ARTICLE

STUDENT SUICIDE ON-CAMPUS: TORT LIABILITY OF CANADIAN UNIVERSITIES AND DETERMINING A DUTY OF CARE

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Trigger Warning/Content Warning:

This paper and its sources contain information about suicide and/or suicidal ideation. While the paper has been written to follow the Crisis Services Canada ("CSC") guidelines for reporting on suicide, there are certain sections with direct quotes which may be triggering to readers. We encourage readers to reach out to CSC or their local suicide hotline for support. If you are experiencing suicidal thoughts, help is available.

ABSTRACT

Suicide is a devastating issue that is increasingly affecting post-secondary students across Canadian university campuses. Despite growing awareness of this problem, research shows that mental health supports for post-secondary students in Canada remain insufficient and inaccessible. This paper argues that the law is also lagging behind. Currently, no legal recourse exists to find universities civilly liable if students die by suicide, on- or off-campus. In an effort to address this lag, this paper examines the potential consequences of expanding the duty of care owed by universities to their students in tort law. This paper briefly maps the current legal terrain, both in terms of general duties of care that universities owe their students and jurisprudence related to suicide prevention, for example, in the contexts of jails and hospitals. The paper turns to American jurisprudence that has recognized a duty of care for universities to prevent student suicides and considers the potential costs and benefits, for universities and students alike, of adopting such a standard in Canada to create a new and expanded duty.

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INTRODUCTION

In November 2019, a University of Toronto student died by suicide. This was the third suicide in less than two years at the Bahen Centre for Information Technology, a building at the university's downtown St. George campus.[1] The 2018 Annual Report published by the University of Toronto's Campus Police Services provides a detailed statistical overview of reported incidents that occur on campus. In both 2017 and 2018, there were three suicides (or attempted suicides) that occurred on campus.[2] Unfortunately, when it comes to suicides on campus in recent years, the University of Toronto is far from alone. Mental health crises, including suicides, are becoming increasingly common on today's Canadian campuses.

Families who may be seeking to recover after the death of a loved one currently have no legal recourse in Canada against universities, as universities are not liable for student suicides in tort. Expanding tort liability[3] owe a duty of care to their students may be an appropriate direction for the evolution of the law of negligence. Though Canadian courts have not recognized such a duty in the context of preventing student suicides, some American courts have recently shown a willingness to find that, in some circumstances, universities owe a duty of care to students to prevent suicide.

This paper begins by providing a social scientific background on mental health and suicide at Canadian universities, including an overview of statistics, mental health resources, and university policies. It will then outline what the "duty of care" is—the first requirement for finding a cause of action in negligence—and circumstances where positive duties of care can be found. The paper will explore the current Canadian jurisprudence on university liability to students and existing contexts where courts have recognized duties to prevent suicide, such as in prisons and hospitals. Finally, this paper argues that universities should be found liable in tort for failing to prevent student suicides on campus. It looks at American jurisprudence that has already recognized such a duty and provides a brief overview of what the standard of care for universities may look like. The paper concludes with a note of caution by considering the potential unintended consequences of expanding tort liability in this domain. As law and economic scholars on the left and right have long insisted, tort liability can incentivize conduct that undermines the policy goals of the law. Any arguments for expanded tort liability will have to consider that this might incentivize universities to require students with mental health struggles to take temporary or permanent leave to reduce the university's legal exposure. In other words, the solution may create problems all of its own.

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1 Melissa Mancini & Ionna Roumeliotis, "'It's literally life or death': Students say University of Toronto dragging feet on mental health services" *CBC* (20 November 2019), online: <www.cbc.ca/news/canada/toronto/student-suicides-mental-health-support-1.5363242> [perma.cc/73S4-3RW9].

2 University of Toronto, "Campus Community Police, St. George Campus 2017 Annual Report" (2018), online (pdf): *University of Toronto* <campuspolice.utoronto.ca/wp-content/uploads/2019/08/2018-Campus-Police-Annual-Report-University-of-Toronto-Affairs-Board.pdf> [perma.cc/27ZG-ZMK6] at 8.

3 For ease, the term "universities" will be used in this paper to refer to all post-secondary institutions, including but not limited to universities, colleges, and private career colleges.

I. AN OVERVIEW ON MENTAL HEALTH AND CANADIAN UNIVERSITY STUDENTS

The state of mental health on Canadian campuses has long been criticized. Some risk factors in worsening mental health, such as the inherent stress of transitioning into adulthood and independent living, are not created by universities themselves. Others, however, like lack of resources and funding for preventative measures, and undue pressure in certain academic programs are created and influenced by the institutions themselves. While universities have made significant improvements in facilitating access to mental health resources and implementing policies in the past few decades, they do not seem to be providing adequate support for their students.

A. Statistics

According to Statistics Canada, suicide is the second leading cause of death in Canada for those aged 15-24, accounting for almost one-quarter of deaths for this demographic.[4] In 2018, this accounted for the deaths of 534 Canadians in this age range.[5]

The most recent Canadian National College Health Assessment (conducted in 2016), which surveyed almost 44,000 students, found alarming rates of mental health issues among students.[6] The assessment reported 59 percent of students feeling hopeless, 64.5 percent feeling overwhelming anxiety, 44.4 percent feeling so depressed they had difficulty functioning, 13 percent had seriously contemplated suicide, and 2.1 percent had attempted suicide.[7] Additionally, each statistic had increased since the previous survey in 2013, with the most significant increases being overwhelming anxiety (8% increase), debilitating depression (6.9% increase), and hopelessness (5.8% increase).[8]

B. Suicide Risk Factors for Adolescents and University Students

Several risk factors are associated with adolescent suicidality. There is strong evidence supporting a correlation between suicidality and depression, alcohol abuse, use of hard drugs, suicidal behaviour among friends, living apart from parents, family conflict, unsupportive

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4 Statistics Canada, *Depression and suicidal ideation among Canadians aged 15-24*, by Leanne Findlay, Catalogue No 82-003-X (Ottawa: Statistics Canada, 18 January 2017).

5 Statistics Canada, *Deaths and age-specific mortality rates, by selected grouped causes*, Table 13-10-0392-01 (Ottawa: December 2019 update).

6 American College Health Association, "American College Health Association- National College Health Assessment II: Canadian Reference Group Data Report Spring 2016" (2016), online (pdf): *American College Health Association* <https://www.acha.org/documents/ncha/NCHA-II%20SPRING%202016%20CANADIAN%20REFERENCE%20GROUP%20DATA%20REPORT.pdf> archived at [perma.cc/5GKK-PXYC].

