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## **Plato vs. Socrates: the devolving relationship between higher education institutions and their students**

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### **Introduction**

Historically, the very idea that a mere student would have the temerity to pursue a legal claim against one of his instructors, his college or his university would have been unthinkable. After all, students were the minions of their academic institutions: they were the Junior Members in the *studium generale*. They were wholly dependent upon their college or university for the successful completion of their education and the receipt of a degree. In the middle ages, a university education may have been all that stood between the student and a life of hard labour or servitude. Just imagine one of Oxford's first pupils, in the thirteenth century, seeking judicial relief for alleged violations of the Statutes of Merton College by the head of his College in negligently admitting a fellow student with a history of violence who subsequently assaulted the plaintiff. Similarly, query the notion of Plato suing Socrates for 'educational malpractice', asserting that he was left unqualified, unprepared and unfit to secure the sort of career he sought and reasonably expected following graduation, despite having satisfactorily completed everything required of him by his paternalistic task master, Socrates.

In historical context, the possibility of a student legal claim sounds absurd. As a matter of historical fact, until the late nineteenth and early twentieth centuries, such claims were virtually unprecedented. In those rare instances when aggrieved students did file claims, the courts typically deferred to the decisions of higher education institutions and dismissed them – not only in academic matters, but also with respect to student discipline (which was often severe if rarely physical) and virtually every other aspect of college life. Higher education was viewed as a privilege, not a right, by the courts, and the relationship between students and their colleges was perceived as a paternalistic, if not a dictatorial, one. Suffice it to say, student legal claims were not a major problem for colleges and universities during the first 700 years or so of formal higher education.

By the middle of the twentieth century, however, things had changed dramatically. In the United States, with the war in Vietnam raging, student uprisings on campuses across the country and an

unprecedented liberalization of societal values, courts began to acknowledge that college and university students were adults, not children, and that they were legally entitled to be treated as such by higher education institutions. Prior to that time, the legal relationship between higher education institutions and their students had been deemed one of *in loco parentis* by the courts, meaning that colleges and universities stood in the shoes of their students' parents in the eyes of the law, and that the institution owed a legal duty to treat each student as a reasonably prudent parent would treat his or her own child. Then, by the late 1960's and early 1970's, courts across the United States began to conclude that the duty owed by higher education institutions to their students, instead of a reasonably prudent parent standard, was one of reasonable care, which meant colleges and universities were obligated to exercise reasonable care in order to reasonably protect their students from reasonably foreseeable harm. As a result of these changes, student legal claims against higher education institutions in the United States began to steadily increase in number and in breadth over the ensuing decades. To a lesser degree, this change also occurred in the United Kingdom: the major US text on 'higher education law' appeared first in 1978; the UK caught up only in 1994!

At the same time, judges in the United States became increasingly less deferential to colleges and universities and started to treat them more like for-profit corporations, in spite of their tax exempt not-for-profit legal status under American law. There are many theories concerning the reason for this sea change in the law. Some blame the most prestigious higher education institutions, which had by then amassed multi-billion dollar endowments, accrued multi-million dollar athletic programs, grown sprawling facilities, and were levying hefty tuition fees. According to this theory, courts in the US began to conclude that colleges and universities could afford to shoulder the same responsibility, and the same legal liability, as private, for-profit entities. Whatever the cause, however, the change in the legal relationship between higher education institutions and their students is undeniable. Colleges and universities in the US have entered the American tort law system full bore, complete with its hallmark 'Court TV' channels, banner headlines and 'runaway' juries awarding mega-damages.

In this article, we examine student legal claims against colleges and universities in the US and in the UK under contract, tort and public law principles, focusing particularly on the evolving legal relationship between higher education institutions and their students. Our goal is to provide the reader with a comparative analysis of the varied approaches taken with respect to student legal claims by the legal systems in these two countries, sharing as they do the common law tradition (and bearing in mind that, in theory, US case law can be cited in the UK courts, and vice versa – see the reference below to the 2004 *McLean* case). We then hope to identify some of the best and worst attributes of both systems, and to analyze whether they seem to be converging or diverging with respect to the processing and resolution of student legal claims against higher education institutions.

Firstly, with respect to the US...

## **Tort liability**

In the American system, tort liability against higher education institutions generally arises in the context of negligence claims. In order to recover on a theory of negligence in most US states the injured party or plaintiff has the burden of proving: (1) a duty arising on the part of the defendant to conform its conduct to a standard of care arising from its relationship with the plaintiff; (2) a failure of the defendant to conform its conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff proximately caused by the breach with resulting damage. Thus, the first requirement in a successful negligence claim is proof that the defendant owed the plaintiff a legal duty. The existence of a duty is a question of law for the court to resolve. It is not a fact question for a jury. Traditionally, American courts have, for example, been reluctant to impose a legal duty to anticipate and protect against criminal acts by third parties unless the facts of a particular case demonstrate that it was or should have been 'reasonably foreseeable' to the institution that a criminal act was likely to occur.

