Service-Learning Paradigms

Intercommunity, Interdisciplinary, International

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CHAPTER 15
SERVICE-LEARNING AND INSURANCE: 'WHO PAYS THE PIPER?'

(with specific reference to the South African situation)

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Introduction

It may be stated, "The main function of an education system is in essence the provision of education for its community" (Dekker & Van Schalkwyk, 1995). Higher education institutions spell this out in their mission statements, which usually have three main focus points: teaching/learning, research, and community service/engagement. Community involvement is an initiative through which the expertise of the higher education institution is applied to address community issues.

In South Africa, there is an increasing imperative for higher education institutions and their students to become involved in community engagement. The notion of "service" in its broadest context is also well established and understood in education. The value of and the values derived specifically by students involved in service-learning are undisputed.

Universities employ a variety of teaching and learning strategies, with inclusion of a formal service-learning component into qualifications being one such approach. Another approach is the cooperative education model, where classroom-based teaching and learning is supplemented and complemented by experiential learning—usually authentic workplace learning, termed work-integrated learning. Both service-learning and work-integrated learning are aspects of experiential learning.

Community engagement forms the third leg of responsibility within higher education and, in South Africa, is currently not separately government-funded. Service-learning offers students opportunities for personal growth and allows them to gain practical experience and thus a sense of civic awareness and responsibility, whilst being aimed at alleviating some sort of need or solving a particular problem identified in the community.

At the University of Johannesburg (South Africa), various incidents occurring within the last few months brought the issue of insurance coverage to the forefront. Instances include a student who had to have her right hand amputated as a result of a workplace accident, trauma counseling having to be arranged for students working in orphanages, a case of rape, and a student who was burnt at work. Needle-prick injuries prove to be an area of great concern for students working in the Health Clinic, and sports injuries occur from time to time. Clearly, an institution would need to firstly identify and understand the various activities its staff and students are engaged in to analyse these activities and the potential risks involved. It would then need to manage the identified risk by taking out appropriate insurance coverage.

Brief definitions of some of the commonly used terms used in the article are given for reference:

- *Experiential learning:* the umbrella term used for structured curriculated learning that occurs (usually) at an off-site external location.
- *Work-integrated learning* (includes teaching and nursing practicals): structured compulsory learning, which occurs at the site of a private or public company in industry.
- *Service-learning:* curriculated, structured, and compulsory learning that occurs in a community setting; e.g., students studying sport management could present gentle exercise classes in a retirement village.
- *Community engagement:* community engagement activities, often voluntary; e.g., a port management student who volunteers to read to the blind.

This article will explore issues surrounding risk management specifically in the practice of service-learning. A brief outline of community engagement and service-learning as seen mainly from a South African perspective follows.

Community Engagement: Service versus Service-Learning

South Africa's Council on Higher Education (CHE) defines community engagement as "initiatives and processes through which the expertise of the higher education institution in the areas of teaching and research are applied to address issues relevant to the community. Community engagement typically finds expression in a variety of forms, ranging from informal and relatively unstructured activities to formal and structured academic programmes addressed at particular community needs (service-learning programmes)" (CHE, 2004, p. 24). Community engagement is thus an umbrella term referring to a range of activities from what may be seen as "pure" service/volunteering (in the sense of benefiting the served community/individual) to service-learning (in which some benefit accrues to the server, usually in the form of academic credit in the case of students).

The 1990s saw a proliferation of service-learning classes in America, with service-learning defined by Bringle & Hatcher as a "course-based credit-bearing, educational experience in which students (a) participate in an organized service activity that meets identified community needs, and (b) reflect on the service activity in such a way as to gain further understanding of course content, a broader appreciation of the discipline, and an enhanced sense of civic responsibility" (1995, p. 112). The University of Pittsburgh defines service-learning as experiential learning that meets the needs of the community and that should be relevant to the course studied (http://www.pitt.edu/~oel/servlear/index,.htm).

Mathieson (2003, p. 5) suggests that service-learning draws on the pedagogy of experiential learning, which is focused on work-based learning. The two concepts are thus related, but are not the same. In South Africa, the CHE has defined service-learning as applied learning that is directed at specific community needs and is integrated into an academic programme and curriculum. It could be credit-bearing and assessed, and may or may not take place in a workplace" (CHE, 2004, p. 26). Muller and Subotzky (2001) define service-learning as "a form of experiential learning in which students engage in activities that address human and community needs, together with structured opportunities intentionally designed to promote student learning and development."

This last definition serves to set the scene for the next section, which will provide an overview of relevant South African legislation impacting service-learning.

