in detail in the previous chapter, was breach of fiduciary trust. The Sibley Hospital case (supra) spells out the fiduciary duties imposed on trustees. Hopkins and Roha note that this new liability is the result of a merger of long-standing fiduciary duties with the plaintiffs ability to file a class-action suit (Blummer 1975, p. 20). They note:

> . . . administrators and trustees of colleges and universities must be keenly aware of this potential and guide their actions in their official capacity accordingly. Whenever a matter comes before an administrator or trustee of a nonprofit organization or institution in which the official has a personal interest as well as an official interest, the administrator or trustee would be well advised to disqualify himself from the decision-making process (p. 20).

Trustees and administrators would be well advised to read the case and adjust their practices accordingly.

*Summary*

This chapter has outlined a number of new torts covering a wide range of university policies, administrative processes, and programs. Trustees and administrators would do well to investigate all of these areas with legal counsel in an effort to develop a risk-management program. Such a program should include the education of faculty and staff to the potential risk of their actions; however, institutions must be careful to base institutional policies on sound educational theory and not solely on legal considerations.

## Some Forms of Protection

The best form of protection available to a director or trustee is preventive protection. Preventive protection involves performance of director or trustee duties conscientiously, awareness of as many facets of institutional operations as possible, and timely recourse to legal counsel for advice. The last two chapters examined traditional and new forms of liability to which a director or trustee may be subjected. In this chapter we will examine some forms of protection available to limit a trustee or director's liability. This discussion will cover concepts of institutional and individual immunity from suit, corporate indemnification of directors, officers, and trustees, insurance forms available to insure against the risk of liability, and the proper use of legal counsel.

*Immunity from Suit*

One clear area of legal distinction between private and public institutions of higher education relates to the immunity of a state or its agencies from suit without its consent. In most states this "sovereign immunity" applies to state educational institutions. Private institutions formerly enjoyed similar protection under the theory of "charitable immunity." That doctrine, as discussed below, has diminished almost to the point of nonexistence.

*Sovereign Immunity* — To understand the effect of sovereign immunity on trustees and directors of institutions of higher education, we must first address the effect of the doctrine on the institutions. The doctrine of "the king can do no wrong" was firmly embedded in English common law. The practical result of that doctrine was that without his consent the king could not be sued. The concept of sovereign immunity was judicially sanctioned in the case of *Russell v. The Men of Devon*, 100 Eng Rep 359, 2 T.R. 667 (1788), in which case Russell sued the town of Devon for injury to his wagon caused by a poorly maintained public road. The doctrine was recognized in this country as early as 1812 in a similar case, *Mower v. Leicester*, 9 Mass. 247 (1812). Subsequently, nearly every state judiciary recognized the immunity of a state from suit, and generally extended that immunity to state agencies and officers acting on behalf of the state. The practical reasoning behind the doctrine appears to rest on three main grounds: (a) the necessity to protect the state treasury; (b) immunity enables government to function unhampered by the threat of time- and energy-consuming legal actions that would inhibit the administration of traditional state activities; and (c) numerous government functions are unprofitable, high-risk, public services that only government can perform and, therefore, government and its officials demand protection in performing those functions (*Brown v. Wichita State University*, 547 P 2d 1015 (Kan. 1976)).

The doctrine of sovereign immunity varies from state to state and from year to year. To what appears to be a rather clear-cut concept of law, several judicially created general exceptions have been formed (see 33 ALR 3d 703). Governmental units and officers are covered by sovereign immunity on the theory that they are mere agents of the state carrying out governmental functions. One exception to the immunity doctrine arises when the agents are deemed to be engaged in nongovernmental or "proprietary" functions. For example, in *State ex rel. State Community College Board v. Sergent Hauskins & Beckwith, Inc.*, 556 P 2d 23 (1976), the governing board of the state college system was not acting as an agent of the state when it issued bonds and constructed dormitories, but rather was acting in its separate corporate capacity. Similarly, the U.S. Supreme Court in *Hopkins v. Chemson Agri. College*, 221 U.S. 636 (1911), found that an agricultural school was not protected by sovereign immunity in building a dike "for its own corporate purposes and advantages" and not for the benefit of the state. However, it appears that most courts will stretch to find that a state institution of higher learning is acting on behalf of the state so as to apply the sovereign immunity doctrine. Governmental functions have been held to include classwork, construction, repair and maintenance of premises, free transportation, operation of cafeterias and lunchrooms, school athletics, and the use of school premises for various nonschool purposes (33 ALR 3d 703, 738).