### *Public universities in the US*

In the US legal system, there are a number of important and notable distinctions between the treatment given to public higher education institutions as opposed to private higher education institutions. Public higher education institutions are wholly owned and operated by each of the 50 US states. They constitute an arm or agent of the state government in the eyes of the law. In tort actions against public universities in the US, state or public institutions enjoy various immunities from civil suit. Under the doctrine of sovereign immunity (which is a bit of a misnomer in this context, given the lack of a sovereign in the US!), states can be sued only for those specific types of tort claims to which they consent, statutorily, to be sued for under state law. Thus, if a student's claim against a public institution is not of a type that is statutorily permitted, then the student will be barred from recovering on such a claim against a public institution. The result is that, often, the parties spend months or even years litigating the question of whether or not the state and its employees who have been sued are statutorily immune from suit under the state's sovereign immunity statutes for the type of negligent conduct alleged by the plaintiff. In many states, it becomes a question of whether the challenged decision or action of a state employee was ministerial or discretionary in nature. Generally speaking, if a claim is for a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused, a public university has statutory immunity for the claim. However, claims based upon ministerial or operational acts that amount to the day-to-day or ministerial implementation of a larger policy are generally unprotected by statutory immunity.

The statutory immunity exception is narrowly construed and aimed at preventing courts from passing judgment on policy decisions entrusted to coordinate branches of government. To operationalize these concepts, American courts tend to draw distinctions between so-called planning level activity on the one hand (which is protected by statutory immunity) and operational level activity on the other hand (which is not generally protected by statutory immunity). Notably, though, the mere fact that a determination or challenged decision is made at a relatively low level does not prevent the application of discretionary immunity. See *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988).

In some states, statutes also limit the maximum amount of legal damages for which a public entity such as a state university can be held liable. In Indiana, for example, that amount is currently \$300,000 (US) per person per occurrence, irrespective of the plaintiff's actual injuries or damages, or the conduct of the university. In several years, the statutory limit in Indiana is slated to increase, first to \$500,000 and then to \$700,000 per person. As a general rule, these types of statutory limits on recoverable damages are deemed enforceable. Thus, the courts will generally enforce whatever statutory limits the Indiana legislature sets. In addition, punitive damages normally cannot be recovered in most states against a governmental entity or an employee acting within the scope of employment. Many states also legally prohibit their public universities or other governmental authorities from agreeing to indemnify a third party. Under these statutory provisions, it is generally unlawful for a state university to agree in a contract to indemnify a private actor. These types of prohibitions do not apply to private colleges or universities, and tend to exist merely because an entity is an arm of the state government.

Although they enjoy various immunities from suit and limits on the damages that can be awarded against them, public institutions (as arms of the state) are nevertheless constitutional actors under American jurisprudence. In essence, state universities, and their employees and agents, are bound by the United States Constitution and the separate constitution of the US State in which they are located. As so-called 'state actors' they are constitutionally prohibited from engaging in certain types of activities, such as:

- Denying students' rights under the Fifth and Fourteenth Amendments to the US Constitution (and often similar state constitutional provisions) to due process of law (which prohibits the state from denying life, liberty or property rights without due process of law). As a result, in order to discipline a student for violating a student conduct code at a public university, the student often must be given some of the rights one would expect to find in a criminal trial, such as a right to be represented by an attorney in the disciplinary hearing. In fact, some public institutions provide an attorney at state expense through an office on campus that represents students. Typically, public university students also enjoy a right to confront and cross examine witnesses against them in a student disciplinary hearing, a right to have their hearing transcribed or recorded, a right to appeal, and several other similar rights.

- Denying their students' Fourth Amendment rights against unreasonable searches and seizures of their persons or property (say, during a warrantless search of a student's dormitory room).

- Denying their students' First Amendment rights to free speech, which gives public university students certain rights to peaceful assembly on campus, to protest (subject to reasonable time, place and manner restrictions), and to write and publish what they desire in the student newspaper.

A federal statute, 42 U.S.C. Section 1983, which was enacted shortly after the Civil War in 1865, provides a private right of action to individuals who believe their constitutional rights have been violated by state actors such as a public universities and their employees. Aggrieved individuals may sue the institution *and* the individual employees allegedly involved. If the plaintiff student prevails in such a suit, the defendants are not only responsible for paying the students' damages but also his or her attorney's fees and costs. Although prevailing party fee arrangements are the norm in the United Kingdom, fee shifting statutes are rare in the American system. In fact, generally speaking, a prevailing party is only entitled to recover his or her attorney's fees from the losing party if a special statute or a written contractual provision between the parties expressly permits it. Once again, there are certain immunities available to the defendant institution and to individual employees in Section 1983 actions. Unfortunately, however, it can take years of litigation in order for a court to determine whether or not those immunities apply in a particular case. By that time, even a successful defendant may have spent tens of thousands of dollars in attorney's fees and court costs.