Law of Insurance

Insurance is not a modern-day phenomenon. Its origins can be traced back as far as antiquity in which, for example, burial societies existed. Although these societies cannot be seen as insurers *per se*, they established the principle of "mutual assistance in the case of the materialisation of risk"[1] (Reinecke, Van der Merwe, Van Niekerk & Havenga, 2002). The first real known precursor to insurance can be found in the proclamation issued by Hammurabi in 1730 B.C., which declared that all members of a caravan had to pay toward damages suffered as a result of, for example, theft of another member's property. In the Middle Ages, maritime insurance developed as the first form of insurance. During the Industrial Revolution, insurance against fire and theft, akin to insurance as we know it today, was developed.[2]

In South Africa, the law of insurance is primarily regulated by the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998. However, various other acts also cover aspects related to insurance: *inter alia* the Road Accident Fund Act 56 of 1996, the Unemployment Contributions Act 4 of 2002 (UIF), and the Compensation for Injuries and Diseases Act 130 of 1993 (COIDA).

Insurance law is based on an agreement between an insurer and the insured. An insurance contract has been defined as "a contract between an insurer (or an assurer) and the insured (or assured), whereby the insurer undertakes in return for the payment of a price or a premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest."[3]

There are various types of insurance cover that may be taken out. For example, liability insurance refers to insurance against legal liability, whether such liability arises as a result of contract, delict,[4] or otherwise. The liability insured against must be described in the policy and may cover a defined group of persons (e.g., employees) or may extend to the public at large. Another form of insurance is professional indemnity (PI) insurance. For example, a lawyer will take out insurance against possible wrong advice that may be provided to clients, or a surgeon takes out insurance against negligence in the operating theatre. Personal accident (PA) insurance policies provide cover to an insured party by means of lump sum payments and/or periodic payments when a person becomes disabled, dies, or is injured and/or thereafter dies as a result of the injury.[5] If a person contracts HIV/AIDS as a result of, for example, a needle-prick, that person could foreseeably have taken out PA insurance to cover such an event.

An insurer can determine the actual risk involved in providing cover to an insured only if the insured provides all the information that may affect the risk. The duty of disclosure thus finds its origins in the principle of good faith in that the insured, in

particular, must volunteer information that may *materially* alter the risk.[6] This duty involves both a positive duty (i.e., to answer all questions truthfully) and a negative duty (i.e., to disclose all other information that may materially alter the risk, even though it was not asked). This duty of disclosure arises each time that the contract is renewed. Failure to disclose information to the insurer constitutes misrepresentation, which renders the agreement void at the option of the insurer. This means that the insurer can elect to honour the contract or to set it aside. In the event that the insurer elects to set the contract aside, it must return the premiums that have been paid to the insured, and the insurer will then not be liable to cover the insured event. In the case of intentional (fraudulent) or negligent misrepresentation, the insurer has an additional claim for damages against the insured.

Section 58 of the Long-term Insurance Act and section 52 of the Short-term Insurance Act state that any minor[7] of 18 and over may enter into, vary, or deal with insurance policies without the assistance of a guardian. Students can therefore assume responsibility and take out cover against an insured event, such as death or disability, in their own name. In the event that the university provides cover, students can also take out additional insurance to top-up the cover that is provided by the university.

Insurance against the loss, damage, or theft of personal items (e.g., cell phones, laptops, motor vehicles, and the like) naturally would have to be taken out by the students themselves, as neither the employer nor the university would have an insurable interest in such items.

Labour Legislation

Introductory remarks. The Constitution, 1996, guarantees *inter alia* the right to fair labour practices[8] and the right to "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."[9]

South African labour law is highly regulated. It is, however, not the intention of this article to address all the acts that govern the employer/employee relationship, although reference will be made to some of the salient pieces of labour legislation. The primary laws that regulate the employment relationship are the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA). The former is concerned primarily with the promotion of economic development, social justice, and the peaceful regulation of labour relations, which regulate both the individual and collective relationship between the employer and the employee. The latter, however, stipulates the minimum standard employment conditions at the work place and regulates, among others, aspects such as remuneration, overtime, leave, notice, and the like.

