



LIABILITY 101: “MYTHS & REALITIES”

THE IDAHO SYSTEM OF
LIABILITY COVERAGE

MYTH OR REALITY?

- If I am named individually in a lawsuit for something I do as an ISU administrator, I may lose my house or have my wages garnished.
- As an administrator, I am entitled to the “highest” degree of protection the law affords for protection from defamatory statements by third parties.
- The State will prosecute a slander/libel action on my behalf.
- The State insures against all accidents occurring on institutional property.
- *Sovereign immunity* is gone. (The King can do wrong!)

MYTH OR REALITY?

(Continued)

- Releases/waivers are worthless.
- The “shotgun approach” to litigation is alive and well.
- Life as we know it ceases as soon as a lawsuit is filed.
- Email is a private, secretive form of communication that may not be used in litigation.
- “Liability” and “risk” are the same concepts.

THE STATE RISK MANAGEMENT PROGRAM (RMP)

- RMP is a division of the Department of Administration
- Staff is RM, several Claims Adjudicators, a Risk Management Analyst and some assistants
- For general liability purposes, the RMP maintains a “retained risk pool”, the amount of which is actuarial funded, based upon: estimate of asset balance; actuarial estimate of open and unpaid claims; excess liability premium cost; 5 year loss history; premium reserve factor
- State’s broker also assists the State in procuring major property, excess insurance, boiler, crime/employee dishonesty, business interruption, aircraft liability policies

IDAHO TORT CLAIMS ACT

- “Except as otherwise provided . . . Every governmental entity is subject to liability for money damages arising out of its *negligent or otherwise wrongful acts or omissions* and those of its employees *acting within the course and scope of their employment duties*”

ITCA REQUIRES STATE TO:

- Provide a defense to institution & named employees, unless:
- Employee acted outside course and scope of employment or with *malice or criminal intent*
- Pay any judgment entered (lost wages not covered)
- However, if employee is using a non-State vehicle, the State's obligation is secondary to the primary obligation of the employee's own insurer
- The defense obligation arises whether the case is in federal or state court

EXCEPTIONS TO GOVERNMENTAL LIABILITY

- Act arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights
(Question: what is the common thread here?)

EXCEPTIONS TO GOVERNMENTAL LIABILITY

(Continued)

- Ordinary care is exercised in fulfilling a *discretionary function* (see, e.g., *Estate of Wellard v. Dept. of Transportation*, 801P.2d 561 (1990)(decision to comply or not with engineering standards is not a discretionary act available as a defense to the state)
- Act arises out of the imposition of a quarantine

EXCEPTIONS (Continued)

- Concealment or fraud: “The coverages afforded . . . (to the institution or individual) may be voided if the covered entity conceals material facts regarding the loss or claim.”

FILING REQUIREMENTS

- Notice of Claim filed with Secretary of State
- (Note: filing with State Board of Education not sufficient; *Pounds v. Dennison*)
- Within 180 days from date claim arose or reasonably should have been discovered
- Minors have 180 days from age of majority or 6 years from the date the claim arose or should reasonably have been discovered, whichever is earlier

CONTENTS OF CLAIM

- Describe circumstances of injury
- Nature of damages
- Names of witnesses, parties
- Time and place
- Place of residence of claimant for a period of 6 months prior to claim

EXCLUSIONS

- Liability not assumed under a defined contract; “defined contract means any written agreement under which the covered entity assumes the liability of others for bodily injury or property damage.” Note: breach of contract actions and damages are generally not covered
- Obligations covered under workers’ compensation or disability benefits laws
- Damages related to eminent domain or adverse possession or zoning disputes

EXCLUSIONS (Continued)

- Damages for dishonest, fraudulent, criminal or malicious acts
- Non-monetary costs related to injunctive actions
- Damages resulting from hazardous materials release, etc.