### *Private universities in the US*

Unlike their public counterparts, private universities in the US are not owned or operated by the government. Nor are they state actors or subject to constitutional requirements. As long as they avoid using public employees such as sworn police officers to do so, private universities in most states are generally free to search student rooms for suspected drugs (unless they promise not to do so in their student prospectus or other publications). In addition, their campus disciplinary hearings need not be conducted with all of the due process of a criminal trial (unless the institution agrees to make them so in a student code, handbook or agreement of some kind), and their campuses are generally private property – not public forums for First Amendment purposes. As a result, private universities can control to a far greater extent than their public counterparts who is allowed to do what and where on their property. On the other hand, private institutions in the US do not enjoy sovereign or statutory immunities from suit. Nor do they enjoy statutory limits on the amount of damages that can lawfully be awarded against them. They are not prohibited from indemnifying or holding third parties harmless contractually. They are subject to awards of punitive damages. In fact, in the US legal system there is often no limit on the amount of damages a jury can award against a private actor. Appellate courts are, however, empowered to reduce verdicts on appeal if they are not supported by substantial evidence, or if a jury's verdict 'shocks the conscience' of the appellate court. Needless to say, this is a very high hurdle.

## Contract law

As a general rule, American courts defer to educational institutions when it comes to student claims based on tort for negligent advising and negligent accreditation. The courts also routinely deny negligent admission, poor instruction and other similar sorts of educational malpractice claims, citing difficulties in establishing the educational standards against which the defendants should be judged, proof problems in terms of demonstrating an injury and causation (crucially, was it the institution's poor teaching or the student's lack of mental ability to comprehend the material?), and the challenge of crafting appropriate remedies (should the student be awarded a court-ordered degree, or perhaps sent back to the institution with an order that he or she be allowed to finish the academic program?). The fear expressed by several courts is that allowing such claims would open the floodgates of litigation by disgruntled students – which may mean these courts believe higher education institutions in the US do indeed have many dissatisfied customers!

Theoretically, under US law contract claims could provide an alternative to educational malpractice and negligent admission claims. To date, however, most courts and state legislatures have chosen to play a passive role. *Ross v. Creighton University* 740 F. Supp. 1319 (N.D. 111.1990) seems to represent the farthest a major US court has been willing to go in terms of acknowledging the possible existence of a contractual liability claim in this context. The *Ross* case involved a men's basketball student-athlete whose athletics eligibility and scholarship ended without the student receiving a degree. When the student subsequently sued, the Court held that, if the plaintiff could establish that the University failed to honor a *specific* contractual promise, then a breach of contract action *might* exist. According to the Court:

To state a claim for breach of contract, the plaintiff must do more than simply allege that the education wasn't good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor. Thus, if the defendant took tuition money and then provided no education, or alternatively promised a set number of hours of instruction and then failed to deliver, a breach of contract action might be available.

But if such contractual claims require inquiry into the nuances of educational processes and theories, and whether academic services were deficient (as opposed to non-existent), the courts have consistently refused to second-guess the university's faculty on academic matters. Several commentators have suggested that the aggrieved student might, however, fare better with a claim based upon contract law's implied obligation of good faith. That said, there is, in fact, a dearth of case law finding institution's liable. Thus, the great weight of authority in the US continues to be against claims, whether in tort or contract, for alleged poor instruction and other forms of educational malpractice. It will be fascinating to see whether the rationale of the British court in the *Rycotewood* case (see below) makes its way into American jurisprudence in the future.



## **Academic and student disciplinary cases**

As with educational malpractice cases, American courts tend to be very deferential to academic judgments when it comes to the academic codes of honour prohibiting cheating, plagiarism and the like. In the US academic dishonesty appears to have reached epidemic proportions: according to recent surveys by *Campus Life* and by *Who's Who Among American High School Students*, 80% of high school and college students admit they have cheated on tests or papers in school. When asked why, 87% said it was because 'they didn't study' and 80% said it was 'to get a passing grade'. About a third of college students surveyed admit to serious test cheating, and one-half admit to one or more instances of 'serious cheating' on written assignments. More than half of the high school students surveyed say they have plagiarized work they found on the Internet. Notably, however, test cheating on campuses with honour codes is typically up to one-half lower than the level on campuses that do not have such honour codes: just 10% of students admit to serious test cheating on campuses with honour codes. Whatever the numbers, academics are reluctant to take action against cheaters. One-third of faculty surveyed who were aware of student cheating in their courses in the last two years of the survey said they did nothing to address it. Where it is addressed via a disciplinary process, American courts have been largely unwilling to substitute their judgment for that of the faculty in these cases of breaches of academic regulations, or even to challenge the procedures employed by universities to adjudicate them, unless the institution fails to deliver the procedural due process it promises in its student handbooks. The same is not true, however, with respect to student disciplinary procedures in cases of social misconduct, and especially in public universities where dreaded Section 1983 lawsuits and injunction actions can result from alleged denials of the right to counsel in such disciplinary hearings, of the right to confront and cross-examine witnesses, of appellate rights, or of other constitutionally based due process rights. Although the money damages in such cases may be relatively low, the prevailing party fee statute can make litigating such claims very expensive for the higher education institution.

With respect to private universities in this context, following one's own published student disciplinary procedures and providing charged students with basic fundamental fairness – which is known as contractual due process – is all that is required. The federal and state constitutions do not apply with respect to private universities and there are few, if any, statutory procedures governing private university student disciplinary proceedings at present. Generally speaking, the process at a private university need only include notice of the charges against the charged student and an opportunity to be heard. There is no prima facie right to counsel in these hearings and the institution is not normally required to provide charged students with an attorney – although some institutions do so as a matter of policy. When institutions fail to follow their own procedures (which are viewed as implied contracts arising from student handbooks and codes), or to provide fundamental fairness, courts often have been more willing than in the academic context to enjoin student disciplinary actions and to remand cases to the university for further proceedings.