Are service-learning students employees? A contract of employment can be defined as "a mutual agreement in terms of which an employee agrees to make his services available under the authority of an employer for a specific period in exchange for remuneration."[10]

Although the LRA does not define an employer, this is generally considered to include any person, including a juristic person or the State, who employs another person and who remunerates the person for the services rendered.[11] On the other hand, an employee is defined as any person, excluding an independent contractor, who receives remuneration.[12] Thus, as the payment of remuneration is an essential element for an employment contract to exist, a student who is engaged in service-learning and who receives no remuneration will not be subject to the protection afforded to employees in terms of the LRA. Moreover, students are engaged in service-learning at a charitable organization, and if they receive no remuneration, they are also excluded from the application of the BCEA.[13]

Vicarious liability. Another aspect that needs to be considered briefly is the concept of vicarious liability, as an employer can be held liable for the delicts committed by its employees on the basis of vicarious liability. In order for the plaintiff to be successful, s/he must prove that (a) an employment relationship existed between the employer and the employee, and (b) the delict was committed in the course and scope of the employee's employment. In order to determine whether or not the delict was committed in the course and scope of employment, one must take all the circumstances into account.

It is doubtful whether or not the "employer" of a student in service-learning could be held liable for a delict committed by a student whilst engaged in service-learning for the same reasons set out above. It is therefore important for students involved in the service-learning environment to have insurance to cover against a claim based on delict against them, which was done "in the course and scope of service-learning." At the very least, students need to be made aware of the potential risks involved and that they could probably be held liable in person for a delict committed as aforementioned.

Social legislation. The Occupational Health and Safety Act 29 of 1997 (OSHA) addresses safety in the workplace by providing a framework for preventive safety measures. An employee, for the purposes of OSHA, means any person who works for another and who is entitled to receive remuneration, or any person who works under the direction or supervision of another. Section 1(2), however, provides that the Minister may in her/his discretion define other persons as employees. It is submitted that

service-learning environments would be responsible to ensure the health and safety of students who are engaged in service-learning, regardless of whether they receive remuneration or not, as an employer's duty is not limited only to employees.

COIDA regulates compensation payable to an employee (or her/his dependents) as a result of work-related illnesses, injuries, or death, as the case may be. For the purposes of this act, an employee is defined as "any person who has entered into or works under a contract of service or of an apprenticeship or a learnership with an employer, whether the contract is express or implied, verbal or in writing, and whether the remuneration is in cash or in kind."[14] Thus, if an employer contributes to the compensation fund, it is indemnified against claims by employees or their dependents as a result of illnesses, injuries, or death sustained in the course of employment. However, if a third party (i.e., any person other than the employer) caused the illness, injury, or death of an employee, the third party is not indemnified against a claim by the employee on the basis of a work-related illness, injury, or death. In such an instance, the employee may claim either from the third party or the compensation commissioner.

For the same reasons set out above, students who are engaged in service-learning would not be entitled to receive compensation in terms of COIDA. This does not, however, mean that such a student (or her/his dependent) would not have a personal claim, based on delict, against any person who caused her/him to suffer an illness, injury, or death. Herein the problem lies: that often the person who is responsible for the loss in, for example, an informal settlement would in all likelihood not have the means to make payment. If there is no prospect of success in a claim, there is no incentive to initiate legal proceedings against such a person, as one would in all probability obtain judgement (if you have proven your cause of action), but would not receive any satisfaction in the form of payment. The only thing that one would "gain" is a huge debt to repay—legal costs. Moreover, it is not always easy to prove all the elements of delict.

Potential Liability for the University

As a general rule, a person cannot be held liable on the basis of delict for an omission or failure to act. However, in certain instances, if a person fails to act, such failure constitutes wrongfulness.

It could be argued that a special relationship exists between the university and its students, akin to the special relationship between a parent and child, in that the university is responsible for the continued education of the parents' children. It could furthermore be argued that the university is aware (or, at the very least, ought to have

been aware) of the inherent potential dangers of engaging in service-learning, yet it places such learning as a requirement in order to comply with all the formal requirements for a particular diploma/degree, and it failed to inform the students of such potential dangers. In the event that a court accepts these (or other similar arguments), the university could be exposed to claims by students on the basis of delict. It is therefore important for universities to inform students of the potential risks to which they may be exposed.

Recommendations

From the above discussion, it is clear that in the event that a student becomes disabled in the course of being engaged in service-learning, the student would have no claim under current labour legislation. However, section 27(1) of the Constitution, 1996, provides that persons have the right to social security and if a person is unable to support her/himself, they have the right to social assistance. Depending on the nature of the disability, the student may qualify for a disability grant. It must, however, be borne in mind that one qualifies for a disability grant only if one is a South African who lived in South Africa at the time of the application for the grant. Moreover, a means test is applied in order to determine whether or not one qualifies for this grant.[15] The amount payable changes annually and varies depending on one's income and assets. In 2005, the maximum monthly disability pension was ZAR 780 and the minimum was ZAR 105 p.m.,[16] which hardly seems fair compensation for someone who may have to repay a National Student Financial Aid Scheme (NSFAS) or other student loan and has studied at a higher institution for a number of years in order to have a better quality of life with the opportunity to increase her/his income potential. It is recommended, bearing in mind the provisions of section 27(1) of the Constitution, 1996, that South African universities through Higher Education South Africa (HESA) make proposals to the Ministers of Education and Labour to consider providing cover under COIDA (or an alternative fund) to students engaged in service-learning in this environment.

