

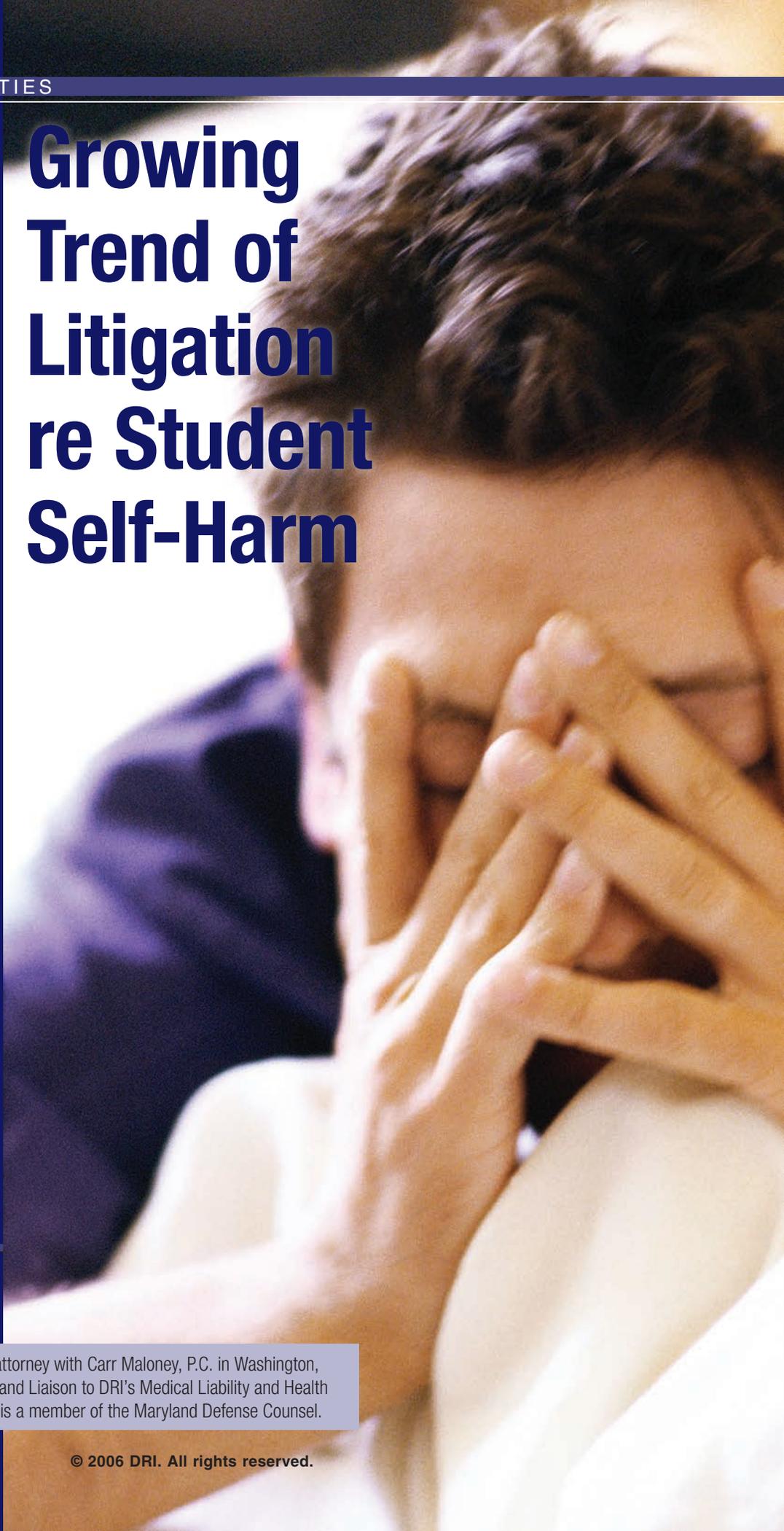


In the Face of  
Liability Risks

By Michael J. Sepanik

**C**ould a likelihood of litigation press educational institutions to withdraw student mental health services?

# Growing Trend of Litigation re Student Self-Harm



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Lawsuits seeking to hold colleges and universities responsible for student acts of self-harm are on the rise.

