

# **GRADUATE STUDENTS IN DIFFICULTY**

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# What Legal Routes are Available to Students?



- There are two possible avenues in the courts for the student aggrieved by a university decision:
- File a statement of claim seeking damages for alleged breach of contract or negligence, or
- File an application for judicial review of a university decision.
- When a student seeks a remedy in the courts due to a dispute with the university, how will the Canadian courts respond?

# University's Response to Claim of Breach of Contract or Negligence?



- Bring application to strike all or portions of the statement of claim or for summary judgement on grounds that it is “plain and obvious” that the claim will not succeed, since the action relates to academic matters which are not within the jurisdiction of the university, and discloses no reasonable cause of action.

# Contractual Breach?



- When a student is admitted to a university program, a contract is formed. The terms of the contract will be set out in relevant documents such as the faculty calendar and other university and departmental documents, including letters of offer which contain information about program requirements, evaluation methods, supervision, completion times, TA opportunities, funding, academic appeal routes etc.)
- University bound by these provisions and student deemed to have accepted the “contract” with and regulations of the university.
- University’s breach of contractual undertakings can give rise to a claim for damages.

# Negligence, a tort or civil wrong



## TEST

1. Was the harm the reasonably foreseeable consequence of the defendant's conduct? Examples – fall from easily accessible residence rooftop; injuries in ill equipped lab; third party injuries due to alcohol overconsumption
2. If so, were the parties in a relationship which gave rise to a duty of care; that is, was the relationship sufficiently close that it would be fair and just to impose a duty of care? If so, the university required to take all reasonable steps to mitigate the risk of harm. If it fails, it is in breach of its duty of care.
3. Are there any policy considerations which negate the imposition of a duty?

Damages claimed seek to compensate for the harm suffered. Injured party seeks to be “made whole”.

# ***Wong v. University of Toronto (1992)***

## ***Ontario Ct of Appeal***



- 5<sup>th</sup> year doctoral student – detailed procedures re program requirements, evaluation criteria and appeal steps.
- Supervisor refused to continue to act (conflict *irreparably damaged supervisor/student relationship*) and student would not accept the University's alternate supervisor.
- Did not exhaust internal appeal procedures.
- Sued for damages arising from breach of contract and in tort.
- The student argued that his dispute with the university was essentially contractual and there had been a breach of contract.
- University brought successful motion for summary judgement, arguing court had no jurisdiction and there was no reasonable prospect that action could succeed

# Wong v. University of Toronto cont.



- On appeal, the Court of Appeal held:
- Re the refusal of the professor to continue and the acceptability of the university's provision of an alternate supervisor, *"[This issue] has all the characteristics of an academic matter and only superficially or incidentally any of a contractual relationship. To say that there has been a breach of contract requires one first to identify the term or terms of the contract said to have been breached. In this case, for his action to succeed the plaintiff must show that a term should be implied that the respondent ( University of Toronto Governing Council) agreed that it would provide Professor X and only Professor X as his supervisor. There is no justification for such an implication."*

# *Warraich. v. University of Manitoba (2003)*

## *Ct of Appeal*



- W. enrolled in a residency program; placed on probation which had to be performed at another university hospital .
- Appealed the terms of the probation internally, but stopped short of Senate appeal process.
- Filed an application in court for a declaration that the university was contractually bound to provide the academic and practical training which formed part of the probation at the faculty rather than externally.
- University applied for an order summarily dismissing the application for lack of jurisdiction.
- Issue: Is the dispute with the university in its “essential character” an academic matter to be resolved by the university’s internal dispute resolution processes, or a breach of student’s contractual entitlement to be provided with academic and practical training **at** the university?