A second exception to the sovereign immunity doctrine has been created where the institution or its officers acted out of gross negligence or malice. In *Toney v. State*, 126 Cal. Rptr.. 869 (1976), a black professor filed suit against the state and a former dean charging defamation and intentional infliction of emotional distress. The appellate court found the judgment entered by the trial court was proper because the jury found actual malice by implication, which destroyed the statutorily imposed immunity.

A third exception to the doctrine involves the maintenance of a "nuisance" by the institution. It should be noted that in our discussion on tort liability the maintenance of a nuisance by private parties could give rise to strict liability. Although the courts generally deny that activities of a public school constitute a nuisance (see 33 ALR 3d 703, §11 & 12), the maintenance of a school district's sewage lagoon was held by one court to be an actionable nuisance in *Kriener v. Turkey Valley Community School*, 212 NW 2d 526 (Iowa 1973).

Some jurisdictions have recognized a limited immunity where state officials are performing ministerial duties rather than discretionary tasks. The maintenance of school property has been classified as a ministerial task, for failure of which a school may be sued. The exercise of student disciplinary powers is, on the other hand, discretionary or quasi-judicial, for which a school or its board members are generally liable only if they violate constitutional rights or act out of malice.

In a recent U.S. Supreme Court case, *Wood v. Strickland*, 420 U.S. 308 (1975), members of a public school board were held personally liable to an expelled student merely on the ground that they "should have known" that their actions violated the student's constitutional rights.

The plaintiffs, two high school students, were expelled from a Mena, Arkansas public school for allegedly "spiking" the punch served at a school event for parents and students. The students sued the school board members under 42 U.S.C. §1983, which prohibits any individual acting under color of state law from violating the civil rights of any person, claiming that they were expelled without due process of law. The school board members defended their action, claiming that as public officials they were immune from suit, and therefore liability, under the doctrine of "sovereign immunity."

The court addressed the issue of personal liability by recognizing a "qualified good faith immunity," and quoted its definition of the standard in an earlier decision:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct (Scheuer v. Rhodes, 416 U.S. 232, 247-248 (1974)).

The basis for the immunity is not to deter honest citizens from accepting the responsibility to serve on public school boards, and to exercise their judgment in a "principled and fearless" manner.

Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. (Scheuer v. Rhodes, 416 U.S., at 241-242 (footnote omitted)).

The court reiterated and further defined the immunity doctrine as follows:

The disagreement . . . over the immunity standard in this case has been put in terms of an 'objective' versus a 'subjective' test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' Pierson v. Ray, 386 U.S., at 557. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith (p. 322).

It is notable that even though the school board members were personally responsible for the wrongs done to the two expelled students, money damages were not assessed against them.

The final judicial exception to the sovereign immunity doctrine is simple repugnance to a medieval concept of state infallibility. As the court stated in *Hicks v. State*, 88 N.M. 588 (1975):

We are thus not concerned with the outmoded medievalisms embedded in our jurisprudence in the form of judicially created sovereign immunity . . . its continuance is causing a great deal of injustice (p. 590-91).

Since the sovereign immunity doctrine was judicially created, it can be judicially abrogated, and as of 1976, at least 24 states have done so in varying degrees (see Table 1).

Even though the doctrine of sovereign immunity originally was judicially created, it has also been created by state and federal statute.