Although suicide and other forms of self-harm are among the most unpredictable behavioral patterns faced by

mental health practitioners and student health centers, a growing number of jurisdictions have recognized a duty to take steps to prevent student self-harm. As this nascent form of liability is fast-developing, educational institutions are forced into a difficult position—one requiring a balance between providing the best health care and counseling to mentally ill students and acting within the parameters of liability law and best risk management practices.

A great deal of publicity has recently focused on George Washington University's decision in the fall of 2004 to bar a suicidal sophomore from campus after the student sought counseling in the wake of a fellow student's suicide. See Susan Kinzie, *GWU Suit Prompts Questions of Liability*, Washington Post, March 10, 2006, at A01. George Washington administrators faced tremendous pressure to explain their rationale for treating a potentially suicidal student as a discipline case. As litigation is ongoing, however, they have not been able to do so publicly. As addressed below, George Washington administrators likely faced confusion in determining the manner in which to treat the student, as only scant and sometimes conflicting judicial opinions offer guidance as to how educators should address the risks posed by suicidal students.

#### **How Common Is Suicide or Suicidal Ideation among College-Age Students?**

The National College Health Assessment Survey (NCHA), completed in 2000, surveyed depression, suicidal ideation, and suicide attempts among approximately 16,000 college students. See *National College Health Assessment: Aggregate Report, Spring 2000*; American College Health Association (2001). NCHA findings reported that 1.5 percent of students reported that they had attempted suicide within the last school year; and 9.5 percent of students reported that they had seriously considered a suicide attempt. *Id.* The NCHA statistical

rates of attempted suicide and suicidal ideation essentially mirrored data reported in a 1995 National College Health Risk Behavior Survey conducted by the Centers for Disease Control and Prevention. See Jeremy Kisch, *et al.*, *Suicide & Life-Threatening Behavior*; 35, 1 (Feb. 2005). According to the NHCA survey, less than 20 percent of students reporting suicidal ideation or attempts were receiving treatment.

Suicide is presently the third-leading cause of death among the U.S. college-aged population (young adults 18 to 24 years of age). *Id.* It should be noted, however, that mere attendance at college is not a risk factor in and of itself, as suicide is higher among non college-matched peers. See *id.* That fact leads to the circumstantial conclusion that colleges and universities offer—at least to some extent—a more protective and nurturing environment than found in non-university life.

#### **Lodestar Decisions**

In 2000, the Supreme Court of Iowa held that a university owed no duty to inform a student's parents of a suicide attempt. *Jain v. State of Iowa*, 617 N.W.2d 293 (Iowa 2000). *Jain* arose from the death of a freshman at the University of Iowa, who committed suicide in his dormitory room on campus. In the weeks prior to his death, resident assistants were called to the student's room due to an argument between the student and his girlfriend. The girlfriend reported that the student had brought his moped into his dormitory room with the intention of self-administering carbon monoxide poisoning. The student's dorm coordinator spoke to the student, encouraged him to see the student counseling service, and also urged the student to call her "if he thought he was going to hurt himself." *Id.* at 295. The student was also forced to remove the moped from his room. The dorm coordinator, following university protocol, discussed the incident with an assistant director for residence life. In a meeting between the



student, the dorm coordinator and the assistant director for residence life, the student blamed the event on exhaustion, and the student was once again encouraged to seek counseling. *Id.* at 296. The school took no further action, and the student died of carbon monoxide poisoning approximately two weeks following the initial incident after the student ran his moped in his

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locked dormitory room. *Id.*