7 Shirley Porter, "A Descriptive Study of Post-Secondary Student Mental Health Crises" (2019) 22:1 College Q.

8 *Ibid*.

parents, and a history of abuse.[9] Relationship, academic, and money problems have also been associated with increased suicidality for students.[10]

Many of these factors are prevalent, and perhaps even become exacerbated, when adolescents begin their university education. Many students decide to live in on-campus residences in their first year of university to experience this new stage of their lives with their peers. While this experience can be rewarding, it can also pose significant issues for students' mental health because of the physical distance from a familial support network when living on-campus. The lack of a social support network from family and friends has been identified as an important correlate for student suicidal ideation.[11] While students moving away for university may still have emotional and financial support from parents, the physical separation can cause stress as they navigate being independent for the first time.[12] Research has identified family cohesion, spending time with family, and parental supervision as mitigating factors for adolescent suicidality. In contrast, factors such as poor communication with parents and low perceived support have been identified as risk factors.[13] Therefore, there is likely an increase in risk factors and a decrease in mitigating factors when a student moves away for university, especially if there is a breakdown in communication or perceived lack of support due to the physical separation.

Certain factors are disproportionately associated with suicidality in women. Research has found that for young women in university, chronic recent alcohol consumption and sexual assault trends are important predictors of suicidality.[14] This is especially concerning considering the alarming rates of sexual assault on campus.[15]

For Indigenous students, a host of risk factors result in a higher likelihood for mental health issues, including relocating from their home community and coming from a lower socioeconomic status than the general student population.[16] Negative experiences in universities resulting in poor mental health outcomes may also be attributable to a lack of culturally appropriate training for university staff, which may repeat the cycle of colonization and assimilation.[17]

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9 Emma Evans, Keith Hawton & Karen Rodham, "Factors associated with suicidal phenomena in adolescents: a systematic review of population-based studies" (2004) 24:8 Clin Psychol Rev 957.

10 Hugh Stephenson, Judith Pena-Shaff & Priscill Quirk, "Predictors of College Student Suicidal Ideation: Gender Differences" (2006) 40:1 Coll Stud J 109 at 109–110.

11 Amelia M Arria et al, "Suicide ideation among college students: A multivariate analysis" (2009) 13:3 Archives of Suicide Research: Official J Intl Academy for Suicide Research 230 at 231.

12 *Ibid* at 242.

13 *Ibid* at 240.

14 Stephenson, Pena-Shaff & Quirk, *supra* note 10 at 114.

15 In 2018, a survey on sexual violence experiences was administered on behalf of Ontario's Ministry of Training, Colleges and Universities to participating post-secondary institutions. The results were very concerning: 63.2 percent of university students disclosed experiencing sexual harassment since the beginning of the academic year alone. [Ontario, Ministry of Training, Colleges, and Universities, *Student Voices on Sexual Violence Survey* (CCI Research Inc., 19 March 2019).]

16 Nolan K Hop Wo et al, "The prevalence of distress, depression, anxiety, and substance use issues among Indigenous post-secondary students in Canada" (2020) 57:2 Transcultural Psychiatry 263 at 264.

17 *Ibid*.

C. Barriers to Mental Health Care

While there are clear mental health concerns among university students, studies also show that these individuals are not seeking mental health services. A 2013 study surveying Canadians aged 15-19 found that only 27 percent of suicidal adolescents consulted with a mental health professional.[18] This age range is significant because adolescents typically enter university at age seventeen or eighteen. Institutional barriers contribute significantly to the issue of students receiving and accessing appropriate and adequate mental health support. These barriers include, but are not limited to, lack of funding, inefficient training of staff, underdeveloped policies, and stigmas and stereotypes.[19] These barriers will now be discussed in further detail.

D. Lack of Funding Affects Availability and Access of Mental Health Resources

While treatment from psychiatrists or family doctors is covered by public health insurance (in Ontario, the Ontario Health Insurance Plan—OHIP), other mental health care providers such as psychologists and social workers are not. The Ontario Psychological Association recommends that its members charge patients $225 for a private session.[20] Not all psychologists charge at this rate, and some do offer "sliding-scale" payment options for those who cannot otherwise afford care.[21] However, even at $150 per hour, counselling may still be too costly for many Canadians, especially university students from lower-income households or those financially supporting themselves. For those trying to be proactive and start therapy on a regular basis, rather than seeking medical assistance from a psychiatrist once a major problem develops, the cost may be prohibitive.

A University of Toronto graduate shared her story in a recent CBC article about the insufficient mental health resources at the university.[22] After waiting several weeks to join a campus therapy group, she attempted suicide shortly after. Campus counselling put her on a priority list for one-on-one therapy, but she still had to wait over a month before seeing a counsellor. Under-funding mental health resources can not only make it more difficult for students to access help, but it can also deter them from seeking support at all. This is because they may not want to pay for out-of-pocket private therapy or find it pointless to wait weeks or months for covered counselling on-campus.

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18 Esme Fuller-Thomson, Gail P Hamelin & Stephen JR Granger, "Suicidal ideation in a population-based sample of adolescents: Implications for family medicine practice" (2013) 2013 ISRN fam med 1.

19 Maria Lucia DiPlacito-DeRango, "Acknowledge the Barriers to Better the Practices: Support for Student Mental Health in Higher Education" (2016) 7:2 Can J for Scholarship Teaching & Learning 2.

20 Peter Goffin, "Timely, affordable mental health therapy out of reach for many" *The Toronto Star* (29 December 2016), online: < https://www.thestar.com/news/gta/2016/12/29/timely-affordable-mental-health-therapy-out-of-reach-for-many.html> [https://perma.cc/5SVS-UQCD].

21 *Ibid*.

22 Mancini & Roumeliotis, *supra* note 1.

E. Mental Health Policies at Canadian Universities are Underdeveloped

While universities across Canada have policies on directing students towards available mental health resources, these policies are riddled with problems. Many are outdated because institutions continue to reflect a "weeding-out" philosophy.[23] A "weeding-out" philosophy encourages students to compete against each other, rather than collaborate and work together, to "weed out" or eliminate students who are deemed unfit.[24] This increases students' stress and exacerbates mental health concerns. Additionally, campus mental health policies also tend to be reactive rather than proactive, meaning that university policies do not focus on preventing and combatting student mental health issues before they develop or worsen.[25]

A 2017 study conducted by the University of Calgary surveyed 168 universities to evaluate the current state of mental health policies across Canadian campuses.[26] The results showed that 50 percent of universities reported having policies to address crisis management, while only 40.4 percent reported having policies or procedures to support students with severe mental illness.[27] Surprisingly, only 32.3 percent of universities reported having a policy regarding students who have attempted or threatened to attempt suicide.[28] These statistics illustrate a significant gap in necessary mental health policy. Without proper policies, vulnerable students across Canadian campuses are left without adequate and proactive support.

The University of Calgary survey also found that less than a quarter of the institutions researched student mental health in the last five years.[29] This may indicate why so few universities implement adequate mental health policies. Without first identifying the most urgent problems on campus, universities will not be able to establish formal mental health policies that meet their objectives.

An additional concern about existing mental health policies across Canadian campuses is that many have yet to implement screening methods that actively identify students with serious mental health concerns or those in crisis.[30] Implementing screening methods is an important step for early detection of mental health problems and could consequently lead to earlier intervention. For example, the University of British Columbia has implemented an "Early Alert System", designed for students to report peers that are in distress so that they can be connected with appropriate resources and services.[31] Instead, most institutions rely on self-identification, putting the onus on students to self-identify as requiring mental health support and to independently seek out mental health services.[32]

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23 Elisea De Somma, Natalia Jaworska & Emma Heck, "Campus mental health policies across Canadian regions: Need for a national comprehensive strategy" (2017) 58:2 Can Psychol/psychol Can 161 at 161.