*Table 1. Status of Sovereign Immunity*

| Abolished[1] | Partial[2] | Insurance[3] | Immunity[4] |
|---|---|---|---|
| (J) Alaska | Conn | Ga. | Ala. |
| (J) Ariz.[5] | (J) Ky. | Kan. | |
| (J) Ark. | | | |
| (J) Cal. | (J) Mich. | Me. | Del. |
| (J) Colo. | (J) Minn. | Mont. | |
| (J) Fla. | Tenn. | (J) N.H. | Md. |
| Haw. | N.C. | | |
| (J) Ida. | S.C. | (J) N.M. | Mass. |
| (J) Ill. | Tex. | (J) N.D. | Miss. |
| (J) Ind. | (J) W.Va. | Okla. | Mo. |
| Ia. | | | Ohio |
| (J) La. | | | |
| (J) Neb. | | | |
| (J) Nev. | | | S.D. |
| (J) N.J. | | | Va. |
| N.Y. | | | Wyo. |
| (J) Pa. | | | |
| Ore. | | | |
| (J) R.I. | | | |
| Utah | | | |
| Vt. | | | |
| Wash. | | | |
| (J) Wisc. | | | |
| (J) D.C. | | | |
| 24 | 9 | 8 | 10 |

[1] General abolition of immunity, subject to normal exceptions.
[2] Partial abolition.
[3] Abolition or waiver in case of insurance.
[4] Full retention of immunity.
[5] Judicial action to abolish.

Source: Restatement (Second) Torts, Special Note §895B at 21 (Tent. Draft No 19, March 30, 1973), with additions from *Brown v. Wichita State Univ.* Supra. cited in *Hicks v. State,* 88 N.M. 588 (1975).

Several states have enacted statutes protecting the state and its agencies from suit, and under the 11th amendment to the U.S. Constitution, states cannot be sued in federal courts.

Earlier in this paper we alluded to the mixed blessing to directors and administrators brought about by public school immunities. That mixed blessing is that although some school administrators are protected from suit by sovereign immunity, there has been a continual pressure in the courts to seek recovery from the individual administrators personally where the institution cannot be judicially reached. That pressure can perhaps be best examined in the context of two recent 11th amendment cases.

The 11th amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This prohibition has been recognized as extending to suits in a federal court against a state by citizens of that state unless the state itself has waived its immunity or consented to suits against itself (*Hans v. Louisiana*, 134 U.S. 1 (1890). The 11th amendment is illustrative because even though it applies only to suits brought in federal court, its concept is similar to statutorily created sovereign immunity in state courts.

In 1908, the U.S. Supreme Court reaffirmed that a state was immune from suit in federal court under the 11th amendment, but held that the immunity did not extend to a state officer who was joined in the suit.[10] In 1944, the court limited the scope of liability of state officials sued individually by holding that a suit against a state officer for monies that would be paid out of the state treasury was, in effect, a suit against the state and was prohibited.[11] The latter case still left public officers subject to potential liability and money damages for actions for which they would not be recompensed out of the state treasury.

In *Edelman v. Jordan*, 415 U.S. 651, 99 S. Ct. 1347 (1973), the Illinois Director of Public Aid was sued in federal court for welfare payments alleged to be due to a large class of state welfare recipients. The U.S. Supreme Court adhered to the doctrine of *Ex Parte Young*, that state officials were amenable to suit in federal court, but specifically limited any money damages to prospective relief. In other words, the court afforded the state officer one free chance to commit a wrong and not be liable. The second time around, however, damages could be assessed. The issue of a judgment being satisfied out of the state treasury was not of concern in *Edelman* because the welfare payments had been appropriated and in effect were being withheld.

The second recent 11th amendment case, *Scheuer v. Rhodes*, 416

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10 *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908).

11 *Ford Motor Company v. Dept. of the Treasury*, 323 U.S. 459, 655 S. Ct. 347 (1944).