- Court of Appeal determined that, as in the Wong case, this dispute was an internal disagreement relating to academic matters and, “*generally speaking, universities have absolute discretion as to the management of their own affairs .... This was an issue of an academic nature masquerading as a breach of contract case*”.
- Court noted that academic, domestic disputes are better resolved by the university’s own dispute resolution procedures, provided they are fair, comprehensive and effective. The court pointed out that it could not compel the Faculty of Medicine to change its residency requirements, whereas the Senate was fully empowered to make those academic decisions.
- Avenues available to students:
  - If there is unfairness in the process, potential remedy by way of judicial review;
  - If dispute is not academic in nature, a cause of action can be pursued.

# Gauthier v. L'Université d'Ottawa (2010)



- Gauthier alleged that her first supervisor told her that she would have her doctorate in 4 years and receive a \$50,000 scholarship and a TA' ship. After 4 years , claiming harassment and intimidation, she requested a replacement supervisor who was allegedly incompetent. After a further 4 years she abandoned her studies and filed a statement of claim based on misrepresentation and breach of contract in not providing her with adequate thesis supervision, claiming 1M in damages and punitive damages of \$500K.
- University brought motion to dismiss on ground that the court did not have the jurisdiction to intervene in academic matters.

- Court disagreed with Ottawa stating that the Superior Court, a court of inherent jurisdiction, does not lack jurisdiction solely because a breach of contract or negligence claim arises in the context of a dispute of an academic nature. If the pleadings show evidence of promises made and then broken, of the level of supervision expected and not delivered, or of behaviour falling outside an academic context ( harassment, intimidation etc), the matter should proceed to trial and court has the jurisdiction to rule on the claim and award damages if the allegations are made out.
- However, claim cannot be an indirect attempt to appeal an academic decision and pleadings must disclose details necessary to establish the contractual obligations or show that the university's actions go beyond the broad discretion that it enjoys.

# Fiduciary Duty



- The relationship between faculty and students is a special one. There is a power imbalance and those whose professional responsibilities include the exercise of power over the careers and future lives of fee-paying students are required to take all necessary care.
- Relationship gives rise to a duty of care, breach of which creates liability for resulting damages.

## *Young v. B., R. and Memorial University (2006) SCC*



- Student submitted, as an appendix to a term paper, a case study of a woman sexually abusing children.
- Professor speculated that it was a personal confession and reported the matter to Child Protection Services. Name “red flagged” and unable to get work. Two years later she discovered the report made by prof and provided the bibliography for the paper.
- Brought action for damages against the professor, the Director of the School of Social Work and the University.

## *Young v. B., R. and Memorial University*



- A jury found in favour of the student and awarded her \$839,400 in damages because the University's negligence had destroyed her career prospects.
- The decision was overturned by the Newfoundland and Labrador Court of Appeal.
- The Supreme Court of Canada subsequently restored the trial court decision. Found that professors had acted on conjecture and speculation and failed to seek explanation from student. No reasonable cause to make the report.

- The Supreme Court described the duty of care as follows:
  - *“Those whose professional responsibilities include the exercise of power over the careers and future lives of fee-paying students are required to take the necessary care to get their facts straight before taking a potential career-ending action in relation to a student.”*
  - *“...even as a ‘distance’ student, the appellant was a fee-paying member of the University community, and this fact created mutual rights and responsibilities. The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound both in contract and tort.”*
  - *“..there was evidence that the University breached these duties through the negligence of its employees.”*

# Negligence /Educational Malpractice



- Case law to the effect that an action for inadequate instruction (*educational malpractice*) cannot be brought against an educational institution.
- Reasons: public policy; difficulties in establishing a relationship between poor instruction and resulting alleged damages; the burden such claims could place on educational institutions; judicial reluctance to interfere with the formulation or implementation of educational policy, or to oversee what goes on in the classroom.
- Court will not establish or supervise course content nor standards of conduct for teachers and will entertain claims about professor only if conduct egregious.