24 *Ibid*.

25 *Ibid*.

26 *Ibid*.

27 *Ibid* at 165.

28 *Ibid*.

29 *Ibid*.

30 *Ibid*.

31 *Ibid*.

32 *Ibid*.

F. Training of University Staff is Insufficient

The 2017 University of Calgary survey also identified a lack of crisis intervention training for university staff. Although 81.7 percent of universities reported providing crisis intervention training for staff providing counselling services, only 54.9 percent provide this training to Residence Advisors (upper-year students that live in residence and provide support to students living in the building).[33] Additionally, only 45.3 percent of institutions offer gatekeeper training (suicide-specific training on how to ask someone if they are contemplating suicide and how to convince this person to seek appropriate professional assistance).[34] Lack of training specifically for Residence Advisors can have grave consequences for the most vulnerable students. As previously discussed, the transition into adulthood when students move away from home is difficult for many of them. Considering that few suicidal students seek help from mental health professionals, providing gatekeeper training consistently across Canada to Residence Advisors may be imperative to ensure vulnerable first-year students living on campus have a more accessible and approachable resource. Further, these statistics do not address the effectiveness of the training provided.

G. Stigma and Stereotyping Contributes to the Problem

Issues of stigmas and stereotypes surrounding mental health and mental illness can affect both students accessing support and the faculty and staff who provide it.[35] Self-stigma exists where students internalize negative attitudes towards mental illness expressed by society—for example, that having a mental illness is shameful or will prevent one from being successful—and can prevent students from accessing necessary support.

Cultural stigmas can also play a role in preventing students from seeking mental health services due to stigmas or concerns that seeking such services are contrary to cultural values.[36] For example, in one study, American Indigenous adolescents with thoughts of suicide reported embarrassment and stigma as reasons for not seeking mental health care.[37] The study also found that this stigma was likely associated with the strong emphasis in traditional healing in Indigenous communities.[38] For racialized individuals, colonialism also contributes to apprehension to access mental health services and distrust in them due to historical abuses and past experiences with mental health professionals who are not culturally-sensitive.[39]

Stigma and stereotyping can also result in university faculty and staff under-reporting cases of students with mental health problems. Staff minimize mental health issues by deeming formal or additional intervention unnecessary.[40] This attitude creates a vicious cycle of university staff

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33 *Ibid*.

34 *Ibid*.

35 DiPlacito-DeRango, *supra* note 19.

36 David B Goldston et al, "Cultural considerations in adolescent suicide prevention and psychosocial treatment" (2008) 63:1 Am Psychologist 14.

37 *Ibid* at 21.

38 *Ibid*.

39 *Ibid* at 26.

40 DiPlacito-DeRango, *supra* note 19.

minimizing mental health issues brought forward by students, which creates apprehension about bringing forward issues in the future, which in turn contributes to staff's views that the mental health crisis is overblown.

II. LAW ON FINDING DUTIES OF CARE

Thus far, this paper has examined the social scientific background of suicide, including the statistics of student suicide, contributing factors, and the significant barriers to accessing mental health care on Canadian campuses. When a student dies by suicide, specifically on campus, do their loved ones have a legal remedy for this devastating loss? Canadian courts have not ruled on this question. However, the most likely remedy would be in a claim of negligence against the university for failing to prevent the suicide of the student.

In negligence cases, the first step in determining defendant liability is finding that a duty of care is owed by that defendant to the plaintiff. Several categories of relationships are recognized as creating a duty of care, such as teacher-student and doctor-patient relationships. [41] However, the duty of care owed to students by their universities is currently not clear in the Canadian case law. Recognizing a novel duty of care would therefore be necessary.

A. Finding a Novel Duty of Care

The test used today by Canadian courts to determine whether a duty of care exists has evolved from the broad *Anns* test first established by the House of Lords.[42] This test involved asking two questions. First, was there a sufficient relationship of proximity between the defendant (the wrongdoer) and the plaintiff (the person who suffered damage), such that it was within the reasonable contemplation of the defendant that carelessness on their part may cause damage to the plaintiff? If so, a *prima facie* duty of care exists. Second, are there any policy considerations that may negate the duty of care?

The Supreme Court of Canada adopted the *Anns* test in *Kamloops (City) v Nielsen*,[43] and redefined it in *Cooper v Hobart*,[44] where the first stage of the *Anns* test was subdivided into two questions. The court must assess: first, whether there was a sufficiently close and direct relationship of proximity between the defendant and plaintiff, and second, whether the harm was a reasonably foreseeable consequence of the defendant's actions. Though the order of these two questions have been treated as being interchangeable in the past, the Supreme Court recently held in *1688782 Ontario Inc v Maple Leaf Foods Inc*[45] that proximity is the "controlling concept." The Supreme Court ruled that this is because proximity informs the foreseeability analysis; thus, it should be considered first.[46]

When assessing proximity, the court must ask whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to

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41 See *Childs v Desormeaux*, 2006 SCC 18 at para 15 [*Childs*].

42 See *Anns v Merton London Borough Council*, [1977] UKHL 4, [1977] 2 WLR 1024 [*Anns*].

43 [1984] SCR 2, 10 DLR (4th) 61 [*Kamloops*].

44 2001 SCC 79 [*Cooper*].

45 2020 SCC 35 [*Maple Leaf Foods*].

46 *Ibid* at 21.

impose a duty of care in law."[47] Courts may find a proximate relationship in one of two ways. A court may establish that the relationship falls within a previously established category or is analogous to one.[48] If a court cannot determine an established proximate relationship, the court must then undertake a full proximity analysis.[49] This is done by examining all relevant factors arising from the relationship, including expectations, representations, reliance, and the property or other interests involved.[50]

When assessing if the injury was reasonably foreseeable, the question is whether the type of injury was foreseeable for the class of persons within which the plaintiff falls. This question is different than whether the loss suffered by a particular plaintiff, could have been foreseen.[51]

If the court finds the relationship to be sufficiently proximate and the harm a reasonably foreseeable consequence, then a *prima facie* duty of care is made out. The second stage of the *Anns* test involves considering residual policy consequences. The complete test is often referred to as the "*Anns/Cooper*" test.

There are some cases in which the foreseeability stage of the *Anns/Cooper* test will be sufficient to establish a duty of care. These are typically cases where the defendant's overt action directly causes foreseeable physical harm to the plaintiff.[52] These differ from cases where the defendant's *failure to act* injures the plaintiff—such cases require a closer analysis of the relationship between the defendant and plaintiff.[53] Failing to prevent a student's suicide would fall under this category of cases.