Turning to student and university/college disputes under English law, and beginning with the legal status of English universities...

The universities of the UK are all legally autonomous institutions; they are not owned by, nor directly controlled by, the Government as part of 'the public sector' (as is the case in many other European countries). That said, the Government provides a substantial proportion of their funding via a quango (the Higher Education Funding Council) in the form of an annual 'block-grant' (the equivalent of a US State budget-line or subvention for its State university system/campuses). This covers 'T' (the teaching of 'home' (ie 'in-state') undergraduates, as opposed to 'the full economic cost' tuition fees charged to overseas (non-UK/EU) students, and all calculated on a standardised formula varying by subject but not varying significantly amongst universities and averaging £5K pa (say \$8K) as 'the unit of resource' (including the modest annual tuition fees of c£1150 collected directly from UK/EU undergraduate students; this flat fee being the same for all courses at all HEIs). It also covers 'R' for research, as assessed and rewarded on the quality of output/productivity by the academic departments of an institution being rated 1 to 5\*; 65%-plus of this 'R' public money goes to the 'top' dozen or so of the c125 universities, notably Oxford and Cambridge, and (as parts of the federal University of London) Imperial College, University College, and King's College. In addition, the UK universities have generally become over-dependent on such State financing and hence, whatever their independence *de jure*, they tend to behave *de facto* as 'the last nationalised industry'. For more on the economics of UK HE as almost entirely the provision of a public good and hence as broadly resembling US public HE, and hence also in contrast to the significant US private (not-for-profits and now also the growing for-profits) supply of HE, see Palfreyman, 'The Economics of Higher Education: Costing, Pricing & Accountability; Access & Affordability', as an on-line OxCHEPS Paper (at [oxcheps.new.ox.ac.uk](http://oxcheps.new.ox.ac.uk)) and also available as a book.

The UK universities as private legal entities are:

*Either* **statutory charitable higher education corporations** created by legislation in 1988 from the former local government owned and controlled polytechnics, and then renamed as universities by legislation in 1992 (aka 'the ex-polys', 'the modern universities', 'the Campaign for Mainstream Universities'); and are closer in mission, governance and management terms to the ordinary (as opposed to the flagship - say, Berkeley and Michigan AA) US public, state universities.

*Or* **eleemosynary lay chartered charitable corporations aggregate**, founded in the middle ages (for example, New College, Oxford, in 1379) or right up to and including the wave of 'the new universities' in the HE expansion of the 1960s, and are akin to the US private, not-for-profit universities and colleges in terms of a more collegial/shared-values model of governance and in terms of a few having permanent endowment (eg. Oxford at c£2.5b, or c\$4b; cf Harvard at over c\$20b).



The latter also have a left-over medieval legal relic in the form of the Visitor, although this role as the arbitrator of the founder's prescribed internal laws for his institution and as 'minder' of the founder's donated corporate permanent endowment assets has been steadily reduced by legislation over the past twenty years, firstly in relation to academics/faculty as 'Senior Members' of the *studium generale* being in dispute with the corporation under their contracts of employment and now (following the 2004 Higher Education Act) in relation also to students as 'Junior Members' being in dispute with the corporation under 'the contract to educate'. One should note, however, that the chartered universities in Scotland have never had the concept of the Visitor, while the office has largely long since been abolished for chartered universities in Canada, Australia, and New Zealand as Commonwealth, common law countries.

In fact, technically the University of Oxford and the University of Cambridge are each lay civil corporations and hence not only do not have charters and founders, but also lack a Visitor (unlike the constituent colleges within their federal structures). They do, however, have a very pure form of 'academic demos' collegial governance in that sovereignty lies with the 2500 or so faculty as 'Senior Members' on the University's and/or colleges' payrolls once gathered at Congregation in Oxford or in the Regents' House at Cambridge ('the Don's Parliament'); similarly, the Governing Body for an Oxbridge college is the assembled Fellows as the incorporators (the fellowship varies in size from 30 to 100 across the 65 or so colleges). For completion of the US/UK analogy, note that the UK equivalent of the US community college is the UK further education corporation, again created by legislation which extracted them/their assets from being, like the former polytechnics, part of local government.

For more on the legal status of UK HE institutions, on their governance and on their management see chapters 2-4 of *Higher Education Law* (Palfreyman & Warner, 2002, Bristol: Jordans), the relevant items at the 'Papers' page on the OxCHEPS web-site, and *Oxford and the Decline of the Collegiate Tradition* (Tapper & Palfreyman, 2000, London: Woburn Press); also (forthcoming) *Managing Governance* (M.L. Shattock, in the 'Managing Universities & Colleges' Open University Press/McGraw-Hill series: details at the 'Resources' page on the OxCHEPS web-site). For the equivalent US material see *The Law of Higher Education* (Kaplin & Lee, 1995 (and the 2000 *Supplement*), San Francisco: Jossey-Bass; new edition due 2005), and *The Academic Corporation* (E.D. Duryea, 2000, New York: Falmer/Taylor & Francis). On the Visitor, see chapters 8 and 30 of *Higher Education Law*.

