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Discovery

ATLANTIC EDUCATION AND THE LAW

STEWART McKELVEY
LAWYERS • AVOCATS

INSIDE

With COVID-19 vaccines rolling out across the country, a renewed sense of hope is in the air. But what does that mean for universities and colleges in Atlantic Canada as they look to the future? The eighth issue of Discovery Magazine addresses a range of topics relevant to academic institutions in the region, from liability for online misconduct and confidentiality policies, to student accommodation and COVID-19 vaccines in the workplace.

Stewart McKelvey is ready to help, and aims to always provide a wide variety of topics for each issue. Please feel free to contact us with subjects you would like this publication to cover in the future.

We hope you enjoy, and wish you continued health and happiness.

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Mandatory vaccines in the workplace

More than a year has passed since the Coronavirus disease ("COVID-19") arrived in Atlantic Canada and caused all in-person events, gatherings and classes to grind to a halt. Colleges and universities were forced to shift to an online format and conduct classes via videoconference and pre-recorded lectures. While all post-secondary institutions have done well to provide a substitute for in-person classes, there is no question that the "all-online" format has been taxing on students and professors/instructors alike.[1]

Those on the verge of burnout should rejoice over the recent news that all Canadians who want a vaccine should be able to get their first dose by Canada Day 2021.[2] Currently, the approved vaccines in Canada range in efficacy from 66%[3] to 95%[4] according to clinical trials, and have little side effects.[5]

With no commitments from government authorities on enforcing mandatory vaccinations for all those who are capable of getting vaccinated, employers will play a crucial role in the campaign to inform and vaccinate the general public. Whether employers should make COVID-19 vaccinations mandatory or not will be fact-dependent; however, every employer should at least consider implementing some form of workplace vaccination policy.

EDUCATE AND INCENTIVIZE

The approach we are currently recommending employers take is to educate, encourage and incentivize vaccination. It is important for employers to act now, before vaccines are widely available, to provide employees with as much information as possible regarding the approved COVID-19 vaccines. This should include information regarding the efficacy, the risks, as well as the availability of the vaccines and where employees can get a jab once available. Updated information should be frequently shared with employees and should come from all levels of management. Employers should ensure that employees are receiving their information regarding COVID-19 vaccines from credible sources, as reports show that misinformation from social media is a major contributor to vaccine hesitancy.[6]

In addition to informing employees, employers may also want to consider incentives for employees who sign up for the COVID-19 vaccine. Incentives might include paid time off to get the vaccine, an extra vacation day off or possibly a 2021 holiday party if enough employees get vaccinated. For some, it will be incentive in and of itself to not have to wear

[1] Jessica Wong, "Students burnt out by pandemic learning push more universities toward longer winter breaks", ***CBC News*** (November 26, 2020), online; see also Tanya Grant, "'Verge of burnout': COVID-19 a factor for universities, faculty in contract talks", ***CBC News*** (October 19, 2020), online.
[2] John Paul Tasker, "Canada on track to receive 36.5 million doses by July", ***CBC News*** (March 10, 2021), online.
[3] Government of Canada, "Janssen COVID-19 vaccine: What you should know", ***Government of Canada*** (March 12, 2021), online.
[4] Government of Canada, "Pfizer-BioNTech COVID-19 vaccine: What you should know", ***Government of Canada*** (January 8, 2021), online.
[5] As of the date of composition of this article provinces in Canada have suspended the use of the AstraZeneca COVID-19 vaccine as a result of the risk of a rare but serious condition called vaccine-induced thrombotic thrombocytopenia. Information on second doses for AstraZeneca recipients will be forthcoming according to Health Minister Patty Hajdu. See, Hajdu says information on second dose for AstraZeneca recipients coming, CBC News, (May 21, 2021), online.
[6] Radio Canada International, "Many nursing home workers haven't consented to COVID-19 vaccine, association says", ***Radio Canada International*** (March 8, 2021), online.

a mask at work (once public health authorities deem it safe) and to be able to gather with fellow vaccinees.

CAN AN EMPLOYER REQUIRE EMPLOYEES TO BE VACCINATED AGAINST COVID-19?

There may be some employees who will refuse to vaccinate regardless of the approach taken by the employer, which begs the question: "Can an employer require employees to be vaccinated against COVID-19?" The answer to this question is a qualified yes, in certain workplaces.

Employers have a general duty under occupational health and safety legislation to take all reasonable steps to ensure a safe work environment. What is considered "reasonable" is likely to depend on the respective workplace. For instance, there may not be a need for a professor/instructor who only ever teaches online to have to get vaccinated to ensure a safe workplace, but there would be such a need for a professor/instructor who works and interacts with hundreds of students. Other factors such as numbers of cases in the province or in a specific workplace will also need to be considered.

RISKS OF VACCINATION POLICIES

Mandatory vaccination policies are not without some risk for the employer. Employers with a unionized workforce run the risk of their policy being grieved and subjected to arbitration. In the non-union context, employers are at risk of facing a constructive dismissal claim from a disgruntled employee who considers the vaccination policy a unilateral and substantial change to their employment contract. In either environment, employers should be aware of the human rights and privacy implications of implementing a vaccination policy.

While there are currently no reported decisions regarding mandatory COVID-19 vaccination policies, there are some prior decisions pertaining to mandatory flu shot policies which give an idea of how future decisions may be decided. For instance, in *Trillium Ridge Retirement Home v Service Employees Union, Local 183 (Vaccination Grievance),* [1988] OLAA No 1046 (ON LA), the arbitrator held that a policy, which required employees at a retirement home to either (1) get a flu shot; (2) take an anti-viral medication in the case of an outbreak; or (3) miss work without pay until the outbreak subsided, was reasonable. The arbitrator agreed with the evidence submitted by the employer which showed that vaccinating residents and employees was an effective means of preventing transmission of influenza. The arbitrator also found that, due to the prevalence of asymptomatic transmission, it was not reasonable for employees to self-monitor and stay home when they show symptoms.