B. When is There a Duty of Affirmative Action?

Canadian tort law has been apprehensive about finding positive duties of care. There is generally no duty to take positive action to rescue a person in the face of danger.[54] However, in *Childs v Desormeaux*, Chief Justice McLachlin stated that "[a] positive duty of care may exist if foreseeability of harm is present *and* if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity."[55] Three categories were established in which this "special link" may exist between a defendant and plaintiff.[56]

The first category of the "special link" includes situations in which a defendant creates or controls an inherently risky situation and intentionally attracts and invites third parties to it.[57]

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47 *Cooper*, *supra* note 44 at paras 32, 34.
48 *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63 at para 26 [*Livent*].
49 *Ibid* at para 29.
50 *Cooper*, *supra* note 44 at paras 30, 34.
51 See *Maple Leaf Foods* at para 26, citing *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 32-33 [*Hill*] and *Livent*, *supra* note 45 at para 78.
52 *Childs*, *supra* note 41 at para 31.
53 *Ibid*.
54 See *Horsley v MacLaren*, [1970] 2 OR 487, 11 DLR (3d) 277 (Ont CA) [*Horsley*], aff'd [1972] SCR 441.
55 *Childs* , supra note 41 at para 34 [emphasis in original].
56 *Ibid*.
57 *Ibid* at para 35.

For example, a boat captain owes a duty of care to rescue passengers who fall overboard.[58] The second category includes situations in which there is a paternalistic relationship of supervision and control between the defendant and plaintiff.[59] These relationships include parent-child or teacher-student relationships, where the plaintiff has a "special vulnerability", and the defendant is in a formal position of power.[60] Finally, the third category includes situations in which the defendant exercises a public function or operates a commercial enterprise.[61] These include cases where the defendant offers a service to the general public, which creates a special duty to reduce risk.[62] For example, a commercial host who serves alcohol to guests owes a duty to highway users who did not attend the gathering and who an intoxicated guest could foreseeably injure.[63] The Court in *Childs* then identified three common features between these three categories: (1) the defendant's material implication in creating the risk or their control of a risk to which others are invited; (2) concern for the autonomy of the persons affected by the positive action proposed; and (3) the theme of reasonable reliance.[64]

III. EXISTING DUTIES OF CARE BETWEEN UNIVERSITIES AND STUDENTS[65]

A. The Contractual Relationship Between a University and a Student May Give Rise to a Duty of Care

The seminal Supreme Court of Canada case, *Bella v Young*,[66] determined whether a university owes a duty of care to its students. In *Bella*, the plaintiff university student wanted to apply to a social work program after her undergraduate degree. In one of her classes, she attached an appendix to her term paper, which detailed a case study of women sexually abusing children. Her professor, the defendant, mistakenly believed this case study to be a confession and reported the plaintiff to the provincial Child Protection Services. The plaintiff was "red-flagged" as a potential child abuser in the social work community, where she hoped to later obtain a job. She brought forward a successful claim in negligence against the professor and the university.

In the *Bella* decision, the Court highlighted that the plaintiff's claim in negligence was a

58 *Ibid*, citing *Horsley*, *supra* note 54.
59 *Ibid* at para 36.
60 *Ibid*.
61 *Ibid* at para 37.
62 *Ibid*.
63 *Ibid*, citing *Stewart v Pettie*, [1995] 1 SCR 131, 121 DLR (4th) 222 [*Stewart*].
64 *Ibid* at paras 38–40.
65 Much of the Canadian case law featuring university liability in negligence does not question whether a university owes a duty to protect their students from harm (whether that be harm from a third-party or from oneself). With a quick online search, one can find many instances of universities being sued for negligence in failing to prevent injury, sexual assault, etc. However, it is difficult to find *judgements* for these cases. The lack of case law featuring a university failing to protect its students may be because the deep pockets and reputation at stake for universities favour settlement rather than proceeding to trial.
66 2006 SCC 3 [*Bella*].

broad one, encompassing the university's dealings with her generally.[67] The Court emphasized a contractual relationship between the plaintiff and defendant: "[t]he appellant, even as a 'distant' student, 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 in both contract and tort."[68] The Supreme Court's decision in *Central & Eastern Trust Co v Rafuse* provides this common law rule regarding tort liability arising from contractual relationships: "[w]hat is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract."[69] This means that a contract between a university and student may create a relationship of dependency on the part of the student, but the "rights and responsibilities" a student is entitled to may be beyond the terms of the contract. Additionally, the relationship's contractual nature can give rise to a one of sufficient proximity to create a duty of care where one may not have existed otherwise.[70] However, as will be discussed below, this is situational as not every contractual relationship between a university and a student automatically gives rise to such a duty of care.[71]

B. The Duty of Care Analysis is a Circumstantial One

There is no general duty of care between universities and students, and a *prima facie* duty of care will not necessarily arise in every case involving a student and an educational institution.[72] In *Hassum v Conestoga College Institute of Technology & Advanced Learning*, the plaintiff students sued the defendant institution, arguing that the institution owed a duty of care not to charge the students "illegal or otherwise proscribed and impermissible fees".[73] However, the trial judge found that the negligence duty of care analysis is highly contextual, and in this case, no such duty existed.[74] Additionally, the trial judge, applying *Bella*, held that the contractual relationship affording sufficient proximity to give rise to the duty of care was specific to *those circumstances*.[75] A duty of care was not inferred "from the relationship between the defendants *qua* fee charging educational institutions and the plaintiffs *qua* fee paying students at these institutions."[76]

In contrast, in *Creppin v University of Ottawa*,[77] a class action was proposed by the university's varsity hockey team after the university suspended the entire team due to allegations of sexual assault. The suspension happened despite the fact that the university was aware that only two

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67 *Ibid* at para 30.

68 *Ibid* at para 31.

69 *Central & Eastern Trust Co v Rafuse*, [1986] 2 SCR 147 at para 58, 31 DLR (4th) 481 [*Central & Eastern Trust Co.*].

70 *Ibid* at para 57.

71 *Hassum v Conestoga College Institute of Technology & Advanced Learning*, [2008] OJ No 1141 at para 53, 2008 CanLII 12838 (Ont Sup Ct) [*Hassum*].

72 *Ibid*.

73 *Ibid* at para 4.

74 *Ibid* at para 53.

75 *Ibid*.

76 *Ibid*.

77 2015 ONSC 4449 [*Creppin*].

students were involved in the conduct. The plaintiffs made several claims against the university and its president, including in negligence. The trial judge used the duty of care analysis between a university and student from *Bella* to determine that there was a duty of cared owed, and the statement of claim in negligence could not be struck out. The trial judge found that the relationship between the university's president and plaintiff students was "arguably one of such proximity that any harm to the students by the president's actions would have been reasonably foreseeable."[78] Additionally, the court did not find a policy consideration that would negate the duty.

IV. DUTIES TO PREVENT SUICIDE: CURRENT CANADIAN JURISPRUDENCE

The duty to prevent suicide is not recognized in most circumstances because "on the whole, people are entitled to act as they please, even if this will inevitably lead to their own death."[79] Generally, adults do not have a duty to protect each other from the consequences of their own self-harm. As stated by Lord Hoffman in *Reeves v Commissioner of Police of the Metropolis*:

> there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves…People of full age and sound understanding must look after themselves and take responsibility for their actions…[D]uties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.[80]

Despite these generalizations, Canadian case law has identified some instances where there is a positive duty of care to prevent suicide.

