

# **LEGAL ISSUES INVOLVING TORT LAW AND MINORS ON CAMPUS**

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## **I. Introduction**

State laws set out what is known as the “age of majority,” or the age at which a person is considered an adult in the eyes of the law. Mississippi’s age of majority, 21, is older than that in most states, where the age of majority is often 18. However, minors do have some legal rights and responsibilities. For example, under Mississippi law, 18-year-olds can enter into contracts involving personal property, vote, enlist in the military, and seek emancipation from minority to become an adult in the eyes of the law for certain specified purposes, such as education, health care, residence, or work. This process is called “Removal of Disability of Minority” and is addressed through a “Petition for Removal of Disability” and an “Order Removing Disability” in Chancery Court.

Minors of all ages regularly come to many colleges and universities, as well as K-12 schools, for a wide-range of activities and circumstances. They may be enrolled students, participants in camps located on or operated by the educational institution, campus residents who live with their parents, visitors accompanied by parents, prospective students, attendees at a university or school-sponsored event, or those simply riding their bikes through campus. Minors may also participate in programs or activities sponsored by the institution or its faculty/staff in off-campus programs through student teaching or community service activities. This presentation will focus on legal issues and potential liability of educational institutions and their employees in various situations involving tort law and the presence of minors on campus or participating in school-sponsored activities.

## **II. Tort Law: Negligence**

A tort is a civil wrong in which one suffers loss as a result of the improper conduct of another. This branch of law is concerned with the compensation of losses suffered by an

individual due to an intentional or negligent act of a wrongdoer. An intentional tort is one where there is an intent to do harm. On the other hand, a negligent tort occurs when there has been an unintended accident or injury caused by the failure of the defendant to use ordinary care and act as a reasonably person would under the circumstances. Some torts may also be a crime, such as an assault or battery.

Most claims of liability on the part of an educational institution are based on the legal theory of negligence. Negligence exists when a person's conduct falls below the standard of care established by law for the protection of others against unreasonable risk of harm. It differs from an intentional tort in the sense that there is no intent to do harm.

To maintain a successful claim of negligence, the plaintiff must prove four essential elements of negligence: (i) a legal *duty* owed by the institution or defendant to the plaintiff; (ii) a *breach* of that duty through acts or omissions by the defendant institution; (iii) the breach of that duty was the *proximate cause* of harm to the plaintiff; and (iv) the plaintiff was *damaged* by the acts or omissions that are asserted to constitute negligence. The element of proximate cause requires the plaintiff to establish foreseeability and causation in fact. *Fenelon v. Jackson Metrocenter Mall, Ltd.*, 172 So.3d 760 (Miss. Ct. App. 2012).

As one evaluates the potential liability to which an educational institution may be exposed as a result of the presence of minors on its campus or participating in its programs, the first step in the evaluation process is to determine what duty exists to the minor. A person has a duty to abide by a standard of reasonable conduct in the face of apparent risks. Courts generally hold that no legal duty exists where the defendant could not have reasonably foreseen the danger of risk involved, as in the classic case *Palsgraf v. Long Island Railroad*. Whether a duty exists is a matter of state common law.

In Mississippi, the common law has established a teacher-student relationship that imposes a duty of care on the part of the teacher to act as a reasonable person would act under the circumstances, *i.e.*, the "Reasonable Person Standard." If no duty exists, the remaining elements of negligence are moot. If the court finds there is a duty owed, the determination of liability must follow a sequential analysis of the other three elements of negligence – breach of that duty, causation in fact (including foreseeability), and damage to the plaintiff.

The reasonable standard of care varies according to the circumstances. A higher degree of care is called for when the student is a minor or engaged in a potentially dangerous activity. A teacher is not necessarily liable for all injuries sustained by students, as this would be impossible. The school teacher, professor, coach, or administrator is liable for injuries that

could have been *reasonably foreseen*. Likewise, there must be a causal connection between the institution's employee and the resultant injury for an action in negligence to prevail. The negligence of the institutional employee must be the *proximate cause* of the injury, that is the substantial cause. Liability can be mitigated if it can be shown that the cause of the injury was the result of a superseding, intervening act, as in the Alcorn University case. [Discuss case in presentation.]

Proof of damage is an essential element in a negligence action. Damage to one's feelings cannot be recovered in a negligence action where there has been no actual loss.