EXCLUSIONS (Continued)

- “For recovery of wages, salary or benefits or for interest or penalties thereon”
- Claims for benefits under employee benefit plans (Retained Risk Document)

RMP RESPONSE TO TIMELY CLAIM

- Investigate (with assistance of University)
- Assess facts & deny claim or attempt settlement or do nothing (claim deemed denied if no action taken by RMP within 90 days)
- Statute of Limitations is 2 years from date claim arose or reasonably should have been discovered, *whichever is later*

RECOVERY AGAINST ENTITY

- Idaho Code Sec. 6-917: “Recovery against a governmental entity under the provisions of this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act or omission gave rise to the claim.”

PUNITIVE DAMAGES & ATTORNEYS' FEES

- Punitive damages not allowed under the ITCA
- Attorneys' fees allowed against *any party*, but only upon clear and convincing evidence that the party “was guilty of bad faith in the commencement, conduct, maintenance or defense of the action.”
- However, even when granted, the total award, including attorneys' fees, may not exceed the statutory limit (\$500,000)

LIABILITY INSURANCE— COMPREHENSIVE STATE PLAN

- The administrator of the division of insurance management within the Dept. of Administration is responsible for providing a comprehensive plan of liability insurance for all state entities
- The “plan” may consist of a retained risk fund, insurance, or a combination thereof
- No state agency or institution may procure liability insurance (without the express consent of the administrator)

WHAT INDIVIDUALS & ENTITIES ARE COVERED?

- Regular employees acting within the course & scope
- Students under the direct supervision of, and assisting, State of Idaho teaching or administrative staffs in the performance of their teaching or administrative work, or while acting within the scope of their duties as elected officers or officially appointed positions serving the associated student body
- Students in academic (non-clinical) practica
- Advisors to authorized student groups

WHAT INDIVIDUALS & ENTITIES ARE COVERED?

- Student groups that are approved by the universities and included in the schedule on file with the RMP
- Authorized volunteers acting within the scope of assigned volunteer duties
- “Foundations, associations, guilds and auxiliaries, and nonprofit corporations and their employees, directors and officers while operating for the benefit of the State of Idaho.” (Retained Risk Document)

UNIVERSITY'S DUTIES IN THE EVENT OF AN OCCURRENCE, CLAIM OR SUIT

- Prompt written notice to RMP
- Reasonable steps to prevent additional damage or injury
- Notify RMP of any demand or summons
- Cooperate with RMP in conducting defense, settlement attempts, providing evidence, testimony, etc.

ADDITIONAL AREAS OF COVERAGE

- Errors and omissions: covers “wrongful acts” defined as “any actual or alleged error, omission, act, misstatement, neglect or breach of duty on behalf of a covered entity”
- Advertising injury liability: written or oral publication that: libels or slanders a person or organization or their goods, products or services; violates a person’s right of privacy; infringes copyrighted advertising materials; misappropriates advertising ideas or style of business

ADDITIONAL AREAS OF COVERAGE (Continued)

- Malpractice liability: covers claims alleging breach of applicable standard of care in providing *professional services*. *Professional services* means “the furnishing of professional healthcare services including the furnishing of food, beverages, medications or appliances in connection with such services, the postmortem handling of human bodies, and services as a member of a formal accreditation, standards review or similar professional board or committee, including executing the directives of such board or committee.” Exclusions: actions by an individual required to obtain a state license—who has failed to secure such license; actions as a private practitioner; injuries covered by workers’ compensation or disability benefits, etc. Note: RPM secures excess coverage for certain areas, including medical malpractice, although the retained risk liability system is primary and the excess insurance is secondary. RPM also permits ISU to secure, by separate student fees, blanket malpractice insurance coverage for students in most of the health professions programs.

HIGHER EDUCATION CASE LAW IN IDAHO

- *Evans v. Andrus (1993)*. Constitution does not permit “splitting” Board into two bodies—one for higher ed and one for K-12.
- *Emery v. BSU (2001)*. Part-time instructor who had been scheduled for three fall classes was not eligible for unemployment compensation for summer period.
- *Leon v. BSU (1994)*. “Special review” of assistant prof who was issued a “terminal contract,” along with alleged verbal promise by chair to permit deferral of tenure application, were not sufficient to provide prof an interest in employment beyond the current contract. Only the Board may authorize employment beyond single contract year.