In 2002, the United States District Court for the Western District of Virginia held that a university owes a duty to protect a student from the danger of self-harm, based on a special relationship between the university and the student. See *Schieszler v. Ferrum College, et al.*, 236 F. Supp. 2d 602 (W.D. Va. 2002). In *Ferrum College*, the court denied the college’s motion to dismiss for failure to state a claim. The suit stemmed from the suicide of a freshman named Michael Frentzel. Mr. Frentzel had experienced disciplinary problems, including being required to complete anger management classes, during his first semester. *Id.* Upon completion of the anger management classes, he was permitted to enroll in the second semester. *Id.* During February of 2000, after an argument with his girlfriend, he sent a letter to her indicating suicidal intent. *Id.* She showed the letter to campus police, who visited Frentzel’s room, and found him in distress with self-inflicted bruises to the head. *Id.* The campus police reported the incident to the Dean of Student Affairs, who required Frentzel to sign a statement promising that he would not hurt himself. *Id.* Over the next few days, Frentzel sent notes to two friends with cryptic, yet potentially suicidal connotations. The notes were given to the dean, who took no action. *Id.* Three days after

the police had initially been called to his dormitory room, Frentzel was found in his room hanging by his belt. *Id.* A wrongful death (negligence) suit was initiated by Frentzel’s personal representative.

### **Does a Special Relationship Arise from Foreseeability of Self-Harm?**

At the outset, it is important to note that there is generally no duty to protect an individual from self-inflicted harm in the absence of a “special relationship.” *Restatement (Second) of Torts* § 314, at 116 (1965). Hospital and prison settings are the most common loci where such a relationship is found.

In *Jain*, the Supreme Court of Iowa held that no special relationship existed between the university and a student that gives rise to an affirmative duty to prevent a suicide. *Jain v. State of Iowa*, 617 N.W.2d at 296–97. In *Jain*, the Supreme Court of Iowa rejected plaintiff’s argument that the university’s knowledge of the student’s “mental condition or emotional state requiring medical care” created a special relationship giving rise to an affirmative duty of care toward the student. *Id.* at 297.

The Supreme Court of Iowa noted an unwritten university policy dictating that, with evidence of a suicide attempt, university officials will contact a student’s parent. *Id.* at 296. Under the unwritten policy, however, parental notification rests solely with the Dean of Students, who bases his decision on the gathering of information from a variety of sources. *Id.* The record in *Jain* revealed that no information regarding the student in question was transmitted to the dean’s office until after his death. *Id.* Due to the relatively short period of time (approximately two weeks) between the initial notice to officials and the act of suicide, the issue of the theoretical policy “violation” did not appear to carry weight in the final determination of the court.

Although arguably not thoroughly reasoned, the *Jain* decision serves to protect university officials who act reasonably when faced with evidence of potential suicidal behavior, but could also merely be dealing with a student under stress or exhaustion from a difficult examination period. The decision also protects universities’ non-medical and nonprofessional staff (such as resident assistants and housing officials) who often serve as the front line in dealing

with student behavior that may or may not evidence determined suicidal intent.

In rejecting plaintiff’s contention that the failure to notify the student’s parents placed the student at a greater risk of self-harm, the court reasoned: “it is undisputed that the RAs appropriately intervened in an emotionally charged situation, offered [the student] support and encouragement, and referred him to counseling. . . [RAs] sought permission to contact his parents but he refused. In short, no action by university personnel prevented [the student] from taking advantage of the help and encouragement being offered, nor did they do anything to prevent him from seeking help on his own accord.” *Id.* at 299. Further, the Supreme Court of Iowa focuses on the omissions of the student himself: “it appears by all accounts that he failed to follow up on his recommended counseling or seek the guidance of his parents, as he assured staff he would do.” *Id.* at 300. Educational institutions should not assume that a despondent student’s failure to act properly for his or her own well-being will become a widely embraced defense to claims stemming from self-harm. As demonstrated by other recent caselaw, certain courts mandate that educational institutions act on the assumption that a despondent or depressed student cannot be charged with the duty of care toward his or her own well-being.

In *Ferrum College*, the United States District Court for the Western District of Virginia noted that Virginia law recognized that a special relationship can give rise to a duty to take affirmative action to assist or protect another. *Schieszler v. Ferrum College*, 236 F. Supp.2d at 607. At the time the *Ferrum College* decision was issued, however, the Virginia Supreme Court had not addressed whether a special relationship exists between a university and its students.