U.S. 232, 94 S. Ct. 1683 (1974), arose out of the death of four students on the Kent State University campus in 1970. The suit sought damages from the former Ohio governor and the president of the university, among others. The state officials cited the 11th amendment and the sovereign immunity protection afforded to public officials acting in their official capacities. The lower federal courts dismissed the complaint on both grounds. The U.S. Supreme Court reversed the 11th amendment holding by simply stating ". . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact they hold public office" (94 S. Ct. at p. 1687). The court went on to deal with public official immunity, and found that "only officials who act beyond the flexible scope of their discretionary public responsibility, or act in bad faith, are subject to personal damage actions in federal courts on account of their official acts or omissions. ..." (Aiken 1975, p. 138). The court further stated that public officials may rely on the "traditional sources" of information, such as staff reports. As Aiken states (1975, p. 139), *Edelman and Scheuer* "are distinctly good news for officers, administrators, and faculty of public institutions," but only if read with the warnings regarding constitutional rights contained in *Wood v. Strickland*, supra.

*Charitable Immunity* — The doctrine of charitable immunity is of considerably more recent origin than the concept of sovereign immunity. The charitable immunity doctrine was judicially imported into this country in 1876 by the Supreme Judicial Court of Massachusetts[12] Apparently the Massachusetts court was unaware that the doctrine had been overruled in England five years earlier.[13] For better or worse, the doctrine arrived on this continent and began a fitful career. The holding in the McDonald case was that the funds of a charity are held in trust and the court will not permit a diversion of those funds to satisfy a private judgment. Other theories have been developed to support the doctrine, but primarily it is supported on the public policy that an organization or institution devoted to the public good should be protected (38 ALR 3d 480).

The charitable immunity doctrine has been shrinking, and only research into the statutes and case decisions of a particular state will disclose whether an institution or its officers are protected under the

12 *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876).

13 *Brown v. Anderson County Hospital Association*, — So. Car. — (May 10, 1977).

doctrine.[14] Where the doctrine does exist, its scope varies widely. Some states provide full immunity to charities by court decision or by statute (New Jersey Stats. §2A:53A-7 et seq.), while other states limit the types of actions that may be brought against charities, or restrict the classes of assets of the charity out of which a judgment may be satisfied. The caution to be observed by directors and administrators is that some courts, by virtue of limiting suits against a charity in its corporate capacity, expose the institution's directors and administrators to liability personally. The doctrine of charitable immunity is waning, and unless advised otherwise by legal counsel, a director or trustee of a private institution should guide his actions as if the doctrine did not exist.

*Indemnification*

Indemnification is simply an obligation to pay or reimburse someone for a loss or expense. In the context of director or trustee liability it generally means the obligation of the corporation to pay or reimburse the director or trustee from any costs or expenses of litigation arising out of the individual serving on the corporate board. Corporate indemnification is an obligation or contingent debt of the corporation, and the authority to enter into that debt must exist either in the statutes, Articles of Incorporation, or in the bylaws of the corporation. A copy of the Delaware statute on indemnification and the New York statute as discussed in Porth (1974, p. 89), is set out in the Appendix.

The Delaware law is modeled after the Model Business Corporation Act, which has been adopted with some changes by more than 25 states. It authorizes corporate indemnification in two general circumstances—suits by third parties against the director, and suits brought on behalf of the corporation against the director. In the first case, the corporation is obligated to pay the director's "expenses (including attorney's fees), judgments, fines and amounts paid in settlement actually and reasonably incurred." In the case of suits on behalf of the corporation only "expenses (including attorney's fees) actually and reasonably incurred. . ." are reimbursed and then only if the di-

[14] As of 1964, six states maintain complete tort immunity (Arkansas, Maine, Massachusetts, Missouri, Pennsylvania and South Carolina), 19 states recognize varying degrees of immunity, 22 states impose full liability on charities, and three states lacked definitive decisions (Kutner, 1970, p. 9). In 1970, Pennsylvania eliminated the doctrine. *Hoffman v Misericordia Hospital of Philadelphia*, 439 Pa. 501 (1970); Massachusetts followed suit in 1969, *Colby v. Carney Hospital*, 254 N.E. 2d 407. See Hospital Law Manual, "Immunity" p. 13 et seq. for a detailed discussion of charitable immunity applied to hospitals.

rector "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. . ." The statute provides that indemnification must be specifically authorized in each instance by the board of directors and that the corporation may purchase insurance to cover its obligation to indemnify. Finally, the law states that it is not the exclusive means of reimbursing a director, and that the obligation to indemnify shall continue after a director ceases to serve in that capacity.