Recent cases pertaining to COVID-19 policies may indicate how arbitrators are likely to decide future COVID-19-related cases, including mandatory vaccinations. In *Caressant Care Nursing & Retirement Homes v Christian Labour Association*, 2020 CanLII 100531 (ON LA), the employer nursing home introduced a policy requiring all staff to undergo bi-weekly COVID-19 testing. Employees who complied were paid for one hour of work and had their hospital parking fees waived. Employees who refused to get tested had to wear additional PPE for the entirety of their shifts. The union filed a grievance, arguing that the policy was an unreasonable exercise of management rights. The arbitrator, in dismissing the grievance, held that the benefits of preventing an outbreak in the nursing home outweighed the intrusiveness of the bi-weekly COVID-19 test.

In *Garda Security Screening Inc v IAM, District 140*, [2020] OLAA No 162, an airport employee was terminated after attending work while awaiting results of a COVID-19 test. This was in direct violation of the employer's guidelines which required employees to self-isolate while awaiting test results. The arbitrator found that the employee was made aware of the employer's requirement for employees to self-isolate, but went to work anyway, putting her colleagues, airport staff and patrons at risk. The arbitrator dismissed the grievance and upheld the termination.

These cases tell us that arbitrators are aware of the increased risks posed by COVID-19 and the need to mitigate those risks to ensure a safe workplace.

POLICY CONSIDERATIONS

When developing your COVID-19 vaccination policy, it is important to consider the following:

- **The need for a clearly-worded policy** – it is important that employees are able to read and understand the reason for the policy, what the policy requires of an individual and what the consequences are for failing to adhere to the policy.

- **Alternatives to mandatory vaccination** – mandatory vaccination may not be needed for every workplace; there are some environments where alternatives to vaccination, such as enhanced PPE and remote work, may be an acceptable alternative to vaccination. Employers should not punish employees for refusing to vaccinate, but may provide less attractive alternatives, such as unpaid time off.

- **Consider making vaccination a condition for new hires** – if, as a condition of employment, the employee agrees to get the COVID-19 vaccine once available, then there is no risk of the employee claiming that the employment contract was substantially changed at a later date.

- **Exceptions for human rights objections** – employees may refuse vaccination if that refusal is based on a protected ground under human rights legislation, such as religion or creed, sex (due to pregnancy) or physical disability (autoimmune disorder or allergic to vaccines). It is important that any workplace policy requiring vaccination include exceptions for employees who have human rights-based objections. Such employees should be accommodated, but only to the point of undue hardship. These exceptions would not excuse employees who simply have a general distrust of vaccines.

- **Privacy considerations** – even requesting confirmation that an employee has been vaccinated may be considered a request for personal information. Therefore, it is important to include in your policy the following:
  - authority for collection;
  - statement of purpose;
  - statement of whether a vaccination certificate will be required; and
  - a statement on storage, sharing and destruction of personal information.

- **Adjust the policy** – employers should be in tune with public health recommendations, and be willing to modify their policies to correspond with the current risk. When doing so, employers should ensure that each modification is clearly communicated to the employees.

There is certainly no "one-size-fits-all" approach to workplace vaccination policies that is guaranteed to be risk-free. Rather, each policy should be tailored to your individual workplace. We encourage you to consult our experienced team of labour and employment lawyers for all advice related to workplace policies. >

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Making the grade or failing to accommodate: a case study

In the recent decision of *Longueépée v University of Waterloo*, 2020 ONCA 830, the Ontario Court of Appeal found the University of Waterloo discriminated against a prospective student when it rejected his admission application on the basis of previous grades received during a time the applicant's disabilities had not been accommodated.

APPLICATION FOR ADMISSION AND DENIAL

The chronicle begins when Roch Longueépée applied for admission to the University of Waterloo's Faculty of Arts for the fall of 2013. Mr. Longueépée's application was filed late and accompanied by transcripts of a GED and grades from two terms of study at Dalhousie University – both of which were below the academic standards required for admission to the University of Waterloo.

Recognizing his grades did not meet the University's standards, Mr. Longueépée advised the University his grades were impacted by the fact that, during his previous studies, Mr. Longueépée had undiagnosed and unaccommodated disabilities. It was not until years after completing his GED and attending Dalhousie University that Mr. Longueépée was diagnosed with a moderate traumatic brain injury and post-traumatic stress disorder stemming from institutional child abuse he suffered early in his life. Accordingly, during his previous studies, Mr. Longueépée had not sought accommodation. In his application package to the University of Waterloo, he included an outline of

his experience and volunteer activities, reference letters and testimonials, writing samples and medical information.

The University of Waterloo considered Mr. Longueépée to be a transfer student, which imposed academic standards of 65% for university courses and 70% in Grade 12 English. The University's policies provided that if an applicant did not meet these criteria but identified extenuating circumstances, the Faculty's Admissions Committee could evaluate the application and grant or deny admission.

Recognizing Mr. Longueépée presented extenuating circumstances, the Committee was convened. In considering his application, the Committee accepted that Mr. Longueépée had undiagnosed disabilities and that these disabilities impacted his previous academic performance; however, in August of 2013, the Committee advised Mr. Longueépée that he did not meet the minimum admission requirements and so he would not be admitted.

HUMAN RIGHTS COMPLAINT AND LOWER COURT DECISION

In November of 2013, Mr. Longueépée filed an application with the Human Rights Tribunal of Ontario alleging that the denial of admission based on his previous grades was discriminatory. He sought various remedies including monetary compensation, the option of admission to the University and that the University develop more flexible assessment criteria for situations where past academic results may not reliably predict future academic success.