## **Tort & Phelps:**

The English law of tort applies to all universities and colleges as to any company, school, hospital, institution or government department (there no longer being an equivalent of the residual Crown or public body immunity still applying to the benefit of US state entities and hence US public universities, as described above). Thus, the student can sue the university/college as he or she might sue any other legal entity that commits a tort against him or her, and the courts would handle the action in the same way. Apart from the issue of statutory immunity, and the fact that there is no longer any jury involvement under English law in tort cases (other than for defamation) and hence the damages awarded tend to be lower than in the US (and do not involve any punitive element), the tort law principles of duty of care, causation, remoteness, mitigation, etc., are very similar for universities and colleges whether in the US or in England & Wales (and indeed in Scotland under the law of delict). The other big difference is that, at present, the likelihood of tort litigation for the UK HEI is rather less, perhaps mainly as a result of the UK not (yet) having an abundance (or even a surfeit) of ambulance-chasing, no-win/no-fee lawyers, and that may well be not least because costs in litigation are in English law and Scots law still awarded against the losing party. The situation is also helped by the students at UK HEIs being much less likely to have access to fire-arms and to own cars, by there not being a fraternity house culture (still less the hazing rituals) as still to be found on some US campuses, and perhaps by the legal age for drinking being 18 rather than 21 (although drunkenness among students is, of course, still a problem).

Moreover, the English judiciary have been fairly robust in not extending endlessly the duty of care or in expecting impractical and unreasonably expensive safety precautions: drunken young men, whether students or not, recklessly engaging in dangerous pranks must live with the consequences, no matter how dire, without expecting compensation from the owner of the premises (in *Ratcliffe v McConnell* [1999] 1 WLR 670, Court of Appeal (CA), it was a closed/locked swimming-pool on campus into which at night the student dived at the shallow-end and where he broke his neck and ended up paraplegic, for which he failed in seeking damages from the college). Similarly, in a recent Scottish case (*Erin Leigh McLean v The University of St Andrews*, Outer House, Court of Sessions, 25/2/04, A1143/01), where a student sent to Odessa for a compulsory period abroad in her Russian degree course was raped and then sued her HEI for allegedly not doing enough by way of warnings about the crime rate locally, the Court, *noting some US case law*, found for the defendant University which could not have been expected specifically to spell out to an adult student that walking along the beach in the early hours might well be inviting trouble. (The Court commented, however, that the result may well have been different had the attack taken place in the residential accommodation to which she had been

assigned by the local HEI with which her home HEI had an arrangement and if, say, the local HEI had been negligent in maintaining the security of that building.) Where, however, the HEI has been negligent in applying appropriate safety precautions in its laboratories or on its field-study activities, then the student will almost certainly succeed in a tort action (for example, *Tuttle v Edinburgh University* 1984 SLT 172, where the University was held negligent in not properly preparing students for tree-climbing when specimen-collecting on a field-trip). For more on personal injury torts, see *Higher Education Law* (paras \$6.20-6.23 at pp 107-109 & paras 20.2-20.8 at pp400-404), as updated paragraph by paragraph and in the 'New Material' section at the 'Law Updates' page of the OxCHEPS website, and as supported by the on-line HE 'Law Casebook' at the same site.

A potential major difference between US law and English law is that, theoretically, the UK student could, following the House of Lords (HL) decision (concerning a school's negligence in identifying the special educational needs of a pupil) in *Phelps v Hillingdon London Borough Council* [2000] 4 All ER 504, sue the university/college, and even the individual academic as a professional, for the tort of educational malpractice: a tort, as noted above, not (yet) recognised even in the USA as 'the land of torts' (see *Higher Education Law*, paras \$6.24-6.28 at pp 109-112, updated as noted above and the *Phelps* case itself at the 'Law Casebook' as cited above). In practice, however, the student would be hard-pressed to demonstrate that the HEI and/or its academic(s) have failed to deliver a reasonable standard of professional care in the provision of teaching or in the assessment/examination process, let alone that any such failure has really caused his/her academic under-performance which in turn has actually led to measurable damage that can (subject to a duty to mitigate loss) then be compensated for appropriately in cash. In addition, the English courts have, like the US courts, shown a marked reluctance to second-guess expert academic judgement, certainly in contract cases and in judicial review (see below), and it is not clear whether instead a tort action would automatically get past this traditional judicial deference to academe. In fact, given *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, HL, English law now also allows the student to select whether to bring the action in tort (post-*Phelps*) or in contract (see below), and, again in practice, such disputes seem to utilise the contract route rather than this fledgling tort of educational malpractice, but anyway most are mediated or settled and few reach the courts: and those that do focus more on misrepresentation (as in *Rycotewood* below) or on breach of concrete/quantifiable terms rather than on breach of an implied term to deliver teaching 'with reasonable care and skill'.