The New York statute, on the other hand, is more restrictive. It provides for reimbursement of "reasonable expenses, including attorney's fees, actually and necessarily incurred" but specifically excludes payment for "(1) Amounts paid in settling or otherwise disposing of a threatened action, or a pending action with or without court approval, or (2) Expenses incurred in defending a threatened action, or a pending action which is settled or otherwise disposed of without court approval." Porth notes that the New York law specifically invalidates any corporate bylaw or other provision for indemnification that is not in accord with the statute, and it entitles a director to indemnification regardless of whether or not a corporate bylaw or other provision exists (1974, p. 89).

Whatever the form or scope of indemnification, it exists as a mechanism to shift financial liability from an individual to the corporation. Because of a fear that completely relieving an institutional director or trustee from financial responsibility for his actions may encourage irresponsible acts, a "public policy" has arisen of limiting indemnification in certain cases. That public policy denies indemnification for criminal acts, grossly negligent acts, and reimbursement for punitive damages. The Delaware act allows some reimbursement where a director has acted negligently, and some courts have held that the public policy argument is not strong enough to prevent reimbursement. Aiken (1976, p. 312 et seq.) discusses the policy reasons that discourage payment of judgments against a director of punitive damages, but concludes that courts have gone both ways on the issue.

Indemnification, while it may comfort the volunteer director, has one serious limitation It is a bare promise of the institution to pay money to the director, and as such is only good to the extent of the institution's unencumbered assets. A large judgment entered against an indemnified director may exceed the assets of the corporation and may expose personal assets of the director to levy. However, as Porth (1974, p. 85) is quick to point out, cases finding directors or trustees personally liable are rare demonstrates, liability for previously unconsidered areas of torts are On the other hand, as *Wood v. Strickland* possible, and thus make the next form of protection we will discuss—insurance—all the more valuable.

*Insurance*

Insurance in our context is simply a commercially purchased form of indemnification. Insurance may be purchased by an institution either to fund the institution's indemnification obligation or to provide direct protection for trustees and directors. An insurance policy may, of course, also be a personal policy purchased by the individual director or trustee.

Adams and Hall (1976), in their companion treatise to Aiken (1976), extensively cover the concepts of risk management and insurance to protect against legal liability. Principally, insurance policies covering against losses are written on two bases—"all risk" and "specified occurrence." The all risk form of insurance obligates the insurance company to pay claims arising out of any source not specifically excluded in the insurance policy. The specified occurrence policy, on the other hand, only obligates the insurance company to pay claims arising out of the type of occurrences specifically listed in the policy. It should be emphasized that an insurance policy is simply a contract and will be interpreted by the courts according to basic contract law.

Adams and Hall (1976) define the three broad sections of liability insurance contracts as (1) declarations, (2) insuring agreements, and (3) conditions. The declarations are those statements of fact and circumstances that form the basis on which a policy is written. If the declarations made by the insured are incorrect, the policy may be avoided in whole or part. The insuring agreements state the losses insured against and exclude various types of losses. The conditions impose obligations on the insured and the insurance company, the performance of which may affect whether or not payment is made under the policy.

In liability policies, the insuring agreements fall generally into four categories: agreements of the insurer, agreements of the insured, rights of the insurer, and rights of the insured. Typically the insurer promises (1) to investigate, adjust, and defend any suit against the insured, (2) to pay damages and expenses assessed against the insured, and (3) to pay all costs of (1) and (2). The insurer's promises typically are limited by location of the insured territory, period for which the policy is in force, and the maximum amount that the insurer will pay for an insured loss. The insured typically agrees to pay all premiums, keep accurate records of insured property, and to be bound by his statements in the declarations portion of the policy.

The insurer's rights include (1) the right to be notified of (a) an "occurrence" that may be covered by the policy, (b) a claim or suit arising out of an occurrence; (2) the right to the assistance and cooperation of the insured in defending a claim; (3) the right to subrogation to any claims of the insured for damages; and (4) the right to cancel the policy for nonpayment of premiums or other specified events. The insured has the right to cancel the policy when he wishes and to receive some portion of his premium back for the cancelled portion of the policy term.