While rejecting that a special relationship exists between an institution and its students as a matter of law, *Ferrum College* held that a duty can arise based on knowledge of the potential harm (foreseeability) based on the particular facts alleged in *Ferrum College*. *Id.* at 609. The particular facts considered noteworthy by the United States District Court for the Western District of Virginia included that Frentzel was a full-time student at Ferrum College; he lived

in an on-campus dormitory; college staff and administrators were aware that Frentzel was experiencing emotional problems; and they had required him to seek anger management counseling before permitting him to return to school for a second semester. *Id.* Obviously, several of the preceding factors (excluding the anger-management counseling) could apply to a broad range of students at educational institutions.

The more extreme elements of Frentzel's final days are seemingly what led to the finding of a special relationship. The facts alleged by plaintiff included: college staff and administrators knew that, within days of his death, Frentzel was found by campus police alone in his room with bruises on his head and that he claimed these bruises were self-inflicted; and the defendants knew that, at around the same time, Frentzel had communicated to his girlfriend and another friend that he intended to kill himself. *Id.* at 609. Finally, "[A]fter Frentzel was found alone in his room with bruises on his head, Ferrum College required Frentzel to sign a statement that he would not hurt himself. *This last fact, more than any other, indicates that the defendants believed Frentzel was likely to harm himself.*" *Id.* (emphasis added). Thus, the United States District Court for the Western District of Virginia held that a trier of fact could conclude that there was "an imminent probability" that Frentzel would try to hurt himself, and that the defendants had notice of this specific harm. *Id.*

The *Ferrum College* decision reached a compromise, and instead of declaring a special relationship as a matter of law, held that a finding of a special relationship requires a factual analysis, one that focuses heavily on foreseeability. The fulcrum of the court's decision was whether the act was foreseeable:

In reaching this conclusion, I have also considered whether defendants could reasonably have foreseen that they would be expected to take affirmative action to assist Frentzel. It is true that colleges are not insurers of the safety of their students. It is also true that Ferrum did not technically stand *in loco parentis* vis-à-vis Frentzel and his fellow students. Nonetheless, [p]arents, students, and the general community still have a reasonable expectation, fostered in part by

colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.

*Id.* at 609–10 (internal citations and quotations omitted).

In somewhat circular logic, it was Frentzel's own behavior that led to the determination of a special relationship that gave rise to a duty to protect Frentzel from the foreseeable danger that he would hurt himself. Frentzel exhibited very extreme behavior, and thus the decision may not be applicable to less extreme acts preceding a suicide or an attempted suicide. It is instructive to note that—even when confronted with specific threats of suicide and self-infliction of bruises by Frentzel—the *Ferrum College* decision found the actions of the college administrators to be the most damning piece of evidence in the foreseeability equation. This leads to the conclusion that although courts may be willing to find that acts associated with severe depression, mental illness and attempts at self-harm to be irrational and unpredictable, courts may demand a measured and well-reasoned response to such acts, specifically one that is in the best interest of the student in light of all the surrounding circumstances.

### Illegal Act/Intervening Cause Defenses

The *Ferrum College* decision rejected the argument that the student's illegal act of suicide barred his recovery, since the student was of unsound mind at the time of his death. *Ferrum College* relied upon a decision by the Virginia Supreme Court holding that although suicide is an illegal act, if the suicide was the result of the victim being of unsound mind at the time of his death, the defense of illegality will not bar recovery for wrongful death. *See Molchon v. Tyler*, 262 Va. 175, 181, 546 S.E.2d 691 (2000).

The *Jain* decision held that the act of suicide is considered a deliberate, intentional and intervening act that precludes another's responsibility for the harm. *Jain v. State of Iowa*, 617 N.W.2d at 300. The *Jain* decision acknowledged, however, the exception arising where there is a special relationship that imposes a duty to prevent foreseeable acts of self-harm by a plaintiff. *Id.* at 300. Similar to the reasoning in *Ferrum College*, the exception is warranted because the intervening act, namely suicide, is the

