



# Privacy law, students at risk and the **safe campus**

By Dan Michaluk

**P**romoting a safe campus environment is top of mind for university administrators across Canada. Over the past two years, we have witnessed a number of significant and disturbing events. These include a shooting at Virginia Tech and a student suicide at Carleton University that have raised claims that privacy law inhibits the creation of good safe campus policy.

My colleagues and I at Hicks Morley have spoken out against these claims because they are both inaccurate and disempowering. Universities have a duty to provide a safe learning and working environment *and* a duty to respect individual privacy. We strongly believe that meeting both these duties is possible. In this article, I explain that the issue of student suicide is part of the challenge of providing a

safe campus and stress the importance of risk-based decision making in promoting safety without sacrificing privacy. I refer to the Carleton University suicide, but am not passing judgement on Carleton's actions and am only using this misfortune because it is necessary and highly-relevant context for my comments.

### **Suicide and shootings should both be viewed as safety risks**

Universities should generally refrain from distinguishing between suicide and shootings in making safe campus policy.

Following the recent suicide at Carleton, a number of editorials were published that questioned the nature of a university's duty of care to its students. Judith Timson of the *Globe & Mail*, for example, stated, "We also need to be

clear on the meaning of *in loco parentis* – does the university have the obligation to act as a parent would in the case of a distressed student?" This question is one that naturally follows a student suicide, and it is similar to the question raised and litigated after Elizabeth Shin committed suicide at M.I.T., in 2000 in her now well-known case. Although universities do not stand in the place of a parent, the exact duty to care for a student is not clear, given the unique university-student relationship. Students are adults, but are typically not fully independent from their parents. Moreover, a university's offering to its students is too multi-faceted to be fairly characterized as simply 'adult education.'

Although interesting, I suggest that the duty of care debate is not highly relevant to university policy makers charged with promoting campus safety. Every Canadian university has policies, procedures and services to address students at risk. In one sense, these are 'support frameworks' that may justify a special duty of care to individual students. In another, they are required as part of the duty to provide a safe campus environment to all community members, but are also 'supportive' because they are structured so students are treated with dignity and respect. Given that the latter duty is well-established, student-at-risk frameworks are strongly supported by universities and are focussed on managing risk rather than providing care. They also do not distinguish between the risk of self-inflicted violence and violence inflicted on others. In my view, this is the correct approach. From a risk-based perspective, the problem of suicide and the problem of shootings are the same. They are acts of violence that universities should actively manage.



## Privacy can be respected by promoting good risk assessment process

Universities can manage the risk of violence while respecting individual privacy by promoting good risk assessment processes. In short, universities should ensure that a person or group of persons qualified or trained in risk assessment should receive all relevant information about potential threats on a timely basis so defensible, risk-based management decisions can be made.

Those inquiring into the Virginia Tech shooting have now identified that the university had custody of information that was not shared with its multidisciplinary threat assessment team. There is speculation that, if this team had access to all the information known by people inside the university, it might have managed the risk posed by the shooter to a different outcome. The apparent breakdown was not caused by privacy law. Privacy law only imposes requirements for the free flow of information about disturbing behaviours to a risk assessment team. By developing policy that encourages the reporting of behaviours necessary to a *bona fide* risk monitoring program, universities can respect individual privacy, while managing risk based on a proper base of information.

Good risk assessment can also help address the problem alleged in the Carleton student suicide – the problem of


reporting to parents, police and others who might be able to help a student at risk. Every privacy statute in Canada has an exception that allows organizations to disclose personal information when the disclosure is necessary to prevent harm. In Ontario, the standard for disclosure that pertains to information held by a university outside of a health care relationship is a ‘compelling circumstances’ standard. Universities can also require students to consent to certain routine disclosures as a condition of continued participation in campus activity (e.g., in a ‘behavioural contract’) where they have a reasonable basis for doing so.

Erring on the side of security in assessing cases against the compelling circumstances standard and taking an aggressive and security-focussed approach to imposing behavioural contracts is an option for universities, but it is an option with risks. A university that does not delegate authority for managing students at risk to a qualified or trained risk assessor or group of assessors is essentially managing risk by guesswork. This model can lead to both over- and under-reporting and can, therefore, lead to security and privacy related liability. To the contrary, a university with a process in place that contemplates defensible risk assessment can be confident in managing students at risk. If faced with scrutiny from a court or tribunal, or if faced with public scrutiny, the university can rely on its process as

an indication that considered and met all of its competing duties.

Since I am stressing the limits of privacy law, I should also note that health privacy is different. Disclosure of personal health information gathered in the course of providing health care generally may not be disclosed to prevent harm unless the risk harm is ‘serious and imminent.’ This higher standard for disclosure is to ensure individuals can seek effective and confidential treatment. It creates a special zone of privacy that is limited, however, and does not preclude universities from using information collected, used and disclosed outside of a health care relationship to manage students at risk. Based on my understanding of what occurred at Virginia Tech and other anecdotes shared by university clients, the behaviour of students at risk is often well-known to university administrators. This information cannot be ignored.

## Conclusion

Managing the risk of violence on campus has many challenges and risks, legal and otherwise. It is fair to say that privacy law adds to the challenge, but it is not a justification for inaction nor does it prevent universities from managing the risk illustrated by the unfortunate events of late. 

*Dan Michaluk acts as an advocate on behalf of Hicks Morley's university clients in a variety of matters, with a special focus on issues relating to privacy and access to information. He also maintains an information and privacy law blog called 'All About Information.'*



**NEED ASSISTANCE RECOVERING DELINQUENT STUDENT ACCOUNTS?**

Since 1991, Commercial Credit Adjusters Ltd. has been helping Universities, Businesses and Financial Institutions reduce delinquency and enjoy improved efficiencies. CCA will consult with you to create a customized collection program that will meet your specific business requirements. CCA provides a wide range of Accounts Receivable Management solutions designed to achieve results at cost effective prices. Contact our office to learn more about how we can help you reach your recovery objectives.

**CCA COMMERCIAL CREDIT ADJUSTERS LTD.**

1.866.958.5850 | [www.cca.ca](http://www.cca.ca) | [businessdevelopment@cca.ca](mailto:businessdevelopment@cca.ca)

**INNOVATIVE IDEAS >> EXCEPTIONAL RESULTS**