The Vice Chair of the Human Rights Tribunal accepted Mr. Longueépée's disabilities and found he was adversely impacted by the admissions standard because of them, resulting in a finding of a *prima facie* case of disability discrimination. The Vice Chair went on to find that the University had a duty to accommodate Mr. Longueépée but that it had met its duty by convening the Committee to assess his application. Mr. Longueépée argued that the University's accessibility services department ought to have been involved in the assessment of his application but the Vice Chair rejected this argument, finding there was no evidence such a consultation would have had any impact on the decision.

The Vice Chair concluded there was no information before the Committee that demonstrated that Mr. Longueépée could succeed at university, stating that in an academic setting, there is no measure to evaluate success other than grades. The Vice Chair dismissed the application and Mr. Longueépée's request for a reconsideration was denied by the Vice Chair in a subsequent decision.

Mr. Longueépée filed an application for judicial review that was allowed by the Ontario Divisional Court, which found the University of Waterloo had failed to accommodate Mr. Longueépée's disabilities in its admissions process. The Court stated the University was required to prove that:

(1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

(2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

(3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that it cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

The Divisional Court found the University had met the first two requirements but fell short at the third stage when it failed to consider information other than Mr. Longueépée's grades.

The Divisional Court acknowledged the University did not have to *presume* that Mr. Longueépée would be successful simply because his previous grades were unaccommodated, but it did have to prove that it accommodated him by either (1) assessing his candidacy without recourse to his grades; or (2) establishing that it would result in undue hardship for the University to do so.

The Divisional Court set aside the Vice Chair's decisions and remitted the matter back to the University's Committee for reconsideration.

COURT OF APPEAL

The Ontario Court of Appeal upheld the Divisional Court's finding that the Vice Chair's decisions were unreasonable, and found they were also patently unreasonable, noting that the Vice Chair had ultimately failed to grapple with the core issue of whether the University had accommodated Mr. Longueépée to the point of undue hardship – a defence which had not actually been raised by the University.

Justice van Rensburg of the Court of Appeal noted there was no indication the Committee had made any effort: to understand how Mr. Longueépée's disabilities might have affected his previous grades; to analyze whether his grades, interpreted in light of his disabilities, might assist in showing his ability to succeed at university; or to consider whether the supplementary materials filed by Mr. Longueépée demonstrated an ability to succeed at university.

Justice van Rensburg noted that if the University was to simply apply the discriminatory grade standard to Mr. Longueépée's application, it needed to establish undue hardship, which it had not relied upon and had not lead any evidence on.

Rather than remitting the matter back to the Committee, the Court of Appeal sent the matter back to the Ontario Human Rights Tribunal for reconsideration by a different person.

At the end of its reasons, the Court of Appeal noted that nothing in its decision should be taken to discourage or disparage grades-based admission standards. This note was expanded upon in a concurring decision by Justice Lauwers, who found it important to reflect on the unique position of universities.

Justice Lauwers acknowledged that while universities are not completely insulated from public scrutiny (including review of their compliance with human rights legislation), our courts do recognize that universities enjoy a measure of autonomy and the admissions process is a core feature of that autonomy. Justice Lauwers went on to note that university admission is not a right and an applicant's obligation to demonstrate the cognitive capacities and other competencies required to succeed is not entirely displaced by the duty to accommodate under human rights legislation, noting at paragraph 105, "The difficult reality is that certain claimants will still fall short of the standards that universities have set, even with accommodation."

WHAT DOES THIS MEAN FOR YOU?

This decision should not be taken to mean that grades are not important for universities in considering admission standards. It should be taken as a warning that human rights legislation imposes very real obligations on universities, even with respect to prospective students. Convoluted and lengthy litigation is a material risk universities face if proper steps are not taken to ensure those obligations are met and properly documented.

The complaint in this matter was filed in November of 2013 – it took more than eight years for the matter to weave its way through the judicial system before this decision from the Ontario Court of Appeal was issued. The decision ultimately resulted in the complaint being remitted back to the Ontario Human Rights Tribunal and so the matter carries on.

Human rights complaints are serious matters and Stewart McKelvey has the experience and expertise to help you navigate the complaint process. As with many problems though, an ounce of prevention is worth a pound of cure. We can provide you with advice in dealing with accommodation issues when they arise in order to help ensure all parties are treated fairly and you are protected if you face legal challenges down the line. >

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Spotlights

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Nancy is our most senior female partner in the Halifax office. In addition to commercial litigation generally, Nancy has a specialty practice in utility regulation, land use planning and development, and defamation/reputation management and privacy law. Her diverse group of clients includes developers, independent media, insurers, private businesses, academic institutions, electricity consumers and renewable energy generators.

A past president of the Canadian Media Lawyers Association/Ad IDEM, Nancy has been recognized by a number of legal publications for her work in the areas of defamation and media law, energy regulatory law, as well as corporate and commercial litigation. She received her Queen's Counsel designation in 2012, became a fellow of the American College of Trial Lawyers in 2018, and currently sits on the Stewart McKelvey Partnership Board.

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Jennifer conducts in-depth legal research with a focus on litigation matters and related strategic advice. She prepares comprehensive legal opinions and submissions to support strong advocacy for our clients. Her work aims to advance clients' interests as effectively and efficiently as possible by turning complex legal problems into practical advice and concise arguments. Her areas of focus and interest include commercial litigation, constitutional law, education law, health law, professional regulation and administrative law, insurance defence and class actions.

In addition to her legal research and writing, Jennifer keeps our clients up to date on the most recent developments in the law and points of interest by publishing a number of articles throughout the year, including pieces for the Stewart McKelvey website. Her most recent article for Discovery was in ***Issue 6***, about freedom of expression on campus.

A past recipient of the Canadian Bar Association Nova Scotia Zöe Odei Young Lawyers Award, Jennifer is active both inside and outside of the legal community, volunteering her time to various social justice, equality and advocacy initiatives throughout the province.

Liability for online misconduct: do new torts mean increased risk for universities?