A. A Duty to Prevent Suicide Has Been Recognized in the Jailor-Prisoner Relationship

Courts have found a duty of care is owed by police officers (or more generally, "jailors") to prisoners in their care to prevent suicide. Prisoners are entitled to have their jailors exercise reasonable care to protect them from foreseeable risks. In *Funk v Clapp*,[81] Funk was arrested for impaired driving and died by suicide in his cell at the Prince George lock up. His widow brought a claim in negligence against the Royal Canadian Mounted Police ("RCMP") constable who arrested Funk and booked him into lock-up, the jail guard on duty, and the RCMP staff sergeant in charge the night of Funk's death. The British Columbia Court of Appeal found that one of the foreseeable risks for incarcerated individuals is suicide, considering the evidence of a high number of suicide attempts at the specific lock-up.[82] The evidence also showed that the defendants were aware of this high risk of prisoners dying

78 *Ibid* at para 20.

79 *Reeves v Commissioner of Police of the Metropolis*, [1999] 3 All ER 897 at 913, Lord Hope, [1999] 3 WLR 363 (HL (Eng)) [*Reeves*].

80 *Ibid* at 902, Lord Hoffman.

81 (1986), 68 DLR (4th) 229, 1986 CanLII 1119 [*Funk*].

82 *Ibid* at para 8 (a senior police officer at the lock up where Funk died by suicide counted 20 suicide attempts in a 70-day period proceeding Funk's suicide).

by suicide.[83] Therefore, given the relationship of sufficient proximity, the foreseeable risk of suicide for prisoners as a group, and the lack of policy considerations that ought to negate that duty, there was a *prima facie* duty of care to prevent the prisoner's suicide.[84] This duty of care is owed to all prisoners, although officers are required to be more vigilant regarding prisoners displaying suicidal tendencies.[85]

B. A Duty to Prevent Suicide Has Been Recognized in the Hospital-Patient Relationship

Courts have found that hospitals owe a duty of care to their patients to take reasonable steps to keep them safe while hospitalized. In *Paur v Providence Health Care*,[86] an intoxicated patient, Paur, was brought into the hospital and staff suspected him to be suicidal. While hospitalized, he attempted suicide and suffered a brain injury as a result. In the "foreseeability of harm" stage of the *Anns/Cooper* test, the evidence showed suicide by the specific method was not "predictable" in this case; however, this was not determinative for the legal test of foreseeability.[87] Rather, it is enough if "one can foresee *in a general way* the class or character of injury which occurred".[88] Several factors in the evidence showed that there was information known to the hospital that "Paur was at a foreseeable, real risk of harm by hanging himself in the bathroom."[89] These factors included the knowledge that Paur had suicidal ideation and that he was intoxicated. Further, the hospital had information on suicidal intoxicated patients generally, suicidal patients attempting suicide at this hospital using the method used in this case, the risk of suicide due to the room layout of the specific unit, and what measures to take to prevent suicide.[90] The British Columbia Court of Appeal stated that there was "little question" that the hospital had a duty to keep Paur safe, including a duty to provide him with adequate supervision, premises, and policies to keep him reasonably safe from harm.[91]

C. A Duty to Prevent Suicide Has Been Recognized in the Teacher-Student[92] Relationship

Another instance where there may be a duty to prevent suicide is in the case of teacher-student relationhips. In *Gallant v Thames Valley District School Board*,[93] a 17-year-old student, Gallant, submitted an essay which began with statements about wanting to die by suicide and the specific method he would use. Gallant died by suicide twelve days later by the method he detailed. His teacher had read his essay a few days prior. The school board had

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83 *Ibid* at para 9.
84 *Ibid* at paras 48, 50.
85 *Ibid* at para 48.
86 2017 BCCA 161 [*Paur*].
87 *Ibid* at para 20.
88 *Millette v Cote*, [1976] 1 SCR 595 at para 8, 51 DLR (3d) 244 [*Millette*] [emphasis added]. See also *School Division of Assiniboine South, No 3 v Hoffer et al* (1971), 21 DLR (3d) 608 at 614, [1971] 4 WWR 746 (Man CA), aff'd [1973] 6 WWR 765 (SCC).
89 *Paur, supra* note 86 at para 23.
90 *Ibid*.
91 *Ibid* at para 19.
92 In this case, "student" refers to a student in elementary, middle, or high school.
93 2011 ONSC 869 [*Gallant*].

provided teachers with resources on how to identify a student at risk of suicide after two other students at the school had died by suicide in the year prior. Gallant's parents alleged that the defendant teacher was negligent in failing to inform them of their son's essay, which caused or contributed to his death. There was no evidence of the steps the defendant teacher took to discharge her duty of care owed to the student, which could not be determined without a complete evidentiary record (as this was a motion for a summary judgment).[94] There is no doubt she owed a duty of care *generally* to Gallant as his teacher, but whether she had a duty to prevent suicide was a question left open for trial. Unfortunately, like many cases involving educational institutions, this matter was likely settled after the motion, as there is no record of a trial. However, this leaves open the possibility that a duty may be owed by teachers to students to protect them from self-harm and suicide, even if this duty simply requires informing the student's parents.

D. Policy Considerations in Allowing Recovery for Suicide

The *Anns/Cooper* test's final step to find a novel duty of care is to consider policy reasons to negate the *prima facie* duty of care. Whether the surviving family of a person who dies by suicide can recover damages for their death is a public policy question that Canadian courts have contemplated. The Court in *Gallant* discusses much of the policy rationale from the 1985 decision, *Robson v Ashworth*.[95] *Robson* had important precedential value in answering this question, and the Ontario Court of Appeal later affirmed it. When the court decided *Robson*, the state of the law was that there was "a well-recognized rule of public policy that the survivors of a person who commits suicide [were] not entitled to benefit from the suicide. The Courts have recognized however that there can be circumstances where a tortfeasor may be held responsible for a death by suicide."[96] At the time, these cases were only those where a tortfeasor's negligence caused a mental condition serious enough to render suicide likely.[97] To render the tortfeasor liable, the ensuing suicide required a sufficient causal connection with the negligent act.[98] For example, in *Cotic v Gray*,[99] Cotic was seriously injured in a motor vehicle accident caused by a negligent driver. He was soon after diagnosed with paranoia and described as "overtly psychotic".[100] Sixteen months after the motor vehicle accident, Cotic died by suicide, and his widow was able to recover damages from the negligent driver for his death.

Justice Galligan also cited a comment by Lord Denning in *Robson,* which was, at the time, recent: "though suicide was no longer a crime, it was still unlawful, and his Lordship felt it was most unfitting that the personal representatives of a suicide should be able to claim damages in respect of his death."[101] Justice Galligan later expressed his opinion about allowing recovery for suicide:

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94 *Ibid* at para 32.

95 [1985] OJ No 545, 1985 CarswellOnt 820 (Ont SC, H Ct J) [*Robson*].

96 *Ibid* at para 127.

97 *Ibid* at para 128.

98 *Ibid*.

99 [1981] OJ No 3043, 124 DLR (3d) 641) (Ont CA) [*Cotic*].

100 *Ibid* at para 10.

