The Erosion of Charitable Immunity for Virginia's Colleges and Universities and What it Means for the Administrators and Trustees Who Lead Those Institutions.

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Historically, Virginia courts have treated non-profit colleges and universities as charitable institutions which are insulated from liability for simple negligence. This rule (known as the doctrine of "charitable immunity") is founded upon the policy that charitable resources should be used to further the goals of a charitable institution, rather than to pay tort claims asserted by the beneficiaries of the charity. Not only does charitable immunity protect charitable institutions from certain types of liability, but it typically filters down to the organizations' volunteers, directors and trustees. Thus, charitable immunity traditionally has offered non-profit colleges and universities in Virginia – as well as the individuals who serve those institutions – an additional layer of protection against tort liability. However, recent court rulings have eroded this protection for the Commonwealth's non-profit schools.

Most recently, a state court in Norfolk found that Virginia Wesleyan College ("VWC") was not entitled to charitable immunity for a student's claim that the school was liable for failing to prevent a sexual assault following a school-sponsored party at which alcohol was served. VWC sought to dismiss the student's negligence claim by invoking charitable immunity. While the Court recognized that VWC originally was founded as a non-profit, religious institution for the charitable purpose of advancing Christian education, the Court considered a number of factors specific to VWC's operations and concluded that VWC no longer operates as a charitable institution. Because the factors cited by the Court are typical of non-profit colleges, the ruling may have wide application to most non-profit colleges in Virginia.

After recognizing that colleges historically have been viewed as charitable institutions, the Court questioned whether that remains the case. Opining that the role of colleges and universities has evolved over time, the Court concluded that "the provision of higher education to its students, by itself, does not inherently qualify as a charitable or eleemosynary purpose." Thus, the Court looked to various other criteria to decide whether VWC was entitled to charitable immunity. Among these factors, the Court emphasized (i) the school's history of earning a profit, (ii) its practice of charging substantial tuition to its students, and (iii) its engagement in significant debt collection practices when students failed to pay tuition. Based largely on those criteria, the Court decided that VWC could not invoke charitable

immunity. Reading between the lines, the Court's ruling appears premised upon the belief that, in the modern era, colleges and universities are run like businesses, and the students are more akin to paying customers than beneficiaries of a charitable organization.

While other courts in Virginia have denied schools the right to invoke charitable immunity, some recent decisions have upheld the doctrine in the context of higher education. Even the Court in the VWC case noted that "each specific educational institution needs to be evaluated on its own merits." Thus, charitable immunity is not dead for colleges and universities. Nevertheless, the recent decision certainly demonstrates that the protections of charitable immunity appear to be deteriorating for colleges and universities.

The question is what impact this erosion of charitable immunity might have on the Commonwealth's non-profit educational institutions. While the loss of such immunity is not a positive for colleges and universities, it is important to note that the deterioration of charitable immunity may be offset by other measures to insulate schools from liability.

For example, the types of claims to which charitable immunity historically has applied (claims for bodily injury or property damage caused by the negligence of a charitable organization) often are insured under general liability insurance policies or other products available to schools in the insurance marketplace. It is vitally important that colleges and universities work with their risk managers and insurance advisors to procure and maintain adequate types and amounts of insurance coverage to protect institutional assets.

Similarly, the VWC decision may create concern among trustees, directors or others who serve institutions in a volunteer capacity that they might now be exposed to personal liability for their conduct in the course of their service to a school. However, those fears may be allayed both through the purchase of proper insurance (such as directors and officers liability insurance) and by the statutory protections in Virginia for those who serve on boards of non-stock corporations. Under the Virginia Code, officers and directors of a non-stock corporation that is exempt from income tax under § 501(c) of the Internal Revenue Code can only be liable to the corporation or its members in an amount equal to the compensation they received in the 12 months preceding the event giving rise to the claim. The statute specifically provides that any volunteer officers or directors who serve without compensation "shall not be liable for damages" in actions related to their service to the corporation.

The ultimate lesson is that, while non-profit colleges and universities in Virginia may no longer be immune from negligence claims under the doctrine of charitable immunity, there are other protections available that schools can use to limit their exposure to such claims. The erosion of charitable immunity is not a good thing for our institutions of higher learning, but it does not spell disaster.

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