As discussed above, the "employers" of students engaged in service-learning would also not be held liable on the basis of vicarious liability for any delict committed by a student during the "course and scope" of service-learning. The student is therefore open to potential claims being instituted against her/him in her/his personal capacity, unless the student has taken out insurance. In most cases, should the claim against the student proceed, it could result in the financial ruin of the student. In an attempt to address similar concerns in the United States of America, the United States

Congress passed the Volunteer Protection Act of 1997 into law on 18 June 1997. The Volunteer Protection Act was enacted essentially to limit lawsuits against volunteers[17] in their personal capacity. However, the act's wording leaves a lot of scope of circumventing the aims of the act and in effect provides a defence only in the event that a volunteer is sued in person, thereby not preventing lawsuits from being instituted against volunteers. As service-learning is curriculated and therefore an obligation placed on students by the Department of Education, it is recommended that HESA investigate this matter fully and provide the Ministers of Education and Social Welfare with recommendations to enact similar legislation, bearing the pitfalls in mind, as the Volunteer Protection Act.

As students engaged in service-learning are not employees and thus not covered by COIDA, it is recommended that the possibility of extending the definition of employee to include "students following a formal service-learning programme" be investigated.

As we believe that the university potentially could be held liable for the failure to inform the students of the inherent risks of participating in service-learning activities—a prerequisite in order to obtain the formal qualification—it is recommended that all universities explain the inherent risks to the students. This should be done in writing but without any legalese. It would also be preferable that information sessions be held during which the processes (and the inherent risks) are explained to the students and, if necessary, their guardians.

In order to act as responsible institutions of higher learning, it is furthermore recommended that the universities provide limited cover to students who are engaged in service-learning activities, as the university requires the students to participate therein before the student can qualify to obtain the credit/degree. Such limited cover could be built into the students' fees or be instituted as a levy.

It is furthermore recommended that universities act as conduit to negotiate top-up cover for students. The university is in a position to use its bulk buying power to negotiate better rates. Such top-up cover would be for the account of the student, but the university could assist in the administration process (e.g., to make payments on behalf of students).

Universities should prepare the students for the service-learning experience. As far as may be determined, students should be placed into safe and healthy service-learning environments. Students should be monitored and supported during their service-learning. The university should develop and communicate the procedures that should be followed in case of a mishap occurring during the service-learning experience. (The preceding statements are part of the accepted quality assurance processes

outlined for work-integrated learning, which are applicable in the service-learning environment as may be seen at http://www.sasce.org.za.)

Lastly, it is recommended that the university enter into an agreement with the student and the community organisation in terms of which liability is excluded.

Conclusions

There is an increasing imperative in South Africa for higher education institutions and their students to become involved in community engagement, alongside the other two focus areas of teaching/learning and research. Service-learning, as a course-based, credit-bearing part of a qualification, is an instance of service occurring under the umbrella of community engagement.

The value derived by all parties involved in the service-learning experience is undisputed, but so are the inherent risks and dangers involved. These risks must be identified, understood, and managed responsibly. Each higher education institution has a responsibility to the stakeholders participating in the service-learning experience—to the university itself, its staff and students, and the community. Issues of risk may be identified as personal (injury, disability, or death); loss of property (own); or damage to a third-party person or property.

Risks involved in service-learning must be disclosed to students up front. The students need to be informed about the cover that the university has taken out for them and the extent of the cover. Where necessary, students would be expected to take out their own cover or additional top-up cover. Preparation, placement into the service-learning situation, and monitoring and support of the student whilst s/he is engaged in service-learning are all important, as is the necessity of clear procedures to be followed should an incident occur.

Just as the higher education institution has a responsibility, so, too, do national government and the ministers of Education and Social Welfare that pass relevant legislation protecting the population. From the paper, it is evident that students engaged in service-learning do not fall into the category of employees and are thus not protected by labour legislation. If community engagement is of national importance and a national imperative, national government structures should give consideration to national blanket cover for students following formal service-learning programmes; consider extending the definition of employee (under COIDA) to include students engaged in service-learning; or follow the example of the United States by enacting a Volunteer Protection Act. The Southern African Society for Co-operative Education (SASCE) should urge HESA to lobby national government on this specific aspect.