101 *Robson*, *supra* note 95 at para 131.

> Accordingly, I have asked myself the following question: Does the law permit a sane person deliberately to kill himself and expect that a person who was not the cause of the problems that led to his suicide will be called upon to support his widow and children? Unless the concept of individual responsibility has now been rejected by our law, it seems to me to be repugnant to public policy and to that common sense upon which it is based to answer the question in the affirmative.[102]

Finally, the phrasing of Justice Galligan's finding that the defendant doctor was not liable for the patient's death by suicide provides some insight into the different societal views of suicide at the time the case was decided: "I have reached the conclusion that it would be against public policy for the plaintiff and her children to benefit in any way *at the expense of Dr. Ashworth* for Robson's *deliberate suicide*."[103]

Suicide was decriminalized in 1972 in Canada. Although *Robson* was decided after this, the illegality of suicide had a strong influence in creating the public policy rule that prohibited recovery for survivors of a person who died by suicide.[104] Today, more time has passed since the decriminalization of suicide than when *Robson* was decided. The Court in *Gallant* recognized that *Robson* may not carry the same precedential value that it once did. The court acknowledged that because *Robson* was decided several decades ago (Robson had been decided twenty-five years prior to when *Gallant* was decided), public policy and community views on suicide may have changed.[105] Support for this view is evident in insurance case law, where survivors of a suicide victim are able to recover accidental death benefits, despite suicide not being accidental *per se*.[106]

The Court in *Gallant* also held that *Robson* did not create a rule absolutely precluding survivors of a suicide victim from recovering.[107] Exceptions exist when negligence "might impose liability on someone charged with the care of a person likely to commit suicide if due care is not taken."[108] Professor Klar has also written that the rule precluding survivors from benefiting from a wrongdoing should not apply to dependants of suicide victims who were not parties to the "wrongdoing".[109] This reflects the change in society's views and the law

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102 *Ibid* at para 135.

103 *Ibid* at para 137 [emphasis added]. On the facts of the case, it is possible that the defendant doctor would have been found liable, had the case been heard today. Justice Galligan provided little empathy to a family that had been devastated by the tragedy of a father and husband's suicide. Additionally, it is curious that he chose to use the term "deliberate" to describe the suicide, as most dictionaries would define a suicide as the intentional or deliberate killing of oneself. Is there such a thing as an undeliberate suicide? By choosing to call it a "deliberate suicide", it seems as if he placed moral blameworthiness on Robson for committing some wrongful act, thus implying that no one else should have to "suffer the consequences" for his "deliberate act".

104 *Gallant*, *supra* note 93 at para 34.

105 *Ibid* at para 44. Considering *Robson* was decided almost 35 years ago, it is very much possible that views on suicide have changed.

106 See *Vijeyekumar v State Farm Mutual Automobile Insurance Co.* (1999), 175 DLR (4th) 154, 44 OR (3d) 545 (Ont CA) [*Vijeyekumar*].

107 *Gallant*, *supra* note 93 at para 38.

108 *Robson*, *supra* note 95 at para 130.

109 *Gallant*, *supra* note 93 at para 42.

surrounding suicide—suicide is no longer seen as a "wrongdoing"—leading to the conclusion that dependants should be able to recover in tort if they did not assist the victim in their death.

Finally, the Court in *Gallant* highlights the Supreme Court of Canada's opinion from *Hall v Hebert* that public policy may change over time: "tort cases, which would necessarily involve the consideration of public policy as a bar to recovery, should determine the applicable principles on a case-by-case basis. These principles, like those applicable in the law of tort, should be flexible and evolve with our ever-changing society. What may be contrary to public policy in our decade may be perfectly acceptable in the next."[110]

V. A DUTY TO PREVENT SUICIDE ON CAMPUS: AMERICAN JURISPRUDENCE

A. A Duty of Care to Prevent Student Suicides Has Been Recognized in Some American Jurisdictions

In recent years, some American jurisdictions have found that universities do have a duty to prevent student suicides.[111] *Schieszler v Ferum College*[112] is one of the first cases to recognize this duty of care. In 2000, Michael Frentzel, a first-year student at Ferum College, died by suicide in his on-campus residence dormitory. The university had been aware that he had "emotional problems"—campus police found him in his room a few days before his suicide and found that him had intentionally harmed himself—and that he had sent communications to his girlfriend and another friend about his specific intent and methods. The method described in the communications matched the method that resulted in his death by suicide. Additionally, the Dean of Student Affairs had Frentzel sign a statement that he would not hurt himself again after campus police found out that he had harmed himself. Frentzel's estate representative brought a wrongful death suit against the university, the Dean of Student Affairs, and Frentzel's Residence Advisor. She claimed that the defendants knew or should have known that Frentzel would likely harm himself if not properly supervised, and that they were negligent by failing to take adequate precautions to ensure he did not harm himself, which resulted in his death. The United States District Court for the Western District of Virginia provided a thorough analysis of Virginia case law and that of other American jurisdictions to find that the facts of this case (specifically, the school's knowledge about the potential for self-harm) resulted in a finding that a special relationship might exist. Therefore, there was a duty to protect Frentzel from the foreseeable danger that he would hurt himself.[113]

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110 *Hall v Hebert*, [1993] 2 SCR 159 at para 71, 101 DLR (4th) 129 [*Hall*].

111 Beyond universities, the United States Court of Appeals for the Sixth Circuit recently held a school board to be liable for the suicide of an eight-year-old boy: see *Meyers, et al v Cincinnati Bd of Education*, 2020 WL 7706731 (9th Cir) [*Meyers*]. The Court in *Meyers* found that suicide was a reasonably foreseeable risk given the circumstances surrounding the student's death (harassment and bullying that the student was experiencing at the school). Though these circumstances are very different from the university context discussed in this paper, it shows a willingness of courts to find that suicide may be a reasonably foreseeable consequence that schools may need to be aware of in certain scenarios.

112 236 F Supp (2d) 602 (Va Dist Ct 2002) [*Schieszler*].

113 *Ibid* at 609.

The court denied the university's and Dean's motions to dismiss but granted the Residence Advisor's motion, as she could not have taken any additional steps to protect Frentzel without direction from the university or the Dean.