# Maughan v. University of British Columbia (2008) BC Ct of Appeal



- Masters student complained about content of course and professor's interpretation; alleged profs and students disrespected her Christian faith and created poisoned learning environment.
- Complained about her professor. Sought to have her grade in the course expunged on the basis that prof treated her differently because of her religion. Request declined. Appealed to Senate Committee unsuccessfully
- Student brought an action against the university and professor alleging breach of Civil Rights Protection Act (the Act) and bad faith negligence arising out of religious bias.
- Defendants brought motion to summarily dismiss alleging that there was no evidence upon which a properly instructed jury, acting reasonably, could return a verdict favorable to the plaintiff.
- Court dismissed the action concluding that, in the case of the alleged violation of the Act, there was no evidence that the professors were motivated in their communications with or conduct towards the plaintiff by religious bias. Case relied on conjecture and speculation.

- In her negligence claim, the student stated that her prof had a duty to protect her from discriminatory classroom activity that threatened her psychological well being, and that the other profs and the university were liable for failing to supervise the conduct of the English prof and provide an environment free of bias , prejudice and intolerance.
- The court adopted the following analysis:
  - Is there a sufficiently close relationship between the parties such that carelessness on the part of the defendant might cause damage to the plaintiff?
  - If so, are there any considerations to limit the scope of the duty, the class of persons to whom is owed or the damages ?

Referring to *Young v. Bella*, the court found that whatever duty of care the professor had towards the student was vitiated when the student commenced her attack against her.

Regarding the other professors, the court found no evidence that the plaintiff was subjected to any discriminatory or prohibited acts. None of the conduct was animated by religious bias

- Rather, the professors urged the student to focus on the literary analysis, not on the feelings the readings generated in her.
- Conclusion: *The law must be restrained in intervening in the conduct of affairs in any circumstances where what are at issue are expressions and communications made in the context of the exploration of ideas, no matter how controversial or provocative those ideas may be.*
- Absent bad faith, a university is not subject to court action by students and others who are offended by controversial or unpopular speech.

## Dawson v. University of Toronto Ont Ct of Appeal (2007)



- Grad student brought claim against university on grounds of negligence. Argued that the Chair of Graduate Studies gave her flawed advice about her options when she was considering withdrawing for a period of time. Such negligent advice is a tort she claimed for which the university should be liable in damages.
- Court refused to allow the action to proceed. Claim against professor “*part and parcel of her academic dispute with the university*”.
- Jurisdictional issues arise in the context of remedy sought – Reversal of academic decision? - Judicial review. Damages due to breach?- Claim in court.
- Judicial review the best way to pursue this claim

# Judicial Review

## Procedural Fairness/Natural Justice



- Person who thinks she has been treated unfairly may apply for judicial review of the decision(s), seeking to have decision reversed (re-instatement, grade expunged) or re-considered. Damages not available.
- Standards for a university degree and assessment of a student's work are clearly vested in the university and a court has no power to intervene merely because it thinks that the standards are too high or the student's work was inaccurately assessed.
- However, if there is a denial of *natural justice* or *procedural fairness* in academic matters, there will be some measure of judicial intervention.

# Procedural Fairness



- Students can't challenge the academic assessment, but can complain about the process.
- Natural justice or procedural fairness have been described as “fair play in action.” Both require that the person who will be affected by a decision has the right to know the case against her and be heard by an unbiased decision maker.
- The degree of procedural fairness expected will depend on the context.
- A high standard of justice is required when the right to continue in one's profession or employment is at stake.
- Courts will not intervene if there are internal university processes still available.

- Law student failed Evidence exam. Grade was based on 3 exam booklets handed in. The student claimed she had handed in 4 booklets.
- She appealed unsuccessfully to the Faculty Examination Committee and Senate Committee.
- Each committee concluded that there had been no 4<sup>th</sup> booklet; however, neither committee gave her a hearing.
- The student applied for judicial review, claiming denial of procedural fairness. The Divisional Court rejected the application.

- On appeal, the Court of Appeal held:
  - In circumstances where credibility is an issue, the student deserves an oral hearing.
  - The Committees failed to consider the examination procedures.
  - The student was not given the opportunity to correct or challenge the factors which influenced the decisions.
  - The appeal to the Senate Committee was not a hearing *de novo*, so previous flaws were not remedied.