More than ever, many of our meetings, classes, presentations and personal communications are happening virtually. With this increased use of the internet comes a greater risk of online misbehaviour. Canadian courts have responded by developing new torts that may offer increased civil law protection for victims of online misconduct, but may also have unintended consequences for freedom of expression.

This article will review two recent decisions from Canadian courts: *Caplan v Atas*, 2021 ONSC 670 ("*Caplan*"), where the Ontario Superior Court of Justice created a new tort of internet harassment, and *Racki v Racki*, 2021 NSSC 46 ("*Racki*"), which found that the tort of public disclosure of private facts exists in Nova Scotia.[1] The conclusion will address the potential impact of these decisions on post-secondary institutions.

CAPLAN V ATAS

This matter, which involved four related proceedings, had a messy and complicated backstory.

The defendant, often anonymously or using pseudonyms, made thousands of online communications through various forums attacking and spreading falsehoods about as many as 150 people against whom she held longstanding grievances. Some of these grievances arose from mortgage enforcement proceedings, and others from the defendant being terminated from previous employment. The defendant made extreme and profane allegations against her victims, alleging they had committed fraud or sexual offences, and often posting their photos alongside her comments.[2]

This misconduct persisted for over 15 years, despite various court orders and interlocutory injunctions enjoining the defendant to stop; an assignment into bankruptcy; a declaration that she was a vexatious litigant; and 74 days' incarceration for contempt of court. The defendant had also been "prohibited from publishing anything at all on the internet (other than trying to sell items on sites like Kijiji)" since April 2019.

In short, as described by the Ontario Superior Court of Justice, the defendant had "engaged in a vile campaign of cyber-stalking." The Court then had to determine the applicable law, and appropriate remedy, for this misconduct.

[1] This article is based in part on Stewart McKelvey Thought Leadership publications by Nancy Rubin, QC and Chad Sullivan and Kathleen Nash, with thanks to Chad and Kathleen.
[2] We note that the decision contains some potentially stigmatizing language about the mental health of the defendant.

Justice Corbett had no trouble finding that the defendant had posted defamatory content online, and there was no defence to defamation available. However, defamation did not fully capture the scope of the defendant's wrongdoing, and the torts of intentional infliction of mental suffering and intrusion upon seclusion (also known as invasion of privacy) were either inadequate or inapplicable on the facts.

Justice Corbett noted that Nova Scotia has a statute that could apply in this kind of scenario, the *Intimate Images and Cyber-protection Act*, but Ontario does not have comparable legislation.

i) *Recognition and elements of new tort*

In response to the egregious facts of the case, the Court decided to recognize a new common law tort of internet harassment.

Interestingly, harassment had been specifically pleaded in two of the underlying matters, on the basis of a trial decision — which was subsequently overturned by the Ontario Court of Appeal, in *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 (*"Merrifield"*). Nevertheless, Justice Corbett in *Caplan* found that *Merrifield* did not prevent him from establishing the tort of harassment.

As framed in *Caplan*, this tort would require proof of the following elements (which are notably not limited to internet harassment):

- the defendant maliciously or recklessly engaged in conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance;
- the defendant had the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and
- the plaintiff suffered such harm.

This is meant to be a "stringent test." As Justice Corbett stated: "It is only the most serious and persistent of harassing conduct that rises to a level where the law should respond to it."

ii) *Findings of the Court*

Unsurprisingly, the defendant's conduct met this test. The more difficult issue was how best to provide a remedy.

Justice Corbett acknowledged that the legal remedies provided thus far had failed to address the defendant's misconduct. Further, although exemplary damages or punitive damages would normally be used to express the law's condemnation of such conduct, the defendant's financial situation meant she was "judgment-proof." The Court also did not order an apology, remarking that the defendant was not a public person whose word carried credibility or weight.

Justice Corbett ultimately imposed a permanent injunction against the defendant, preventing her from posting about the parties, along with their friends, families and associates. He declined to order that the defendant remove the posts, as she had previously demonstrated her unwillingness to follow court orders. Rather, Justice Corbett made an order "vesting title" in the postings with the plaintiffs, to help them get offensive posts taken down.

iii) *Comments on* Caplan

Justice Corbett was clearly responding to the extraordinary circumstances of *Caplan* in recognizing the tort of harassment. His requirements were meant to distinguish conduct that is merely annoying from serious and persistent harassment that requires legal intervention.

It remains to be seen if, or how, this tort will be applied in less drastic fact scenarios, and whether it will also be extended to harassment that takes place offline. The strict test that the Court developed will likely make it difficult for many future claimants to prove they experienced harassment that went "beyond all possible bounds of decency and tolerance."

Additionally, the *Caplan* approach may influence how Nova Scotia courts define "harassment" in cyber-bullying claims under the *Intimate Images and Cyber-protection Act*.

The Judge in *Caplan* was creative in vesting title to the postings in the plaintiffs, with additional orders that enabled them to take steps to have the postings removed themselves. Presumably, this will require internet service providers and hosting services to allow access to the accounts from which postings were made and/or to disable the offensive posts.

RACKI V RACKI

This Nova Scotia case arose in the context of an acrimonious divorce and custody dispute.

The Respondent self-published a book in 2018 called *Free Trials (and Tribulations): How to Build a Business While Getting Punched in the Mouth*, about how he overcame hardship to become a successful entrepreneur. The book was widely promoted on his various social media platforms and was available for download. The Respondent sold several hundred copies.

The book disclosed that the Applicant, who was the Respondent's former spouse, had experienced addiction and suicide attempts. These statements were true so she could not claim defamation, and the *Charter* protection for privacy does not apply to common law disputes between individuals. Instead, the Applicant commenced an action for damages on the basis of "public disclosure of private facts."