It is submitted that higher education, certainly in the USA and, even post-*Phelps*, in the UK, is a long way from going down the road taken by the medical profession and health care providers over the last forty years in terms of the growth of medical negligence cases. This is partly because the courts have sound public policy reasons for not wanting to end up arbitrating on

examination results and degree classifications or transcript grade-averages, partly because students lack funds to finance litigation and alternatively the likely level of damages do not tempt no-win/no-fee lawyers, partly because there are significant problems of evidence and causation (many medical malpractice cases are in comparison fairly simple: the wrong leg got chopped off!), and perhaps also partly because in the great scheme of things whether the result should have been a 2i or a 2ii, a GPA of 3.3 or 3.7, an assignment mark of B+ or A- does not really matter once the individual is out 'in the real world'. That said, in an age of ever-greater 'credentialism' and ever-increasing tuition fees, the pressure to score high and the expectation of value-for-money, especially in vocational courses directly related to career prospects, do mean at least more internal appeals over and challenges to the assessment/marking process, if not so much in relation to the teaching.

### **Contract and *Rycotewood***

The 'contract to educate' between the student and the university/college is recognised in English law, arguably from as far back as an 1896 case (*Green v Peterhouse, Cambridge*, 10/2/1896, *Times*) and certainly more recently and definitively in *Moran v University College, Salford (No.2)* (23/11/93, *Times*, CA) and *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, CA. It is a contract to supply a business-to-consumer service (teaching in preparation for and access to the examination/assessment process for the award of a degree). As with any such service (say, architectural design, dentistry, surgery, litigation), there is no guarantee of success, although the service must be rendered with 'reasonable care and skill' according both to the common law and also in accord with consumer law (s13, Sale of Goods and Services Act 1982). In addition, consumer protection laws require that the contract does not contain terms unreasonably onerous and disadvantageous to the student as the assumed weaker party (Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999). For more, see chapters 6 and 29 of *Higher Education Law*.

The student in a statutory HEI has always had access to the courts (subject to first exhausting all internal remedies), whether for a breach of contract action or for judicial review of the HEI's procedures as a body created under statute. In practice, however, the courts, as already noted and as in the USA, will not unpack and review academic judgement, nor act as an appeal tribunal in relation to the decisions of university examiners (providing the proper procedures have been followed in reaching the academic decision). They are also very reluctant to second-guess decisions concerning social (mis)behaviour (again providing they have been reached via the published procedures). As was noted in *Clark*, the courts are 'far from being the ideal forum in which to resolve the great majority of disputes between a student and his or her university'; and indeed some aspects of the contract may well be 'unsuitable' for adjudication in the courts

because these are issues of academic or pastoral judgement which the university is equipped to consider in breadth and depth, but on which any judgement of the courts would be jejune and inappropriate'.

As discussed above, the students of the chartered HEIs will soon be in exactly the same position, as the 2004 Higher Education Act becomes law and abolishes the 750 year old exclusive jurisdiction of the Visitor in relation to such student disputes. The same legislation will also introduce the Office of the Independent Adjudicator as a kind of 'super-ombuds' or, one might say, 'HERO' (Higher Education Regulatory Officer), and a student will probably be required to exhaust this route before accessing the courts (although, like the courts, the OIA will not tackle academic judgement issues). Along the way, and certainly before reaching the courts, the increasing expectation of the courts is that a genuine attempt should have been made by both sides at mediation: see the 'OxCHEPS Higher Education Mediation Service' page at the OxCHEPS web-site. Thus, a student's dispute with the university over, say, its allegedly poorly resourced provision of teaching could involve ten levels over many years: internal complaint, appeal over complaint decision, an attempt at mediation, off to the OIA, then to the County Court, next the High Court, perhaps a further attempt at mediation, an Appeal Court hearing, followed by the House of Lords and even the Strasbourg Court of Human Rights (if the Human Rights Act 1998 and the European Convention on Human Rights have been invoked)! Increasingly, however, it will not be one student, but (literally!) 'a class action' or 'a multi-party action' as a whole cohort of students complains that the course failed to meet the expectations reasonably engendered by the shiny recruitment materials and by the unrealistic things said at interviews or recruitment fairs.

This was very much the scenario in the only such case so far to have worked through the courts; disputes of this kind are often rumoured to be underway at HEI X or Y, but are usually settled out-of-court. In a recent case concerning disappointment damages for breach of the contract to educate, *Rycotewood* (re damages: 28/2/2003, Warwick Crown Court, His Honour Judge Charles Harris QC, OX004341/42, *Buckingham and others v Rycotewood College*) the provision of FE/HE was linked with the supply of holidays via the package tour industry in terms of applying consumer law principles to the student-institution contract, and especially in awarding damages for 'disappointment' with the educational experience on offer and thereby extending to the FE/HE 'industry' the hitherto *very* limited scope for gaining any compensation for 'mental distress' in a breach of contract case: usually only for spoiled holidays and wedding photography. (See *Higher Education Law*, chapter 29, and the OxCHEPS on-line update to para.29.38; also in *Education and the Law*, 15 (4) 237-247, 2003.) The facts of *Rycotewood* were that during 2002 six students split into two cases successfully sued Rycotewood College, an Oxfordshire FE college, for breach of the contract to educate in that the HND course on historical vehicle



restoration/conservation failed to deliver what its recruitment literature and interviews had offered by way of an appropriate practical content. Quoting from specifically *Buckingham and another v Rycotewood College* (26/3/2002, Oxford County Court, His Honour Judge Charles Harris QC, OX004741/0X 004342): 'the practical content, which they legitimately expected to be substantial and good, was low and often poorly taught' (47); and 'None of the teaching staff had any practical experience at all as professional old car restorers' (50).