# Khan v. University of Ottawa



- *“I recognize that courts have shown great deference to the academic and disciplinary decision-making functions of universities ...But I see no room for deference and no basis for a more stringent standard of judicial review when all internal university tribunals deny a student procedural fairness. If, as here, the procedures of the university committees do not conform to the requirements of fairness, they should be reviewable.”*
- *“ In many academic appeals, procedural fairness will not demand an oral hearing. An opportunity to make a written submission may suffice. For example, I doubt that students appealing their grades because they believe they should have received a higher mark would ordinarily be entitled to an oral hearing. What distinguishes this case is that the determining issue before the Examinations Committee was Ms. Khan's credibility. In denying Ms. Khan relief the Committee judged her credibility adversely. In my view, the Committee should not have done so without affording her an in-person hearing and an opportunity to make representations orally. ”*
- Remedy – refer her appeal of the Evidence grade to the Examinations Committee for an oral hearing.

# *Mulligan v. Laurentian University (2008)*

## *Ct of Appeal*



- Applicants denied admission to Masters of Science program because supervisor did not have funding.
- Departmental policy required students without a scholarship to receive a TA and contributions from supervisor's research grant of \$6,000.00 in yr 1 and \$8,000 in yr 2. Students prepared to fund themselves
- Sought judicial review alleging bias and procedural unfairness. Divisional Court dismissed application. Appealed to Court of Appeal which dismissed the appeal.
- Decision – University faculties and programs have considerable discretion in choosing who, among a pool of persons who meet the admissions standards, will be admitted. The decision to admit goes to the core of a university's functions. Courts should be reluctant to interfere in those essential functions.
- There was no procedural unfairness. Normal steps were followed, students made aware of the funding policy; they had a chance to discuss the policy and were advised that the requisite funding did not include parental funding.

## ***Alghaithy v. University of Ottawa* SCC (2012)**



- Starting in 3rd year of neurosurgery residency and continuing through his dismissal in his 5th year, residency program administrators complained of Alghaithy's unprofessional behaviour and absenteeism.
- Placed him on a formal remediation period, and issued written warnings when the problematic behaviours persisted. Then voted to dismiss him from the neurosurgery program.
- At the Senate Appeals Committee, the applicant pointed to various procedural irregularities at the lower level committees in arguing that the requirement to withdraw should be dismissed. The Senate Appeals Committee ruled that because it had the jurisdiction to consider the case on its merits, and where necessary, to hold a hearing *de novo*, it need not resolve the issue of whether there had been procedural irregularities at the lower levels.
- The Senate Appeals Committee considered the case *de novo*, and found against the applicant.

# *Alghaithy v. University of Ottawa*



- The Court considered whether the Senate Appeals Committee's *de novo* hearing cured procedural irregularities at the lower levels. The Court cited *Khan v. University of Ottawa*: "The closer the appeal is to a complete reconsideration, with fair procedures, by a body that does not attribute significance to the initial decision, the more likely the defects will be cured."
- Applying this standard, the Court found that the Appeals Committee put no weight on the decisions reached by the lower level committees, and instead reviewed the documentation, written submissions and oral testimony on its own. Accordingly, the question of procedural fairness turned on whether the Appeals Committee's procedure was fair, and not on the procedures followed earlier.
- Court reviewed the Appeal Cttee's reasons( detailed) and found that it considered all relevant evidence including his pattern of behaviour, standards in the profession that there was no breach of procedural fairness in the Senate appeal and its decision was reasonable.
- Recently an appeal to the SCC was dismissed

## **Alavi v. York University, Ont Divisional Ct (2010)**

Doctoral student in Chemistry violated Code of Conduct with threatening, abusive behaviour towards supervisor. Local Adjudicator imposed restrictions on his contact with supervisor and entry to the lab. Entry to be authorized by supervisory committee and department head. Internal appeals unsuccessful.