This tort has been recognized in the United States and a few cases in the United Kingdom and New Zealand. It was mentioned in the landmark decision of *Jones v Tsige*, 2012 ONCA 32, but had not been applied in Nova Scotia (or, apparently, elsewhere in Canada) until *Racki*.

i) *Recognition and elements of the tort*

Justice Coughlan accepted that a tort exists in Nova Scotia for the public disclosure of private facts, with the following elements:

- the facts have been communicated to the public at large, such that they have become a matter of public knowledge;
- there is a reasonable expectation of privacy in the facts; and
- the publicity given to the private facts would be "highly offensive to a reasonable person causing distress, humiliation or anguish."

ii) *Findings of the Court*

All three elements were met in *Racki:* the Respondent "intentionally communicated" the facts about his former spouse to the public at large, through the book and its promotion; the Applicant had a reasonable expectation of privacy in the facts about her health; and the publicity would be highly offensive to a reasonable person.

Acknowledging that the right to privacy must be weighed against other interests such as freedom of expression, Justice Coughlan commented:

> *The right to privacy is not absolute. It has to be weighed against competing rights including freedom of expression. In this case Mr. Racki has the right to publish a book to encourage entrepreneurship and overcome hardship. But the issue in considering the Book as a whole, is whether the publication of the private facts of Ms. Racki's addiction and suicide attempts is in the public interest.*

Justice Coughlan referred to *Grant v Torstar Corp*, 2009 SCC 61 (*"Grant"*), where the public interest was considered as part of the "fair comment" defence to defamation. According to *Grant*, topics of public interest could include those that:

- invite public attention;
- affect the "welfare of citizens";
- have attracted "considerable public notoriety or controversy"; and/or
- relate to a prominent person, as long as the disclosure goes beyond "mere curiosity or prurient interest."

Justice Coughlan found it was not in the public interest for the Respondent to publish the personal facts about the Applicant, noting that the Respondent could have written about their relationship "falling apart" without disclosing these details. In the circumstances, the Respondent's freedom of expression did not outweigh the Applicant's privacy.

The Court in *Racki* ordered that the offending portions of the book be removed, and awarded the Applicant $18,000 in general damages and $10,000 in aggravated damages, as the publication was found to be motivated by actual malice. The Court rejected her claim for punitive damages.

iii) *Comments on* Racki

The increasing importance placed on privacy online, and the sad facts of this case, surely demanded a remedy. However, the case raises "slippery slope" concerns. It is not difficult to imagine the reverse situation to *Racki*, with this new tort being used to silence abuse survivors (as we see when defamation threats are made against accusers).

The decision also has implications for freedom of expression, particularly freedom of the press.

The news media often report stories that involve the public disclosure of private facts, and this new tort risks stifling their (*Charter*-protected) work. While malice was present on the facts of *Racki*, malice was not included as an element of the tort and may not be required in every case.

As well, the judicial invitation to weigh the purpose of the expression against the public interest in the subject-matter bears watching to see how far this tort will be extended, and in what fact scenarios it will apply. Unlike *Caplan*, which crafted a relatively narrow tort, the *Racki* tort could apply in a much broader range of cases.

IMPACT OF *CAPLAN* AND *RACKI* IN THE UNIVERSITY SETTING

There are myriad ways these new torts could impact post-secondary institutions. Could a university be liable if one student harasses another on social media, using university-related platforms or accounts? Or a professor publishes an academic paper or book disclosing private facts about someone involved in a case study or research project? What about an administrative staff member who posts or discusses confidential student information online or in electronic communications?

Conversely, do universities now have a new tool to silence their cyber-critics? These are just some of the scenarios and issues that come to mind.

Possible defences arise, too. For example, will academic freedom or research mandates afford a defence to professors alleged to have made "public disclosure of private facts"? Will it make a difference if harassing social media posts are sent from a student's home computer while classes are virtual, rather than on campus?

Until such questions are resolved in the case law, it helps to revisit first principles.

Historically, students could not successfully sue their universities for purely academic claims, but cases like *Lam v University of Western Ontario*, 2019 ONCA 82 seem to be moving away from that categorical approach. For this reason, it is a real possibility that universities may be held liable in tort to students (and others). Common tort claims in the university setting include negligence and misfeasance in public office. These torts could also be raised in cases of internet misbehaviour, depending on the circumstances.

Having robust internal policies and procedures related to privacy protection and acceptable internet use — and proving they were followed in a given situation — will help university officials fend off tort claims related to online misconduct. Some jurisdictions (including Newfoundland and Labrador and Prince Edward Island) may also have statutory protections from liability for certain university officials.

We would be pleased to offer more specific advice on how the *Caplan* and *Racki* decisions might impact your institution. >