When discussing insurance for professional personal liability, it must be noted that two important insuring agreements exist. The traditional form is an "occurrence" form, wherein the insurer insures against loss for any occurrence during the policy period, even though the claim for the occurrence is discovered or made several years later. The second form of insurance is written on a "claims-made" basis, that is, the company will defend against all claims made during the policy term regardless of when the event giving rise to the claim occurred. The "claims made" policy is becoming more popular; however, it can leave a gap in individual coverage when the insured retires or leaves an institutional board and no policy is in effect to cover him for claims made. This gap can be cured by a rider to the institution's policy that will continue to protect the retired director or trustee.

It is the authors' experience that many basic questions revolving around insurance contracts are completely lacking in legal precedent This is not a criticism of policy drafting, since not all possibilities may be covered in one document. It is rather a peculiarity of the insurance industry. An insurance company builds its reputation on its willingness to pay claims, not to deny them. Therefore, many of the issues that arose between insurer and insured are settled without litigation, so that the insurer can continue to write policies with those insureds.

Some companies are offering comprehensive liability policies to individuals in connection with automobile insurance, life insurance, homeowner's insurance, or any number of other contracts. These policies are usually inexpensive, and, subject to the conditions of the policy, can provide backup coverage to the director or trustee of an educational institution.

### *Legal Counsel*

As stated at the beginning of this chapter, the best form of protection against personal liability is prevention. While *Wood v. Strickland,* supra, points out that reliance on advice of counsel may not serve to relieve a board member of liability, the use of competent legal counsel can reduce exposure to liability. The attorney representing an institution should be familiar with the laws of higher education, as well as familiar with the organizational structure, charter, and bylaws of the institution. He should also understand the goals of the institution and have sympathy for accomplishing those goals. As Aiken (1976) states:

> It will require some exceptional good fortune in many cases for the institution even to assemble the professional and administrative personnel who are necessary to make a fair beginning on the task. The law of higher education, for example, is not a subject upon which the average practicing attorney, even though he may be of the highest general professional competence, can claim any great expertise, or even adequate familiarity. Perhaps even less frequently does the attorney possess the detailed, sympathetic understanding of the policies and inner workings of the institution which is essential to his effectiveness on its behalf. An even greater problem may be encountered in establishing the level of rapport between professional and administrative personnel, to say nothing of faculties and staff, which will permit them to work together effectively in shaping such a program (p. 321).

Frequent recourse to counsel cannot eliminate liability, but it can reduce the risk of liability, at least for the traditional forms of liability discussed earlier. Further, as the law of higher education develops, legal counsel can be of invaluable assistance in charting a collision-free course through the turbulent waters of the "new torts."

## Summary and Conclusions

Legal liability issues with regard to educational administrators and governing board members are in a state of flux. The area of corporate fiduciary relationships is continually being redefined by the courts. *Wood v. Strickland* and *Sibley Hospital* have helped to define the standard of care that trustees and directors must apply to their fiduciary relationships, but the law can be expected to grow and change. A review of the "new torts" is particularly important in assessing institutional liability risk. The laws regarding immunity, indemnification, and insurance are also in a state of flux. Due to the unsettled nature of these issues, a careful study of case law and statutes is required to determine and develop appropriate institutional risk management and insurance needs. The following conclusions regarding specific liability issues are:

- The development of educational institutions in this country has resulted in a hybrid structure in which governing board members assume responsibilities more closely akin to the duty of corporate directors than trustees.
- Personal liability of governing board members and administrators under traditional theories of contract, tort and criminal liability can be reasonably limited by conservative risk management policy and timely consultation with legal counsel.
- "New tort" liability, created by increasing government intervention into higher education, and by expanding constitutional concerns, presents a significant chance of personal liability to governing board members and administrators. To date, these new tort liabilities have not posed a personal financial risk to institutional personnel.
- Sovereign immunity provides some protection from personal liability to governing board members and administrators of state institutions.
- Corporate indemnification and insurance provide reasonable protection to institutional personnel.