- Failed to make sufficient academic progress and required to withdraw. Appealed and allowed to continue with alternate supervision.
- Applied for judicial review of decision to impose restrictions on the grounds of lack of procedural fairness and sought an order requiring York to provide him with a qualified supervisor.
- Court found that internal appeal processes were fair. No evidence of bias. And the Adjudicator had the authority to impose the restrictions.
- Re mandamus, evidence showed that Graduate Program Director and Dean looked for qualified supervisors. Student's field highly specialized and no one willing to act either because of nature of the research or concerns about behaviour.
- Court acknowledged that it is the student who seeks out supervisor and must make a case to the proposed supervisor. Supervisor not provided as of right. Applicant has no legal right to a supervisor

## What can go wrong procedurally?

- Absence of appeal procedures to address academic failures and discipline arising from non academic misconduct.
- Failure to advise student of an investigative process, consequences of a finding of wrongdoing or appeal rights.
- Decision making body meeting with witnesses, obtaining or considering evidence without student's knowledge. No opportunity to hear evidence against him or her and respond.
- Failure to give adequate notice and reasonable opportunity to respond.
- Denying adjournment
- Denial of right to advocate or counsel
- Failure to give reasons

# Protection for All



- Clear set of rules (re behaviour and academic requirements) and appeal procedures. Faculty are given discretion to set evaluation standards, but they must implement those standards fairly and without bias.
- Course outlines should provide all course expectations .
- Describe appeal processes available to students: nature of the levels of appeal (review or hearing de novo, oral or in writing), disclosure of relevant material, timelines, parties, representatives, witnesses.
- Appeal bodies are acting as judicial bodies; must be fair, unbiased (actual or perceived) and objective and informed about the appeal process

## Summary

- Issue will be viewed as an academic one if it focuses on the academic requirements, rules and regulations and the means and results of evaluations.
- Courts will not interfere with the discretion of universities to manage their academic affairs, their decisions re the nature and quality of education, course offerings, faculty instruction and evaluation methods
- What is important is the characterization of the nature of the dispute. If there are superficial or incidental contractual or negligence issues, courts will not intervene. However, if there is a clear breach of contract or duty of care, courts will hear the claim.
- Re judicial review, if there are fair, robust internal appeal processes court will not intervene.



- Question is our case, did the university have documents setting out expectations regarding a graduate student's academic progress, required timelines, requirements for a research topic, role of the supervisor, consequences of failing to meet timelines, responsibilities of graduate student. If so, no contractual breach
- Is it an implied term of the contract that a student's right to academic freedom overrides a supervisor's direction? What do the relevant documents say about scientific rigour?
- Canadian courts have recognized the significance of academic freedom, but usually as it relates to faculty. Unless the university document specifically addressed a graduate student's academic freedom rights, the courts would not find that it was a term of the admission contract which could be enforced by the courts.
- Nor would a court conclude that it had the authority or expertise to determine what the scope of academic freedom might be in such a dispute.
- Negligence or breach of fiduciary duty? Did supervisor and department head act in the student's best interest in attempting to direct her research interest? Did the level of discussion deteriorate into personal harassment ?

# Human Rights and the Duty to Accommodate



- Universities have a duty to accommodate students with disabilities or on religious grounds in order to assist the student in meeting the academic standards, provided it can do so without undue hardship.
- The duty to accommodate has both a procedural and a substantive content.
- In the procedural domain, means that there must be an individual assessment of each person affected to determine what is needed to accommodate the disability. No rush to judgment.
- If aware that a student has a disability and is not succeeding in the program, there is an obligation to initiate discussions about possible accommodation.