Nguyen v Massachusetts Institute of Technology[114] is one of the most recent American cases that recognizes a duty to prevent suicide in a university context. Han Duy Nguyen was a 25-year-old graduate student at the Massachusetts Institute of Technology ("MIT") when he died by suicide on campus in 2009. MIT first became aware of Nguyen's mental health issues and past suicide attempts two years before his death. Unlike in *Schieszler*, the university provided him with many resources and encouraged him to seek help, which Nguyen's usually refused. While MIT was not found liable for Nguyen's death, the Massachusetts Supreme Judicial Court (the state's appellate court) found that the relationship between universities and students is a special one. This special relationship gives rise to affirmative duties of reasonable care, creating a duty to rescue, including the duty to prevent suicide.[115]

When analyzing whether a special relationship exists between universities and students, the Court in *Nguyen* recognized that there are competing interests: "[s]tudents are often young and vulnerable; their right to privacy and their desire for independence may conflict with their immaturity and need for protection. As for the universities, their primary mission is to educate…but they still have a wide-ranging involvement in the lives of their students."[116] Various factors are accounted for in the "special relationship" analysis, as suggested by legal scholar Ann MacLean Massie:

> foreseeability of harm to the plaintiff…; degree of certainty of harm to the plaintiff; burden upon the defendant to take reasonable steps to prevent the injury; some kind of mutual dependence of plaintiff and defendant upon each other, frequently (as in these cases) involving financial benefit to the defendant arising from the relationship; moral blameworthiness of defendant's conduct in failing to act; and social policy considerations involved in placing the economic burden of the loss on the defendant.[117]

While the Court in *Nguyen* went on to find that a duty of care should be recognized to protect students from dying by suicide, it was clarified that this duty is not a generalized one.[118] Rather, there are certain conditions that must exist for a non-clinician[119] to owe a duty of care:

> [w]here a student has attempted suicide while enrolled at the university or recently before matriculation, or has stated plans or intentions to commit suicide, suicide is sufficiently foreseeable as the law has defined the term, even for university nonclinicians without medical training. Reliance of the student on the university for assistance, at least for students living in dormitories or away from their parents or guardians, is also

114 479 Mass 436 (2018) [*Nguyen*].

115 *Ibid* at 437.

116 *Ibid* at 452.

117 Ann MacLean Massie, "Suicide on Campus: The Appropriate Legal Responsibility of College Personnel" (2008) 91:3 Marq L Rev 625 at 639.

118 *Nguyen*, *supra* note 114 at 455.

119 Non-clinician here refers to a university administrator (implying that they do not have formal medical or counselling training).

> foreseeable. Universities are in the best, if not the only, position to assist…They have also "fostered" expectations, at least for their residential students, that reasonable care will be exercised to protect them from harm.[120]

This means that university staff do not simply owe a duty to any student expressing suicidal ideation without a plan or intention to die by suicide; the finding of a duty of care hinges on self-harm being foreseeable.[121]

VI. PROPOSING A NOVEL DUTY OF CARE IN CANADA

A. The *Anns/Cooper* Test, Stage 1(a): Universities May Have a Sufficiently Proximate Relationship With Their Students

While no Canadian jurisdiction has found that universities owe their students a duty of care to prevent suicide, the time may have come to recognize this duty. As discussed previously, courts can employ the *Anns/Cooper* test to determine if a duty of care is owed. The first requirement for finding a novel duty of care is a sufficiently close and direct relationship of proximity between the plaintiff and defendant.[122] This could be found in the context of universities owing a duty to protect students from suicide. The Supreme Court in *Childs* found three categories where a "special relationship" can give rise to a duty to take affirmative actions. These categories had the common features of: the defendant creating and controlling the risk, the concern for the defendant's autonomy in proposing the positive action, and the theme of reasonable reliance.[123] The *Childs* categories and common features also align with the factors used in Massie's analysis of the "special relationship". [124]

Risk creation is one example of why there may be a relationship of sufficient proximity: for example, universities may create risk by implementing "weeding out" philosophies. Such actions can, in turn, contribute to and aggravate mental illness, as the university pits students against each other. It also creates stress for those who realize they may not be able to

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120 *Nguyen*, *supra* note 114 at 455.

121 *Ibid*.

122 Depending on the circumstances, a direct relationship of proximity may be found between the student and an employee of the university (which could result in vicarious liability—the university is held liable for the negligence of an employee acting in their capacity as an employee) *or between the student and the university institution itself*. In the university context, it is more likely that direct liability would be imposed on the institution due to its own negligence. Though this paper has addressed student suicides in public school contexts, the circumstances in these grade schools may tend to involve the negligence of one teacher or staff member that had a close relationship with the student—in these circumstances, an argument of vicarious liability may be a better approach for finding liability. In contrast, within universities, there may be multiple actors as well as systemic factors (such as policies) that contribute to a student's suicide risk. In *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 42, 133 DLR (4th) 1 [*Ross*], the Supreme Court of Canada held that "a school board has a duty to maintain a positive school environment for all persons served by it", thus imposing a duty of care on school boards *themselves*. Similarly, a duty of care could be imposed on universities *themselves*, given the analysis in this paper.

123 *Childs*, *supra* note 41.

124 Massie, *supra* note 117 at 639.

continue in their program if they are at the bottom of their class. While there is concern that imposing a positive duty of care may affect the autonomy of universities, these institutions would only have a positive legal duty to act when they create and control risks.[125]

Additionally, while the relationship between universities and students may not satisfy the "paternalistic relationship of supervision and control" category, students living on-campus are still significantly more dependent on the university for support than students living off-campus. Thus, for first-year students living in residence, the feature of reasonable reliance by a plaintiff student on the defendant university might create a "special relationship."

Finally, the direct financial benefit to universities arising from their relationships with students should be considered, which falls under the third *Childs* category. While *Hassum* does state that the fact that a student pays fees to a university does not in and of itself create a *prima facie* duty, this is a factor that courts should consider in finding a relationship of sufficient proximity.[126]

While the relationship between universities and their students does not appear to neatly fit into a *Childs* category of "special relationships", it seems the relationship takes on many of the common features of the categories.

B. The *Anns/Cooper* Test, Stage 1(b): Suicide may be a Reasonably Foreseeable Consequence

Given that the relationship between universities and their students may be held as sufficiently "close and direct" to find a proximate relationship, whether suicide resulting from a university's actions or omissions is a reasonably foreseeable consequence must be assessed. As emphasized in *Nguyen*,[127] depending on the specific facts of a case, suicide could be a reasonably foreseeable consequence for a student, should their university negligently fail to provide adequate mental health resources and support.[128] Additionally, *Funk* found a duty of care owed to prisoners because suicide was a reasonably foreseeable risk for prisoners as a group, despite Funk not presenting as a suicidal individual himself. A high-pressure university environment is not comparable to that of a jail or prison, where one's liberty is at stake or deprived and prison officials exercise near-absolute control. However, based on the social scientific evidence, it seems clear that university students do represent a group of the population that is particularly vulnerable and at risk for mental health concerns, including suicide. Given the statistics for mental illness and suicide among university students, it may be reasonable in some cases to find that suicide is a foreseeable consequence if a university acts negligently. Considering the sufficient proximity between universities and their students, and the reasonable foreseeability of suicide in certain contexts, courts may find that a *prima facie* duty of care could therefore be made out in certain circumstances.

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125 *Childs*, *supra* note 41 at para 39.

126 *Hassum*, *supra* note 71.

127 *Nguyen*, *supra* note 114.

128 *Ibid* at 455.

C. The *Anns/Cooper* Test, Stage 2: Residual Policy Considerations May Still Not Negate the Duty of Care

Finally, in the *Anns/Cooper* test, policy considerations may weigh against recognizing an otherwise valid *prima facie* duty of care. To reiterate the previous discussion in this paper regarding policy considerations, societal views on suicide have evolved in the last few decades. While a significant stigma still exists, it is not what it once was.