very risk the special duty is meant to prevent. *Id.*

### Recent Massachusetts Opinion Adopts Reasoning of Ferrum College

A recent decision by the Superior Court of Massachusetts (Middlesex County), *Shin, et al. v. Massachusetts Institute of Technology, et al.*, 19 Mass.L.Rep. 570, 2005 Mass. Super. LEXIS 333, \* (Mass. Dist. Ct. June 27, 2005), adopted the reasoning of *Ferrum College* and held that educational institutions have a duty to prevent foreseeable student self-harm. As with the cases analyzed above, *Shin* sought to hold a university liable for the suicide death of Elizabeth Shin, a sophomore at M.I.T. Ms. Shin was a severely depressed student who had experienced mental health problems while in high school, had overdosed on prescription drugs during her freshman year at M.I.T, and had undergone over a year of counseling and psychiatric care by both university officials and university health care workers prior to her death. The facts analyzed by the *Shin* decision do not merely address a student who did not receive the proper level of help from a university at the start of severe mental health issues, but focuses on a significant period of counseling and mental health care treatment within the umbrella of mental health care services offered by a major educational institution such as M.I.T.

While the superior court granted summary judgment in favor of university officials on claims involving breach of contract, negligent infliction of emotional distress, and negligent misrepresentation, the superior court found sufficient issues of fact existed on counts alleging gross negligence against M.I.T. medical professionals, breach of duty to prevent harm against M.I.T. university administrators, gross negligence against M.I.T. university administrators, and wrongful death against M.I.T. university administrators.

The decision in *Shin* adopted the analysis of the United States District Court for the Western District of Virginia in *Ferrum College*, finding that a "special relationship" existed between the M.I.T. administrators and Elizabeth Shin, which imposed a duty on administrators to exercise reasonable care to protect Elizabeth from harm. *Id.* at \*38. Similar to the reasoning of *Ferrum Student Self-Harm*, continued on page 63

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**Student Self-Harm**, from page 19  
*College*, the *Shin* decision determined that M.I.T. administrators could reasonably foresee that Elizabeth Shin would hurt herself without proper supervision. *Id.* at \*37. In addition, the *Shin* decision notes Section 314A of the Restatement (Second) of Torts, which notes that although the finding of special relationships were historically only found in custodial contexts, “the law appears... to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence.” *Id.* at \*33.

### **Pennsylvania Jury Finds in Favor of Allegheny College Mental Health Counselor**

In August 2006, a Crawford County, Pennsylvania, jury returned a verdict in favor of an Allegheny College mental health counselor and a private practice psychiatrist for their roles in the treatment of a 20-year-old Allegheny College student who, after suffering from lengthy period of depression, hanged himself in 2002.

While the case before the jury was essentially a medical negligence action, Allegheny College, as the employer of the mental health counselor, could have been held vicariously liable for a negligence verdict

against the counselor. In their verdict form, the jury determined that neither the counselor nor the psychiatrist breached their respective professional standards of care, and the decedent’s own negligence caused his death. This verdict is significant even though the behavior presented by the student in question was comparatively less extreme than other cases analyzed in this article (*i.e.*, the student in question, despite a progressively deepening depression, had neither engaged in nor threatened any specific acts of self-harm prior to his death) as it may reflect the fact that juries are not ready to ascribe blame for suicide on those other than the actor him- or herself.

### **Will a Detailed Standard Actually Help Administrators at Colleges and Universities?**

As demonstrated in the case law addressed in this article, decisions finding fault with an educational institution’s failure to act when student self-harm was foreseeable, or an “imminent probability,” are very fact-specific. It is easy to imagine that behavior cited as wrongful under one set of circumstances could be seen as reasonable when considered in other contexts. It is therefore difficult, if not impossible, to draw black-

and-white rules for administrators to follow when dealing with potentially suicidal students. In addition, a very real potential outcome of large verdicts or settlements against universities could be institutions stepping back from offering services for students in the mental health arena, or attempting to pre-screen applicants based on prior mental health issues or risk factors. On a more basic level, deans, coaches, dorm captains and others might be less inclined to counsel, or otherwise take an interest in, a student facing depression or increased stress if they thought that extending a helping hand could lead to the uncomfortable bracelets of litigation.

Counsel advising educational institutions should take particular care to offer measured and balanced advice on this issue, as the law set forth in this article is only valuable within the context of the particular facts of each situation. A college or university that withdraws student mental health offerings or curtails “informal” student support offered by non-professional staff would be doing a disservice to its students, and potentially increasing the likelihood of student self-harm. 