# Human Rights and the Duty to Accommodate



- Students must still meet academic standards, but the university must provide them with the opportunity(ies) to achieve those standards. Examples:
  - Exam times altered to accommodate religious holidays
  - Extended time limits for completion of a program
  - Extended exam periods
  - Different form of evaluation
  - Lightened course load
  - Flexibility re supervisors
  - Ability to record lectures
  - Related funding issues
- Consultation important.
- Reasonable, not perfect accommodation, to be expected.
- Cooperation from the person affected is expected. If a reasonable proposal is presented which, if implemented, would fulfill the duty to accommodate, the complainant has a duty to facilitate the proposal.
- Is there a requirement to change content of course or academic standards to accommodate a student's religious beliefs?

## Freedom from Discrimination with respect to Services

- *Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.*

# Ketenci v. Ryerson, Ontario Human Rights Tribunal, (2012)



- Masters student in Social Work Program whose belief system was based on ethical veganism; her proposed thesis topic was on specieism and Social Work . Program Director advised that the “*topic is not consistent with the curricular objectives of the Master’s program*”. Brought human rights complaint alleging discrimination in the provision of goods services and facilities on the basis of creed, claiming that her beliefs were a factor in how she was treated by the university.
- The HRTTO held a summary hearing to determine whether, based on the allegations, and assuming, without deciding, that the ground of creed was engaged,” *there is a reasonable prospect the applicant can establish discrimination*”.
- The Tribunal stated that, “*The Code does not extend so far as to preclude the university from critiquing academic work simply because it contains an articulation of a student’s values or beliefs. To hold otherwise would be to shelter academic work from oversight or criticism because it makes reference to the author’s creed.*”... “*Further, to accept the applicant’s arguments would be to hold that, where a Code ground is engaged, it is discriminatory to express disagreement in an academic context. This would chill academic discussion*”
- Professors have a right to academic freedom and this freedom is engaged in their evaluation of students’ work. However: “*Academic freedom does not override the respondent’s Code obligations. In other words, while academic freedom may include the ability to express a critical opinion of academic work, it is not a licence to discriminate by treating a person differently from others because of her beliefs.*”

- *Ketenci* referred to in a 2012 Tribunal case, *McKenzie v. Isla*, involving a faculty member, Isla, and the university chaplain, McKenzie
- Isla loudly critical of the chaplain's involvement in campus ministries and Catholic student experiences abroad.
- McKenzie applied to the Tribunal claiming discrimination and harassment in employment on the basis of his creed.
- Tribunal determined that application should not proceed to hearing because no reasonable chance of success.
- *"Ambiguity in the scope of Code rights should be resolved in favour of protecting freedom of expression"*.
- Re academic freedom, *"courts and tribunals should be restrained in intervening in university matters where what is at issue is communication made in the context of the exploration of ideas, no matter how controversial.....The mere fact that comments are hurtful does not make them discriminatory"*.
- Harassment under the Code must be a course of vexatious comment or conduct, based on a prohibited ground, that is known or ought reasonably be known to be unwelcome . Isla's comments were personally offensive, but not harassment on a prohibited ground.

# Ont Freedom of Information and Protection of Privacy Act



- With certain exemptions, a requester is entitled to have access to “records” “*in the custody or under the control of the*”... university
- The question in this case is whether faculty and student emails are considered to be “records” of the university
- In the *City of Ottawa v the Ontario Information and Privacy Commissioner*, the issue was whether the emails of a city employee to staff at the Children’s Aid Society, where the employee was a volunteer board member, were city records. The IPC ordered disclosure of the records, arguing that they were on the city’s server and therefore in its custody and control.
- The court focused on the purpose and intent of freedom of information legislation and noted that the primary purpose was to enhance participation in the democratic process by providing citizens with access to government information.
- The court asked whether having access to an employee’s private communications unrelated to government business advances the purposes of the legislation. Would denying access to those private communications impair a citizen’s right to participate in democracy?

- Decision: No
- Clear that student emails on university servers not subject to access legislation in Canada.
- Faculty emails may be, depending on the context. If they concern university business –committee meetings and other administrative work, yes, course work, perhaps, teaching responsibilities, communications with students, yes.
- If they concern personal matters unrelated to the university's business, then they will not fall within the scope of the Act