### **III. Defenses to Claims of Negligence**

In Mississippi, the doctrine of comparative negligence provides that damages may be apportioned between the plaintiff and the defendant according to the degree of negligence attributable to each.

In addition to comparative negligence, the doctrine of assumption of risk may be available as a defense when the injured party knew of the possible danger and either by agreement or actions voluntarily accepted the possibility of harm. Participants or spectators in athletic contests assume the *normal* risks associated with these activities by voluntarily placing themselves in a potentially harmful environment. However, neither a participant nor spectator assumes the risk of negligent or willful or wanton conduct of others. For example, a spectator at an athletic event does not assume the risk of the stands falling down at a football game or by attending a baseball game where a player intentionally throws a bat into the stands and injures a spectator. Only those risks normally associated with the activity are assumed.

Releases and other exculpatory agreements (by whatever name they are called) are contracts by which one party agrees to release or exculpate another from potential tort liability for future conduct covered in the agreement. For years educational institutions have prepared releases and required students and others to sign these documents before allowing them to participate in intramural and club sports, school trips, study abroad programs, externships, internships, summer camps, and various other curricular and extracurricular activities. Some courts have enforced liability releases in the higher education context, while others have refused to do so.

Courts carefully scrutinize exculpatory agreements executed by minors and almost always hold that such agreements are invalid or voidable at the option of the minor. Mississippi is an exception, holding that its statute authorizing persons 18 or older to enter into binding

contracts in matters affecting personal property includes the right of the person 18 or older to contract concerning a chose in action (*i.e.*, a right to bring an action in court). *See Garrett v. Gay*, 394 So.2d 321 (Miss. 1981). For all other minors, any release they sign is voidable at the option of the minor. The Mississippi Supreme Court has held in broad terms that parents of minors cannot contract away rights vested in their minor children. *See Lawrence v. Lawrence*, 574 So.2d 1376, 1381 (Miss. 1991). Although parents generally cannot waive the right of their minor child to bring suit, they may, in most states, waive their own right to sue.

Although no particular form or “magic words” are necessary in order to create a valid release, the words used must manifest in clear, explicit, and unequivocal language the releasor’s intent to discharge the liability of another for specific acts or omissions. Many courts further require that the words “release,” “negligence,” and “fault,” or their equivalent, be used in a conspicuous place in the document, not buried in fine print in the middle of a long agreement.

With all the requirements for enforceability placed on releases by courts and with wide discrepancies from state to state in their enforceability, the question still arises: Is there still a place for the use of releases by educational institutions? After review of many cases and commentaries, the answer remains a tentative “yes.” Even if a release may not exculpate an educational institution from its own negligence, a clearly drafted release that sets forth in detail the risks inherent in the activity will inform the participant of the risks involved, provide evidence of the institution’s fulfillment of its duty to warn, serve as a written acknowledgment of the participant’s understanding of and assumption of risks inherent in the activity, and, on occasion, act as a deterrent to suit. For these reasons, there is still a place for the use of releases.

#### **IV. Premises Liability**

An educational institution has a duty to maintain its premises in a reasonably safe condition for those who enter the property at the invitation of the institution. The duty imposes a responsibility to exercise ordinary care in managing premises to avoid exposing persons to a dangerous condition on the property. An injured plaintiff must establish that a duty was owed him or her and the owner/manager of the premises either created the defective condition or had actual or constructive notice of the dangerous condition for such a period of time that with the exercise of reasonable care, the owner/manager could have corrected the condition.

A key consideration in these cases is whether the danger was *foreseeable*. Negligence cannot be presumed solely because an accident occurred on the institution’s property. As long

as the institution fulfills a duty to exercise reasonable care for the protection of participants from concealed or unreasonably increased risks, then the institution is insulated from liability.

In Mississippi, premises liability is distinguished by the classification of the complaining party between business invitee, licensee and trespasser. Although the Mississippi Supreme Court has repeatedly been asked to abolish these classifications, it has refused to do so.