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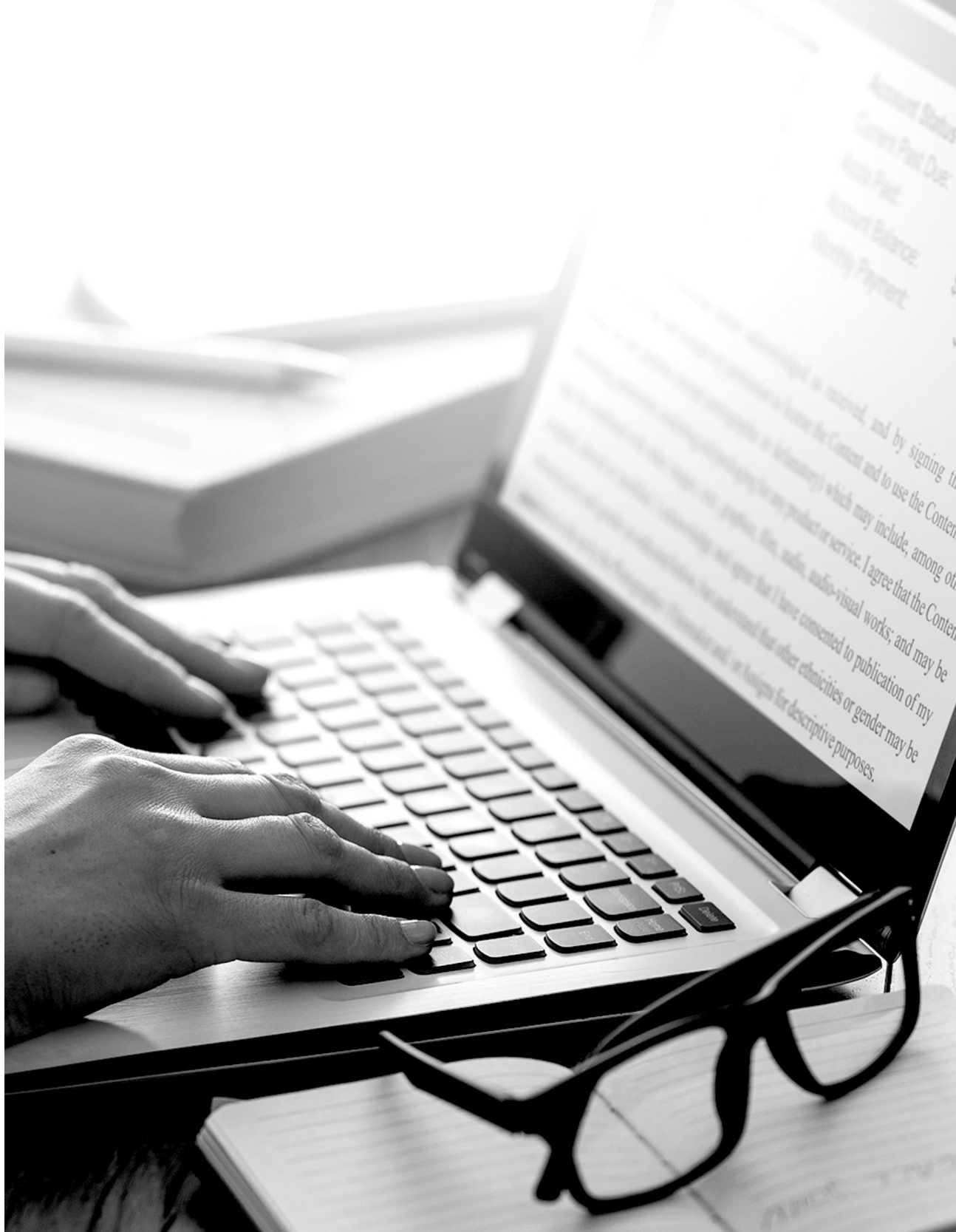
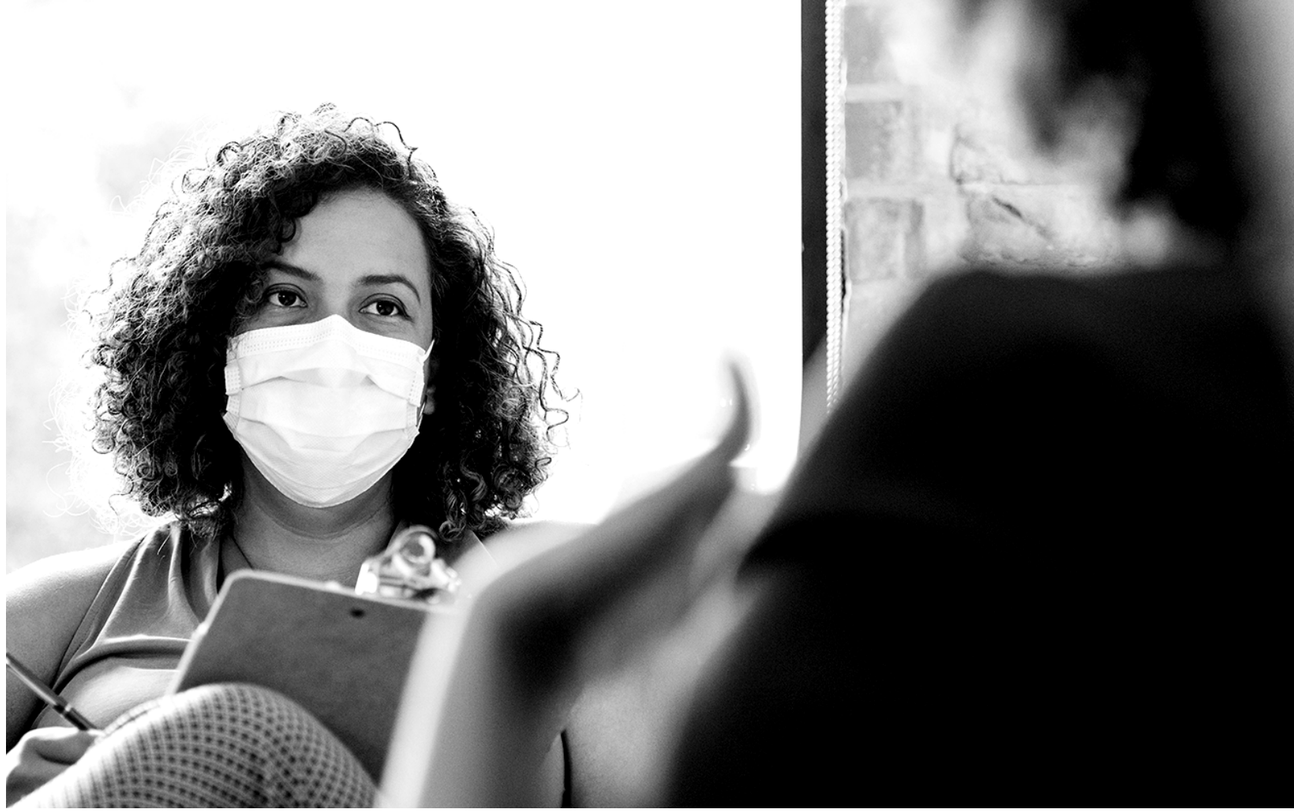


In the strictest confidence: reviewing confidentiality clauses with a view to fostering engagement and limiting risk



STRIKING THE PROPER BALANCE

Public discourse around instances of sexual violence is at an all-time high. In the wake of the #MeToo movement there are signs of greater willingness to speak up against sexual violence. With greater public accountability for perpetrators, there may also be increased motive on respondents to "clear their name" based on the stigma that attaches to perpetrators of sexual violence.