CASES (Continued)

- *Pounds I & II (1988 & 1991)*. Classified employee must exhaust remedies provided in classified employment system before filing suit, and, (in Pounds II), the filing of a grievance with university does not serve as notice under the ITCA.

CASES (Continued)

- *Scholes v. Healas (D. Idaho 1985)*. Instructor was dismissed pursuant to bona fide Board declaration of financial exigency which could not reasonably be alleviated by other means.
- *Milbouer v. Keppler (D. Idaho 1986)*. Same as Scholes; also, Eleventh Amendment would bar any damages against the State and State officials in federal court.
- *Totman v. EITC (1997)*. First year instructor was given notice of nonrenewal in February—prior to second semester evaluations. She claimed non-renewal could not occur at that point. Held: notice of nonrenewal was only process to which instructor was entitled and that statement of reasons was not required. Also, instructor's public expression of displeasure with the nonrenewal was not protected under the First Amendment.

CASES (Continued)

- *Horne v. ISU (2003)*. Classified employee's dismissal for insubordination and conduct unbecoming upheld based on conduct of disruptive nature, including phone call to another department indicating possibility of "tak[ing] everybody out with me." Appeals court will "uphold the determination of the Personnel Commission to demote, suspend, or terminate . . . if there is substantial, competent evidence supporting a *single* incident of misconduct by the employee."

CASES (Continued)

- *Hughes v. ISU (1992)*. University did not breach employment contract, violate due process, or the implied covenant of good faith & fair dealing when it reassigned a non-tenured instructor from teaching duties in Boise to duties in Pocatello the following year.
- *Olson v. ISU (1994)*. Instructor initially recommended for tenure by his dean had the recommendation “revisited” after he conducted his own unauthorized evaluation of his chair. He was ultimately denied tenure and received a terminal contract. He claimed a due process violation, but the court held he had no property interest beyond the terminal contract.

CASES (Continued)

- *Wickstrom v. NIC (1986)*. The principal relationship between a college and its students is contractual. The contract is made up of both implied terms and specific terms, (from bulletins, publications, customs and usages). Held: promises made in about job placement, etc., in a college publication might give rise to breach of contract claim.
- *Bignall v. NIC (1976)*. A plaintiff claiming de facto tenure, “must run the procedural gauntlet,” i.e., exhaust all meaningful administrative remedies.

CASES (Continued)

- *Coghlan v. UI (1999)*. Under age sorority pledge injured after drinking at parties at Greek houses where she alleged university employees were present and aware of her drinking and did nothing to stop illegal distribution was entitled to trial on whether university breached a voluntarily *assumed duty*.
- *George v. UI (1991)*. Non-harassment release agreement between prof and student who had been involved in an “intimate relationship” obligated university to enforce the same.

CASES (Continued)

- *Banks v. UI (1990)*. Minors must file a notice of tort claim within 180 days of reaching majority age.
- *White v. UI (1990)*. Professor's battery against a student could not form basis for liability against university as an intentional act under ITCA.
- *Pace v. Hymas (1986)*. University and Board unable to sustain burden of proving a bona fide financial exigency.

CASES (Continued)

- *Huyett v. ISU (2004)*. Illustrates the “shotgun approach” to litigation. Coach placed on administrative leave during season sued under several theories: breach of contract; gender discrimination; breach of covenant of good faith and fair dealing; due process violation. Defendants prevailed on all counts and were awarded attorneys’ fees by district court and supreme court. Held: no multi-year agreement without Board approval; no liberty interest violation since no charges made when reassignment occurred; no implied covenant when an express agreement exists.
- *Aldrich v. Bowen (1997)*. Land exchange with LDS Church not a violation of First Amendment.

CASES (Continued)

- *Lyman v. Swartley (Board) (1974)*. Board's dismissal of tenured faculty without a hearing violated due process. Basic due process required for dismissal during a contract term or during tenure is: (1) specification of charges; (2) an opportunity to respond; and (3) a fair and impartial fact-finding process to determine the validity of the charges.