The Supreme Court and more recently the legislature have defined the three categories as follows:

**Trespasser** -- one who enters upon another's premises without license, invitation or other right. Mississippi codified the definition and duty owed to a trespasser in the 2016 legislative session (Miss. Code Ann. 95-5-31. The new law defines a trespasser as "a person who enters upon the property of another without an invitation, express or implied, or other legal right." The duty owed a trespasser by the owner or occupier of premises is to refrain from willful and wanton injury. An owner has no duty to protect the trespasser from conditions on the premises unless the trespasser is a child injured by an artificial condition on the property, referred to as an "*attractive nuisance*" and all of the following apply:

- (1) The condition is one of which the possessor knew or had reason to know and which the possessor realized or should have realized would involve an unreasonable risk of death or serious bodily harm to a child;
- (2) The injured child, because of his youth, did not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it;
- (3) The utility to the possessor of maintaining the condition and the burden of eliminating the danger was slight as compared with the risk to the child; and,
- (4) The possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the child.

The above conditions are known as the "attractive nuisance doctrine." [Example: Johnny Firefly v. Faultless Light Company and duty owed to trespassing child to be discussed during presentation.]

**Licensee** -- one who enters upon the property of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the owner. (A social guest is a licensee.) The owner's duty to a licensee is to refrain from willful, deliberate injury and to warn the licensee of dangerous conditions on the premises which the licensee is not likely to perceive.

**Invitee** – one who goes onto the premises of another at the express or implied invitation of the owner or occupant for their mutual advantage. The owner's duty to an invitee is the highest duty of care, which is to refrain from willful, deliberate injury, to warn of hidden dangerous conditions, and to main the premises in a reasonably safe condition.

A person's status can change depending on the circumstances. If an injured party goes beyond the bounds of his or her invitation, he or she may lose the invitee status and rights. [Example: Lady in Laundromat.]

## **V. Managing Camp Liability**

Colleges, universities, community colleges, and some K-12 schools commonly host camps for youth, especially during summer months. Campers enjoy rich experiences in sports, academic, music, drama, art, and a myriad of other activities. Camps provide enriching experiences and benefits, but they also create institutional risk.

From an organizational perspective, an institution may run its own camps (Ex.: The Happy Valley Soccer Camp) or lease its facilities to an outside group (Whiz Computer Camp, held at Happy Valley College).

The primary goal of any camp is to provide a safe and enriching experience for campers. To accomplish this goal, the host institution must take reasonable precautions to limit foreseeable harm, especially in the following areas:

### **1. Selecting Camp Staff**

Staff at institutionally-sponsored campus fall into the general categories of employee, contractor, or volunteer. Some have short-term roles such as counselor or camp assistant. When camp ends, the institutional relationship ends. Other camp personnel, such as the baseball coach or engineering professor, have an on-going employment relationship. Their camp responsibilities are usually secondary to their primary duties during the academic year.

All, however, share the fundamental responsibility of interacting with minors on behalf of the institution.

In selecting camp staff, the American Camp Association (ACA) recommends that each individual have two references, undergo a personal interview, and be at least two years older than the minors whom they supervise. The U.S. Department of Justice has noted that in-personal selection processes are at least as valuable in protecting minors as criminal background checks. The ACA recommends annual criminal background checks, including annual checks of the Department of Justice's online National Sex Offender Registry Database.

## **2. Training and Supervising Camp Staff**

It is important for the institution to establish behavioral expectations for camp staff and provide appropriate training in how to work with a group of young adolescents. For example, no behaving as "one of the gang," or spending time alone with a camper. Follow the "rule of three." A staff member needing to enter a camper's sleeping area should always bring a second adult. Avoid using social media and taking photos and videos.

Train camp staff and volunteers on how to report known or suspected harm to minors, including physical or sexual abuse. Follow state law, which in Mississippi requires, among others, "any public or private school employee or any other person having reasonable cause to suspect that a child is a neglected child or an abused child shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing to the Department of Human Services . . . ." The identity of the person making such a report under these requirements shall not be disclosed to anyone other than law enforcement officers or prosecutors without an order from an appropriate youth court.

Any person required by state law to make such reports and who fails to do so shall, upon being found guilty of failing to act, be subject to a fine not exceeding \$5,000 or imprisonment in jail not to exceed one year, or both. Miss. Code Ann. 43-21-353.

## **VI. Policies Addressing Minors on Campus**

Many educational institutions have adopted policies addressing minors involved in on-campus or institution-sponsored activities both on and off campus. Those will be discussed in the next part of this presentation by Professor Phyllis George.