Institutions run a greater risk of liability claims now than they did several years ago. New federal regulations have established new torts that further expand the risk, forcing institutions to evaluate current policies in light of new risks. Such an evaluation may be time-consuming and expensive, but the alternative liability claim would entail much greater amounts of time and money.

The following recommendations seem appropriate in commencing the institutional review process.

• Trustees or directors should read *Sibley Hospital* and *Wood v. Strickland* and be briefed on the nature of the fiduciary relationship and steps required to avoid liability claims.

• Administrators and trustees should be asked to review policies and procedures governing release of information, admissions, discipline, promotion, salary allocation, tenure, program and facilities availability based on sex, and contracting authority. Such a review should include documentation of current policies and procedures in each of these areas.

• Legal counsel and administrators should evaluate current practices in light of liability risk and make changes to reduce the risk or bring the institution into compliance with federal regulations.

• In the area of release of information, faculty need to be advised of their rights and obligations in the areas of letters of recommendation, grading, disciplinary procedures, and student records

*Implications for the Legal Counsel*

Legal counsels face a great burden They must evaluate shifting liability theories to determine their applicability to the institution and its governing board members and administrators. They must review institutional policies to insure that they are within tolerable limits of risk of liability claim. Yet they must help educators to make policy decisions based on sound educational principles, not solely to bring the policy within legal constraints.

*Institutional Implications*

As the federal government increases its involvement in higher education, there is a clear and present danger of over-regulation. Some educators believe that federal regulation may inhibit the institution's ability to maintain the integrity of its educational programs through sound educational policies. Where educators and legal counsel perceive that federal regulations go beyond the intent of federal law, or where sound educational policy must be balanced against compliance with federal regulation, they share a responsibility to take steps to prevent unnecessary encroachment by government into institutional affairs. The authors applaud the moves by a number of national associations that together are investigating the feasibility of forming a legal task force to aid institutions in fighting governmental encroachment into institutional affairs. as discussed by Huitt in his recent speech at Montana State University. The need for such a task force is clear and it should be developed as rapidly as possible

*Conclusion*

The risk of personal liability to directors, trustees, and administrators of institutions of higher education is ever-present and is continually increasing. The translation of that risk into personal financial liability has historically been limited, and as dicta in *Wood v. Strickland* indicate, will be reserved for those cases where individuals act with "impermissible motivation" and bad faith. Directors, trustees, and administrators must be courageous in the face of increasing litigation and court challenges to their actions. Only through their resolve to act selflessly and in the best interests of sound policies can our institutions continue to build a sound higher educational system.

## Appendix

*Delaware Corporation Law*

Sec. 145. Indemnification of officers, directors, employees and agents; insurance

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(b) A corporation shall have the power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b), or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsections (a) and (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case under a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsections (a) and (b). Such determination shall be made (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the stockholders.

(e) Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

(f) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any by-law, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

(h) For purposes of this section, references to 'the corporation' shall include, in addition to the resulting corporation, any constituent corporation (including any constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers and employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under the provisions of this section with respect to the resulting or surviving corporation as he would have with respect to such constituent corporation if its separate existence had continued (As amended by Ch 437, Laws of 1974).

*New York Not-for-Profit Corporation Act*
§722 (eff. 9/1/73)

(a) A corporation may indemnify any person, made a party to an action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, his testator or interstate, is or was a director or officer of the corporation, against the reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, or in connection with an appeal therein, except in relation to matters as to which such director or officer is adjudged to have breached his duty to the corporation under section 717 (Duty of directors and officers).

(b) The indemnification authorized under paragraph (a) shall in no case include.

(1) Amounts paid in settling or otherwise disposing of a threatened action, or a pending action with or without court approval, or

(2) Expenses incurred in defending a threatened action, or a pending action which is settled or otherwise disposed of without court approval.

