

Failure to Educate...Who is Failing Whom?

A growing genre of claim is evolving against universities and, not unlike the wolf in Goldilocks and the Three Bears, this type of claim has many faces under which it may be disguised. Educational Malpractice, Educational Errors & Omissions, Failure to Educate; all fall within the professional liability coverage provided under the CURIE insurance program.

CURIE, The Canadian Universities Reciprocal Insurance Exchange, has been monitoring educational malpractice claims and has prepared this communication to provide its subscribers with an overview of the history of these types of claims; how they have manifested; some statistical data; common denominators; the escalating costs; and, what CURIE and its member universities need to consider to mitigate, manage and minimize this risk.

Common Causes:

Common allegations that are pled in Failure to Educate claims include, but are not limited to, the following:

- Breach of contract;
- Negligent misrepresentation (including misrepresentations in student calendars or student literature);
- Sufficiency of academic accommodation;
- Negligent supervision and training;
- Bias/bad faith, racism or personal conflicts in clinical rotations;
- Breach of fiduciary duty;
- Failure to grant degree/degree requirements;
- Decisions regarding student status;
- Improper advice;
- Conspiracy to injure;
- Defamation (both on-line and traditional modes);
- Alleged Racism or discrimination based on country of origin or other protected grounds;
- Breach of duty of care;
- Harassment;
- Alleged bias/discrimination in evaluation and/or appeals procedures;
- Conflict between student and faculty/supervisor;
- Delayed Graduation/Delayed entry into workforce due to wrongdoing of University;
- Administrative errors;
- Failing to provide the necessary tools, feedback and/or professional services for a successful educational experience.

Are these claims successful?

In the past Courts had generally held that they did not have the jurisdiction to hear actions relating to academic disputes within universities, and CURIE was instrumental in developing that line of cases. Judges reasoned that such matters were within the sole purview of the university to deal with through its internal procedures, regardless of whether the claim was framed in contract or tort. In limited circumstances, a student had a right to judicial review of the

procedures used by the academic institution to make a decision, but they could not ask the court to interfere with the academic decisions or judgments of the university.

The tides, however, began to change with two recent decisions from the Ontario Court of Appeal. In **Gauthier v. University of Ottawa** the court held that *“It thus appears that there is no precedent to indicate that the court lacks jurisdiction to hear cases solely because the delict or breach of contract in question arises out of a dispute of a scholastic nature...the court will have jurisdiction even if the dispute arises out of the scholastic or academic activities of the university in question.”* Also in **Jaffer v. York University** the court, following *Gauthier*, stated *“... the Superior Court will have jurisdiction to hear a claim even if the dispute is academic in nature...the real issue is whether the pleadings support a cause of action in either contract or tort.”*

Although courts have recently indicated a willingness to hear cases involving academic decisions of universities, they have indicated that they will do so only in limited circumstances, i.e. where the university has exceeded the “broad discretion that it enjoys” in making such decisions. Arguing in support of this “broad discretion”, CURIE through defence counsel has been successful in having numerous Failure to Educate claims struck at the outset. Accordingly, while the claims are getting in the door, they are not going beyond the foyer.

Statistical Data:

As noted in CURIE’s graph below, the majority of the Errors and Omissions claims submitted by its member universities are for Failure to Educate. Since the inception of the CURIE program this type of claim has increased by over 300% from 12 claims during the first CURIE underwriting period to a total of 41 claims for the CURIE 5 underwriting period. Failure to Educate claims represents 84% of claims advanced against the errors and omissions coverage. This type of claim is projected to continue to increase for the CURIE 6 period.

Claims Volume

	E & O	Ed. Malpractice
CURIE 1	14	12
CURIE 2	39	25
CURIE 3	43	27
CURIE 4	46	36
CURIE 5	50	43
CURIE 6	43	37

As of September 30, 2015

So what are the costs?

Significant! Not only are there financial costs incurred through the University's insurer, there are also costs of the faculty member's or supervisor's time, the University's administrative staff involvement, and the potential negative reputational impact that the institution may suffer when served with an educational malpractice lawsuit. Defense counsel will need to interview all who may be named in the pleadings, as well as those with whom the plaintiff may have communicated with concerning the alleged claim. Documents will need to be provided, affidavits filed, and discoveries may be required in the University's defense to the claim. This is not only time sensitive and invasive, it can also be very costly. Of the \$12,053,594 costs incurred by CURIE for Errors & Omissions claims from 1989 to the end of 2012, \$9,962,662 were as a result of Educational Malpractice claims. CURIE has taken a very assertive and aggressive position in defending these types of claims, which is evidenced by the fact that of the \$9M plus incurred approximately \$2.5M was paid in indemnity. The remaining \$7M plus consists predominantly of legal fees as well as some moderate expert and adjusting costs.

Total Incurred

	E & O	Ed. Malpractice
CURIE 1	281,336	192,353
CURIE 2	673,977	477,948
CURIE 3	3,698,987	3,241,948
CURIE 4	4,328,198	3,032,829
CURIE 5	3,691,224	3,022,560
CURIE 6	1,755,126	1,531,413

As of September 30, 2015

How can Universities avoid being pulled into the educational malpractice arena?

CURIE's defence counsel across the country offer the following suggestions:

- Have clear policies and procedures in place;
Consideration should be given to including language, approved by your Legal Department, into the student Calendar, for example: "The University used best efforts, insofar as reasonable possible, to confirm the accuracy of this Calendar at the time it was published. However, The University retains the right, at its sole discretion and without notice, to revise or alter its curriculum, including but not limited to cancelling programs, in which case this Calendar may no longer be accurate. It is understood and agreed that the University will not be in any way liable or legally responsible for such inaccuracies."
- Make sure policies are accessible and communicated to students;
- Then – trust and follow your policies and procedures;
- Ensure appropriate checks and balances on supervisor/student relationship;
- Early investigation into complaints by student re. supervisor/student relationship;

- Consider use of external investigators if situation warrants;
- Control communication with the students;
- Stress to faculty and staff that ALL their internal emails and communications will likely be producible in a civil action or pursuant to FIPPA;
- Ensure there is clear language in the Student Course Calendar. This ultimately forms part of the contract that the student has with the University;
- Annual audit of Student Course Calendar to ensure it remains accurate;
- Include in Course Calendar right of University to revise without notice;
- Confirm other literature provided to students is accurate, clear and consistent with University policy, procedures and calendar;
- Make sure all appeal and review procedures comply with the Rules of Natural Justice;
- Then – trust and follow your appeal and review procedures;
- Review competence and credentials of faculty and staff.

Concluding Remarks:

Failure to Educate are undeniably a growing genre of claim against universities, and one which is not only expensive to defend (both in terms of actual defence costs and the person hour costs of those within the university on point for response), but also carry unique reputational risks for universities.

Fortunately, there are steps which both CURIE and its member universities can take, and are taking, to mitigate and minimize the risk of such claims. Universities can continue to put in place and follow appropriate risk management procedures as outlined above. CURIE can continue to be aggressive in the defence of such claims, and continue to push for developments in the law which minimize the availability of such claims. With this joint approach to dealing with Failure to Educate claims, we are confident that we can effectively address this challenge.