Social media often becomes the platform of choice for the complainant, the respondent, or witnesses to an act of sexual violence to provide their explanation of the circumstances behind an allegation of sexual violence. In promising confidentiality, educational institutions are right to limit promises to what they can realistically control.

Even the best drafted sexual violence policy is of limited use if it does not foster engagement in the community it seeks to protect. Confidentiality is vital in order to provide an environment in which victims can report instances of sexual violence, obtain support and ensure reports of sexual violence are dealt with fairly. A well-drafted sexual violence policy: 1) protects a complainant's privacy insofar as is possible; 2) builds confidence through transparency, both in process and outcome; 3) satisfies requirements of procedural fairness; and 4) limits institutional risk.

PAST PRACTICE

Canadian educational institutions have not only been facing mounting political pressure to respond to allegations and findings of sexual violence, but they may also risk complaints and lawsuits by students and employees if they fail to do so. For example, suits have been *filed* by students who claim that inadequate security provided by the university for places such as residence and laboratories facilitated sexual assaults.[1] Actions have also been initiated against educational institutions by students alleging that universities have responded inadequately after acts of sexual violence have been *committed*.[2]

In addition to allegations of both inadequate preventative measures to reduce instances of sexual violence and inadequate responses to reports of sexual violence, *confidentiality practices* employed by educational institutions in the aftermath of sexual violence investigations have also come under particular scrutiny.[3]

Few practices have received more media criticism than the use of non-disclosure agreements in resolving complaints of sexual violence, particularly complaints of sexual violence involving faculty members. Critics emphasize that the existence of non-disclosure agreements in resolving disputes of this nature could have the effect of allowing perpetrators to move to other institutions where they could offend again. Critics further stress that under the banner of confidentiality, institutions go too far in seeking to protect their reputational interest over the safety interests of students.

CAMPUSES IN 2021

Effective confidentiality provisions will address interim measures pending investigation or hearing up to, including and past the point of resolution. Though policies should be drafted thoughtfully to consider a variety of eventualities, there may not be a "boilerplate" approach to every given situation.

[1] Karen Pinchin, "Sex-Assault victim sues Carleton for negligence" ***Macleans*** (August 10, 2009), online
[2] Kristy Hoffman, "York University fails to support sex assault victims, woman says" ***CBC News***, (March 3, 2015), online
[3] Ibid.

There must be rules protecting a complainant's privacy insofar as is possible. This being said, the degree of procedural fairness owed to respondents involves, among other things: 1) the right to know the case against them; 2) the right to receive any document that will be relied upon in the decision; 3) the right to be judged by an unbiased decision-maker; and 4) the right to be given reasons for the decision.

Victims should be free to tell the story of their own experiences. Victims should, however, be informed that if they so choose to make public statements about an ongoing investigation arising from a complaint of sexual violence, the investigation may be compromised and the victims may be putting themselves at risk of civil lawsuits by those who believe they have been defamed. A well-drafted policy upholds necessities of individual and institutional accountability while balancing the rights of the parties involved.

Addressing instances of sexual violence at educational institutions requires the engagement of that specific institution's entire community, not only those most vulnerable. A well-crafted policy should attempt to ensure that complainants feel comfortable remaining in the educational institution's community in the aftermath of a sexual violence investigation.

Confidentiality is key to engagement. For example, in the criminal law context, courts often use initials for the name of an accused if releasing their name will also identify the complainant. Publication bans are also commonly used. Despite concerns of confidentiality, practical limitations exist respecting the level of confidentiality that can be offered by a sexual violence policy. Campuses are often small and closely knit. Educational institutions should at a minimum ensure that the school newspaper and other media do not report on a complainant's name or identifying information. Any publication of the results of a disciplinary process should only use initials for the complainant. An updated media policy may be required.

Transparency is also critical to engagement. Investigations which lack overall transparency may in fact have a chilling effect on individuals who may seek to come forward with reports of sexual violence.[4] The adage "*not only must Justice be done; it must also be seen to be done*" rings especially true for sexual violence investigations. It is easy to see how objectives of transparency and confidentiality can at times conflict. To build confidence in the process and outcomes of sexual violence investigations, policies should recommend collection, analysis, and public release of data in a manner that does not interfere with confidentiality obligations owed to parties involved in investigations.

MOVING FORWARD

Prevailing societal views have become increasingly less tolerant toward acts of sexual violence. Sexual violence is, however, not only a societal issue but specifically an issue facing educational institutions. Acknowledgment by educational institutions of the prevalence of sexual violence, and the development of clear, responsive and transparent policies to address this issue, are crucial to alleviating safety concerns of students as well as liability concerns at an institutional level.

If your institution does not have a current, well-drafted sexual violence policy in place, one should be implemented. Stewart McKelvey can assist with reviewing policies, developing and drafting new policies, and advising on your institution's responsibilities and potential liabilities. Stewart McKelvey can also provide in-house training for staff as well as legal advice and further ongoing support. ➤

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[4] Leah Hendry, "McGill profs back students on call for investigation into sexual misconduct allegations," *CBC News*, (April 16, 2018) online

Volleyball coach reinstated after recruiting student athlete charged with sexual assault

It is increasingly difficult to reconcile the rights of a student charged with sexual assault, with the rights of the victim, along with the university's responsibility to ensure the campus is safe and free of sexual violence. While a student is innocent until proven guilty, universities have an obligation to keep students safe and make them feel safe. It can be difficult to manage the public relations fallout when pressure mounts from social media and other sources to act quickly and publicly. It no longer matters how well a situation is being handled, as universities are being pressured more and more to publicize their actions and process. On this backdrop, *Administrative and Supervisory Personnel Association v University of Saskatchewan*, 2020 CanLII 49268 (SK LA), a decision out of the University of Saskatchewan ("U of S"), should be a cautionary tale.