The parties did not manage to settle on damages and hence the matter came back as the February 2003 case cited above: 'This case involves ascertaining the measure of damages which is appropriate when an educational establishment fails to provide a course of the type or quality it contracted to provide' (1A); and 'The question now at issue is how the claimants are to be compensated' (2A). The judgement in *Rycotewood* was interesting in relation to the calculation of damages and awarding them also for disappointment. The students were claiming from £17K to £27K each; the College was thinking in terms of a flat-rate c£4K each; the Court awarded £10K each (£7500 'for loss of value of the course' and £2500K for 'mental distress'), with additional damages of up to £4750 where the student concerned had (unwisely, in retrospect) allowed his car to be dismantled and then discovered that ('due to the shortcomings of the course', 2G) it could not be put back together again! The Judge did not award anything for 'loss of earnings' (the students would have foregone earnings whether the course had been good or bad) and, by the same logic, 'for living expenses'; nor for loss of 'post-course earnings' given that it is so hard to prove such a loss (11F&G).

With reference to the students' claim for 'anxiety, depression, loss of satisfaction and annoyance' (3E), the Judge acknowledged the students' 'acute annoyance, unhappiness and frustration' (6A&B, citing one student's description of the course as 'fraught, not pleasant and productive; it was stressful and not enjoyable'), and there was recognition by the Court of 'mental distress' damages as 'an interesting, and probably developing, area of the law' (6B). The judgement rehearsed the limitation on a contract-breaker not usually being liable for distress, displeasure, vexation, tension or aggravation; while noting the so-far established few exceptions concerning contracts specifically to provide pleasure, relaxation and peace-of-mind. It then brings 'a course for the provision of education' firmly within the exceptions 'as something which contains, or should contain, important elements of satisfaction, pleasure and tranquility of mind'. The Judge indeed waxes lyrical: 'It can pellucidly be appreciated that, for example, the assimilation of literature, history, art or philosophy should, and generally will, provide pleasure and relaxation as well as employment opportunity. So, too, no doubt, will mathematics and science, where an appreciation of the harmonies of numbers and the secrets of creation ought to provide limitless intellectual pleasure and satisfaction. The enjoyment of these pleasures is part of the purpose of university and many other educational courses' (7A-D). The Court concluded that 'these

claimants did not have the pleasant and agreeable time that they had hoped for and legitimately expected at Rycotewood, and that for much of their time they were annoyed, anxious, angry, frustrated and disappointed that the course was not providing what it should have provided' (7F-H); 'I see no reason why a man should not be compensated for his disappointment in not receiving the education he desired' (8A).

Of course, *Rycotewood* is only a first-instance decision, but the 2003 edition of *McGregor on Damages* (paras 3.013-030) duly notes it as another small indicator that the restrictions on the recovery of damages for mental distress, having relaxed in the 1970s and 1980s before the return of 'a more limiting attitude' in the 1990s, *may* again be about to be eased. If they are, and if upset and disappointed students in 'group actions' were to get significant damages from their HEI, perhaps the UK may yet see the growth of litigation fuelled by US-style no-win/no-fee lawyers. Here, the UK cases would, ironically, involve an aspect of the law of contract not yet as (if at all) developed in the US cases, an aspect combining an action brought under the student HEI contract-to-educate with the concept of mental distress damages awarded in contract being widened to take in the higher education experience.

### **Public law and fairness**

As already noted, the student at the UK statutory HEI, as at the US public university/college, can seek judicial review of the HEI's powers and procedures in reaching a decision about him or her, even if academic and despite the opportunity also to pursue the matter in contract. The student at the chartered HEI, as for his/her US counterpart at a private not-for-profit or at a private for-profit HEI, is not able to access judicial review since public/administrative law does not impact on this student HEI legal relationship which is solely grounded in contract law (unless the HEI is carrying out a particular public function, is acting as an agent of the State, in relation to the student). The High Court in the process of judicial review will be concerned solely with whether the HEI's decision has been reached with procedural fairness and within its powers, checking whether the HEI has properly applied its rules and testing those rules against the principles of natural justice (probably less demanding than due process in US terms for the public HEI, and closer to contractual due process for the US private HEI). It will not be reviewing, second-guessing or replacing the substantive decision, whether an academic matter or even one relating to student behaviour/misconduct. See *Clark* as cited above, and *Higher Education Law* pp 127-131 and chapter 9. As in the US, the court also will not take a case until all internal routes to a remedy have been exhausted (unless the need for such judicial review arises because the statutory HEI is, allegedly, failing to follow its own rules in handling the grievance/appeal). In addition, the court tends to expect some form of alternative dispute resolution (probably mediation) to have been tried prior to seeking judicial review. The time limits within which judicial review may be sought are much tighter than for commencing litigation

under tort law or contract law. Judicial review reported cases in HE greatly outnumber those brought in contract (still less in tort): most are listed at the OxCHEPS Online HE Law Casebook.