Finding a duty to protect students in *certain circumstances* will not open the floodgates because certain conditions must be met to trigger the duty of care. Massie and the Court in *Nguyen* both suggest that "it is both the *actual knowledge* on the part of the non-clinician college administrator, together with the *imminence* of the threat, that can create the duty to take reasonable steps to prevent self-harm."[129] Relevant factors for this analysis would include whether the university knew of any suicide attempts by a student in the recent past, whether staff or officials knew or acknowledged that a student had mental health issues, and whether the student is living on-campus. Weighed also against countervailing medical confidentiality issues, these non-exhaustive factors would be relevant for courts deciding on a case-by-case basis whether the facts appropriately give rise to a preventative duty of care.[130]

Another policy concern that may emerge relates to imposing liability on non-clinicians for not taking steps to protect students at-risk, despite not being medical professionals who can diagnose clinical issues.[131] However, under this proposed limited duty of care, non-clinicians would not be expected to make medical judgments or decisions. Rather, the duty would impose realistic duties and responsibilities, and non-clinicians would be expected to make decisions based on what a reasonable person in their role would do given the specific facts of the case.[132]

One final policy consideration that may cut against finding a preventative duty of care in this context is the paternalistic and intrusive consequences this may have for the privacy and autonomy of young adults. Courts could attend to this risk both by using a contextual case-by-case analysis and ensuring that the preventative duty is limited to serious cases. As the court stated in *Nguyen*, having a limited duty of care "respects the privacy and autonomy of adult students in most circumstances, relying in all but emergency situations on the student's own capacity and desire to seek professional help to address his or her mental health issue."[133]

D. "Damned if You Do, Damned if You Don't": Finding a Duty of Care May Still Be to the Detriment of Students

One significant issue that remains if a duty of care to prevent suicide is recognized is that universities may mitigate this by forcing students to take a leave of absence—temporarily or permanently—due to mental health concerns. That is, universities may react to avoid the risk

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129 Massie, *supra* note 117 at 670 [emphasis in original].

130 *Ibid*.

131 *Ibid* at 675.

132 *Nguyen*, *supra* note 114 at 457.

133 *Ibid*.

of tort liability in a manner that is to the overall detriment of students and their educational pursuits. If a student is at risk of suicide, a university may attempt to distance itself by forcing the student to take leave, thereby severing the relationship of sufficient proximity.

Such policies have been introduced both in Canada and the United States. In 2018, then Chief Commissioner of the Ontario Human Rights Commission, Renu Mandhane, criticized a mandatory leave policy that had been recently implemented at the University of Toronto: "the *Policy* appears to allow the University to immediately put the student on leave and withdraw essential services (housing, health, and counselling services) at a time when the student is in crisis and most in need of support. This approach is not consistent with the *Policy*'s intent of preventing harm."[134] In the United States, some schools have gone one step further, and demanded withdrawal permanently for "endangering behaviour".[135]

This "damned if you, damned if you don't" situation can negatively affect both universities and students. Universities may risk lawsuits regardless of what they do (either for failing to prevent the suicide of a student if they allow the student to stay in the program, or for forcing a student to withdraw "for their own good").[136] In turn, students may be apprehensive about seeking out services if they know that disclosing mental health issues may force them to take a temporary or permanent leave from the university.

However, the hope with recognizing a duty of care is that it may act as an accountability mechanism for universities so that they recognize they have certain obligations to protect their students physically and mentally. Recognizing a duty of care in tort law does not mean that suicide is evidence of a breach in every case. There will be cases where suicide occurs, despite universities meeting their respective standard of care. The law should emphasize meeting this standard of care, which may mitigate universities resorting to mandatory leave policies in cases where there are mental health concerns.

VII. STANDARD OF CARE: A BRIEF OVERVIEW

Most of this essay discussed duties of care and why one should be found for universities to protect their students from self-harm and suicide. A brief overview of what the standard of care would entail will now be discussed. *Creppin* provides that the relationship between the university and plaintiff students "gave rise to a duty of care which carried a standard of care requiring the university's conduct not create an unreasonable risk of harm."[137] Meeting this standard of care requires that universities take certain reasonable measures. *Nguyen* suggests that if the university has developed a suicide prevention protocol, it must be employed when the university knows one of its students is at risk.[138]

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134 Letter from Renu Mandhane to Claire MC Kennedy, Chair of the Governing Council at University of Toronto (29 January 2018), online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/re-university-mandated-leave-absence-policy-%C2%ADraises-human-rights-concerns> [https://perma.cc/4WTE-56HD] (Then Chief Commissioner Renu Mandhane has now been appointed a judge of the Ontario Superior Court of Justice).

135 Massie, *supra* note 117 at 671.

136 *Ibid* at 672.

137 *Creppin*, *supra* note 77 at para 23.

138 *Nguyen*, *supra* note 114 at 456.

In the absence of a protocol, several reasonable steps can be taken, including contacting the appropriate university officials empowered to assist the student in obtaining clinical care.[139] Should the student refuse such care, reasonable steps may include contacting the student's emergency contact.[140] In the case of an emergency, reasonable steps would include contacting police and emergency medical personnel.[141] These suggestions entail reactive measures taken only when there is an imminent threat that the student may harm themself or attempt suicide. Meeting the standard of care may also require taking preventative measures to ensure students are supported before an emergency arises. As discussed earlier in this paper, this may include: providing adequate counselling (with increased accessibility for at-risk students), properly training university staff (including professors), training Residence Advisors to support first-year students (at minimum, by providing them with gatekeeper training), and implementing better policy, including proper suicide prevention protocols.

CONCLUSION

Suicide remains the second leading cause of death among Canadian adolescents and young adults, including university students. Courts have found in limited circumstances that institutional actors and officials may owe a duty of care to prevent suicide, for example, to prisoners, patients, and potentially grade-school students. University students are vulnerable to mental illness, and private law might play a potentially productive role in incentivizing universities to provide better supports and services. Given this, it may be time for courts to recognize that universities owe a duty of care to protect their students from self-harm and suicide.

Courts should assess this duty on a case-by-case basis. This analysis would involve determining whether there was reasonable foreseeability that the university's negligence could result in a student dying by suicide and whether the relationship between the university and student was sufficiently proximate to give rise to such a duty. Factors to consider in this analysis include whether the student depended on the university (creating a sufficiently proximate relationship) and the university's knowledge about the student's suicide risk (foreseeability). One might argue that there are policy considerations to negate this duty of care, such as the propensity of Canadian courts not to allow recovery in tort for suicides and wanting to respect the autonomy of adults. However, changing societal views about suicide and the recognition of the magnitude of mental health issues on campuses may negate such policy concerns. Finally, a duty of care would only be found in limited circumstances, so a general duty owed by universities to every student is not implied. A plaintiff would still need to overcome the substantial hurdles of finding that the university breached the standard of care and proving causation. Some American courts have begun to recognize a duty of care to protect university students from suicide. While no case of student suicide has been brought to a Canadian court yet, the issue will likely arise in the near future, and hopefully, courts will acknowledge that recognizing a duty of care is a step forward in better protecting vulnerable students.

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139 *Ibid*.

140 *Ibid*.

141 *Ibid*.