BACKGROUND TO THE GRIEVANCE AND MEDIA REPORTS

In May 2018, a number of media outlets reported that a U of S student had pleaded guilty to a charge of sexually assaulting a woman at a Medicine Hat College residence and was sentenced to two years in prison with three years' probation. The student was a member of the U of S men's volleyball team, having transferred to the University after he left Medicine Hat College after being charged in 2016.

This student was recruited by the head volleyball coach at U of S who, in response to the media storm, conceded that he was aware of the charges. He was quoted in the media stating that they, "had talked briefly about the situation" but, "didn't go into a lot of detail". He also stated as follows:

> *He made a very bad choice and decision with his actions and what he did for one night. And it's cost him dearly. It's obviously cost the victim — please don't get me wrong; I'm not being flippant about that situation, but I think people who are in my position have to do everything they can to give young adults and teenagers an opportunity to grow and develop and improve on their character and improve on their choices and improve on their lifestyles, whatever the case is.*

U of S held a meeting with the coach immediately in which he acknowledged that he knew about the sexual assault charges when the student joined the volleyball team in 2016. He also acknowledged that he had not spoken to any of his supervisors specifically about the criminal charges.

Ultimately, the University decided to dismiss the coach after 26 years of service with positive performance reviews and a clean disciplinary record. The termination letter cited, "poor judgment" and "safety and reputational risks to other student-athletes, Huskie Athletics and the University as a whole." The coach later testified at arbitration that he assumed that the University had been made aware of the sexual assault charges through the vetting process for the student's transfer from Medicine Hat College to U of S.

On the same day as the termination, the U of S issued a media statement, which was widely reported. In addition, the Province's Status for Women Minister publicly condemned the coach's earlier comments as disturbing because they trivialized what happened to the victim and overstated the impact on the student athlete.

The U of S did not have any policy relating to the recruitment of student athletes on its athletic teams or prohibiting head coaches from recruiting athletes charged with, or convicted of, a serious criminal offence. Nor was there any policy for head coaches to follow when speaking with the media. All student athletes were subject to an Athlete Code of Conduct, which required student athletes to conduct themselves "in a manner in which [their] behavio[u]r will not be considered a form of harassment". The University also had a general Sexual Assault Policy aimed at preventing sexual assaults on campus and raising awareness of incidents of sexual assault or sexual misconduct.

ARGUMENTS AT ARBITRATION

At arbitration, the union argued that the University could not establish any policy or expectation that was breached in failing to disclose the sexual assault charges, recruiting the student, or speaking to the media. They further submitted that the grievor had simply committed an error in judgment and that the U of S had "panicked" and treated him as a "scapegoat."

The U of S argued that the grievor had breached his employment duties by failing to exercise good judgment when recruiting the student and providing comments to the media without having cleared the comments through the appropriate personnel; failing to notify the University of the criminal charges in breach of his duty of fidelity to the University; and placing his own and the student athlete's interests above the interests of the University by failing to consider or mitigate the potential safety and reputational risks to other student athletes, Huskie Athletics, and the University. It also maintained that permitting the student to play on the volleyball team constituted a breach of the Sexual Assault Policy and the Athlete Code of Conduct.

THE ARBITRATOR'S DECISION: "COMPLETE LACK OF POLICIES"

The arbitrator reinstated the grievor with full back pay and benefits, placing the blame on the University for its role during the student registration process. He found that the University did not pursue missing information on the eligibility transfer form in the transfer-vetting process after Medicine Hat College stated it could not reveal reasons why the student would not be eligible to compete at the U of S.

The arbitrator also criticized the "complete lack of policies regarding recruitment" and the broad discretion conferred on coaches in selecting players. Further, he rejected the U of S's argument that the grievor had failed to exercise good judgment, noting that the gravity of the facts of the sexual assault were unknown to the grievor at the time. He determined that it was reasonable for the grievor to assume that the University was aware of the charges against the student since it had approved his transfer. The Arbitrator stated that, in light of "what the Grievor knew and assumed at the time, as well as the complete lack of policies regarding recruitment" he could not "conclude that the Grievor's error was serious enough to

warrant discipline."

The arbitrator also declined to find any breach of U of S policy, noting that the Code of Conduct applied to student athletes and not to coaches and, in any event, did not prohibit a player with pending charges from playing. He found no breach of the Sexual Assault Policy.

Finally, the arbitrator found that the comments to the media were not governed by any media policy, noting that the coach had regularly spoken to the media without needing prior approval. In his view, any reputational damage that may have been caused by the situation, "was already there with or without the interview" and the comments allowed the University to treat the grievor as a "scapegoat" and place the responsibility solely on him.

CONCLUSION: POLICIES TO GUIDE ACTIONS

The recent decision from the U of S highlights the importance of having detailed and updated policies in place. Many different aspects and roles at a university can be impacted by these cases and a review of various policies to ensure they contemplate potential issues of sexual violence and sexual assault charges is important. This would include recruiting and media policies but also other governing documents that guide the student body, faculty and others on campus.

When faced with serious decisions and the heightened scrutiny associated with traditional and social media, having a guiding process and requirements in place is essential. While there is tremendous pressure on universities to act and to be seen as acting quickly when there are allegations of sexual violence, all actions should have a foundation in university policy and process. Ensuring your policies are evolving with the current realties will be invaluable as these situations arise on campus. >

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