## **Conclusion**

While there are significant differences between the legal systems in the UK and in the USA with respect to the manner in which they adjudicate and remedy student legal claims against HEIs, there are many similarities as well. One cannot help but wonder whether, in the final analysis, we might see a convergence of the two systems. Our hope is that we can learn from one another, and that the best attributes and elements of the British and American systems will survive in a converged model as a result of increased dialogue and cooperation between and among British and American higher education law scholars, counsel and academic administrators. (Indeed, the first of, it is hoped, many US/UK HE Law ‘roundtable’ gatherings was hosted by OxCHEPS and held at New College, Oxford, in June 2004, funded by the Stetson University Law School, Florida, and by the UK law firm, Eversheds.)

It is undeniable that the volume, breadth and diversity of student legal claims being litigated have been increasing in recent decades in the USA. As a result, American higher education institutions find themselves spending increasingly large portions of their diminishing budgets on legal fees, court costs and skyrocketing insurance premiums. This, in turn, diverts scant and vital financial resources away from the educational mission of the university. Although the situation in the UK has not yet devolved to the same level, some would suggest that students in the United Kingdom are becoming more litigious, and that the trend in legislation, common law rulings and damage awards is gradually moving toward the US model (albeit it without mega-damages, ‘runaway’ juries and punitive damages in most cases).

While there may seem to be a slight trend toward convergence between the two countries in the area of student tort claims for physical injury, the two systems seem to be diverging in the area of educational malpractice, negligent advising, negligent admissions and the like given that, in theory, there is, post-*Phelps*, now scope in the UK for academic negligence claims. Moreover, students in the UK seem to be able to rely increasingly on contract based claims to help ensure that they receive the education for which they have paid, but American courts have been more stingy in this area, citing endemic proof problems and difficulty in crafting appropriate remedies as a means of closing the potential floodgates of litigation in at least one key area. The *Rycotewood* case and its award of ‘loss of enjoyment’ damages would seem to indicate a willingness on the part of at least one British court (albeit only at first instance) to go further than the US courts would likely allow. (Interestingly, the OIA is currently consulting with HEIs as to whether such ‘disappointment damages’ should be part of its award where a student’s

complaint/grievance is upheld.)

With respect to student disciplinary proceedings, the US courts have clearly created a panoply of due process (in the public HEIs) and other rights which do not seem to exist at the same detailed (and burdensome) degree for the UK HEIs at present where the court's test is whether substantive fairness has been achieved by following the rules of natural justice (although the fairly recent 1998 Human Rights Act via its incorporation into English law of the European Convention on Human Rights and its article 6 right to a fair hearing in criminal, quasi-criminal and certain other disciplinary proceedings *may* yet prove to import a model somewhat closer to US due process). University provided (and funded) defense lawyers for students, as well as the requirement of disciplinary hearings nearly resembling criminal felony trials seem to be a unique phenomenon of large US public institutions; while the system-wide ombuds in the form of the Independent Adjudicator set up by statute in 2004 seems to be unique to English HE.

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

On both sides of the Atlantic, the best institutional hedges against litigation and increased legal liability are improved risk assessment and pro-active risk management on campus. In this context, the best defense to the proliferation of tort claims is a good offence, in the form of reducing the risk of injury and harm to students, faculty, staff and guests in the first instance. To that end, college and university administrators on both sides of the Atlantic should consider investing greater thought, time, energy and resources in preventative law, risk assessment, faculty and staff training, student orientation and educational programs. These steps can be time consuming and expensive, especially with the current budget crisis and economic strain facing higher education in the both countries. These items are not nearly as time consuming, expensive, stressful or destructive to institutional reputation and morale, however, as a single serious injury to or death of a student, along with the expensive and protracted litigation that is likely to follow. Furthermore, with an investment in preventative law, the funds the institution expends go toward the use and benefit of its core constituencies (students, faculty and staff), rather than to lawyers, law firms and legal judgments. Like many good investments, this one can pay huge dividends. In fact, avoiding even one major piece of litigation can often save a college or university hundreds of thousands of dollars (or more) and untold reputational damage from the accompanying negative

publicity.

What can or should academic institutions do to help avoid or minimize student legal claims? One important step is the formation of a risk assessment committee on campus. Such a committee exists to identify significant areas of risk on campus, and to help the institution identify, assess and better manage those risks to help protect students, faculty, staff and visitors from foreseeable harm. That, in turn, is also the best way to minimize institutional legal liability and to avoid the time and expense and public institutional embarrassment of a major lawsuit or claim. Typically, a university-wide risk assessment committee might include representatives from student affairs, the legal department (or outside counsel), risk management, facilities operations and information technology.

It never will be possible, of course, to eliminate all of the risk of injury or harm on a university campus or in connection with university programs. But with careful planning the financial, institutional and human costs of litigation can often be avoided, or at least significantly mitigated.