*Sibley Hospital Court Order*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| DAVID M. STERN, Et Al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 267-73 |
| LUCY WEBB HAYES NATIONAL TRAINING SCHOOL FOR DEACONESSES AND MISSIONARIES, Et Al., | ) | |
| Defendants. | ) | |

ORDER

This action came on for trial before the Court and the Court having considered the briefs, arguments and evidence presented by all parties and having set for its findings of fact and conclusions of law in a Memorandum Opinion filed herewith, it is hereby

**DECLARED** that each director or trustee of a charitable hospital organized under the Non-Profit Corporation Act of the District of Columbia, D. C. Code §§29-1001 *et seq.*, has a continuing fiduciary duty of loyalty and care in the management of the hospital's fiscal and investment affairs and acts in violation of that duty if:

(1) he fails, while assigned to a particular committee of the Board having stated financial or investment responsibilities under the by-laws of the corporation, to use diligence in supervising and periodically inquiring into the actions of those officers, employees and outside experts to whom any duty to make day-to-day financial or investment decisions within such committee's responsibility has been assigned or delegated; or

(2) he knowingly permits the hospital to enter into a business transaction with himself or with any corporation, partnership or association in which he holds a position of trustee, director, partner, general manager, principal officer or substantial shareholder without previously having informed all persons charged with approving that transaction of his interest or position and of any significant facts

known to him indicating that the transaction might not be in the best interests of the hospital; or

(3) he actively participates in, except as required by the preceding paragraph, or votes in favor of a decision by the Board or any committee or subcommittee thereof, to transact business with himself or with any corporation, partnership, or association in which he holds a position as trustee, director, partner, general manager, principal officer, or substantial shareholder; or

(4) he fails to perform his duties honestly, in good faith, and with reasonable diligence and care: and it is hereby

ORDERED that the appropriate officers and/or trustees committee of Sibley Memorial Hospital shall, prior to the next regularly scheduled meeting of the full Board of Trustees, draft and submit to the full Board, and the Board shall modify as it deems appropriate and adopt at said meeting, a written policy statement governing the utilization and investment of the Hospital's liquid assets, including cash on hand, savings and checking accounts, certificates of deposit, Treasury bonds, and investment securities; and it is further

ORDERED that the Board and its appropriate committees shall, promptly after adoption of said policy statement and periodically thereafter, review all of the Hospital's liquid assets to insure that they conform to the guidelines set forth in said policy statements; and it is further

ORDERED that each trustee of Sibley Memorial Hospital shall disclose to the full Board of Trustees prior to its next regularly scheduled meeting, in writing, his or her affiliation, if any, with any bank, savings and loan association, investment firm or other financial institution presently doing business with the Hospital and shall thereafter quarterly amend such writing to reflect any changes; and it is further

ORDERED that the Treasurer of Sibley Memorial Hospital shall, at least one week prior to each regularly scheduled meeting of the Board of Trustees for a period of five years from the date of this Order, prepare and transmit to each trustee a written statement setting forth in detail all business conducted since the last Board meeting between the Hospital and any bank, savings and loan association, investment firm or other financial institution with which any Sibley officer or trustee is affiliated as a trustee, director, partner, general manager, principal officer, or substantial shareholder; and it is further

ORDERED that the auditors of Sibley Memorial Hospital shall, for a period of five years from the date of this Order, incorporate into each annual audit a written summary of all business conducted during the preceding fiscal year between the Hospital and any bank, savings and loan association, investment firm or other financial institution with which any Sibley officer or trustee is affiliated as a trustee, director, partner, general manager, principal officer or substantial stockholder, and shall make a copy of said audit available on request for inspection by any patient of the Hospital's offices during business hours; and it is further

ORDERED that each present Trustee of Sibley Memorial Hospital and each future trustee selected during the next five years shall, within two weeks of this Order or promptly after election to the Board, read this Order and the attached Memorandum Opinion and shall signify in writing or by notation in the minutes of a Board meeting that he or she has done so; and it is further

ORDERED that plaintiff's request for reconsideration of the Court's refusal to certify their class under Rule 23(b)(1) or (3) is denied; and it is further

ORDERED that all other relief requested by plaintiffs is denied; and it is further

ORDERED that plaintiffs shall have their costs, but only for the successful phases of this action.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 30, 1974.

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