Definitions will become important, especially when it is remembered that community engagement occurs on a continuum from altruistic service (where the community may be considered the major beneficiary) to service-learning (an academic component within community engagement).

Insurance cover is expensive, yet it may be more expensive *not* to have adequate cover. It is imperative that higher education institutions work closely with their insurer to ensure adequate risk management, as the issue is simply too important to neglect.

This article has identified what the authors consider to be serious matters related to service-learning. These would need to be investigated further and appropriate measures would have to be instituted to ensure that "the piper is paid" appropriately and that it is not the student who is left to face the music if things go wrong.

References

SOUTH AFRICAN LEGISLATION
Basic Conditions of Employment Act 75 of 1997
Compensation for Injuries and Diseases Act 130 of 1993
Constitution, 1996
Labour Relations Act 66 of 1995
Long-term Insurance Act 52 of 1998
Occupational Health and Safety Act 29 of 1997
Road Accident Fund Act 56 of 1996
Short-term Insurance Act 53 of 1998
Skills Development Act 97 of 1998
Unemployment Contributions Act 4 of 2002
Unemployment Insurance Act 63 of 2001

SOUTH AFRICAN BILLS
Children's Bill [B 70–2003 (Reintroduced)]

UNITED STATES OF AMERICA LEGISLATION
Volunteer Protection Act of 1997

SOUTH AFRICAN COURT CASES
Commercial Union Insurance Co of SA v Lotter 1999 2 SA 147 (SCA)
Lake v Reinsurance Corporation Ltd 1967 3 SA 124 (W)
Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 1 SA 419 (A)
Rauff v Standard Bank Properties 2003 ILJ 126 (W)

Books

Bringle, R. G. & Hatcher, J. A. (1995). A service learning curriculum for faculty. *Michigan Journal of Community Service Learning 2*, 112–122.

Dekker, E. & Van Schalkwyk, O. J. (1995). *Modern education systems.* (2nd Ed.). Durban, South Africa: Butterworths.

Gibson, J. T. R. (2003). *South African mercantile & company law.* (8th Ed.). Cape Town: Juta.

Higher Education Quality Committee (HEQC). (2004). *Criteria for institutional audits.* Pretoria, South Africa: Council on Higher Education (CHE).

Mathieson, S. (January 17, 2003). HEQC draft service learning criteria framework. Presented at the HEQC workshop on service learning held at Vaal Triangle Technikon, South Africa.

Muller, J. & Subotzky, G. (2001). What knowledge is needed in the new millennium? *Organization* 8(2).

Nagel, C. J., Boraine, A., De Villiers, W. P., Jacobs, L., Lombard, S., Lötz, D. J., Prozesky-Kuschke, B., Roestaff, M., Van Eck, B. P. S. & Van Jaarsveldt, S. R. (2000). *Business law.* (2nd Ed.). Durban, South Africa: LexisNexis Butterworths.

Reinecke, M. F. B., Van der Merwe, S., Van Niekerk, J. P. & Havenga, P. (2002). *General principles of insurance law.* Durban, South Africa: LexisNexis Butterworths.

University of Pittsburgh. (2003). www.pitt.edu/~oel/servlear/index.htm University of Pittsburgh (accessed March 5, 2003).

Van Jaarsveld, F. & Van Eck, S. (2005). *Principles of labour law* (3rd Ed.). Durban, South Africa LexisNexis Butterworths.

Web Sites

http://www.capegateway.gov.za/eng/directories/services/11586/47485#who (accessed November 20, 2005).

http://www.capegateway.gov.za/eng/directories/services/11586/47485#how_much (accessed November 20,2005).

http://www.pitt.edu/~oel/serlear/index.htm (accessed March 5, 2003).

http://www.runquist.com/article_vol_protect.htm (accessed November 23, 2005).

http://www.sasch.org.za (accessed September 23, 2005).

Notes

[1] Reinecke MFB *et al* (2002) *General Principles of Insurance Law,* Durban: LexisNexis Butterworths (hereinafter "Reinecke") *op cit* 7 para 17.

[2] Nagel CJ *et al* (2000) *Business Law* (2nd Ed), Durban: LexisNexis Butterworths (hereinafter "Nagel") *op cit* 195 - 1996.

[3] Lake v Reinsurance Corporation Ltd 1967 3 SA 124 (W).

[4] In English law this is referred to as the law of torts. Examples of delicts include motor vehicle accidents and defamation.

[5] For more detail, refer to Reinecke pp 429 *et seq* (para 584).

[6] Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 1 SA 419 (A); Commercial Union Insurance Co of SA Ltd v Lotter 1999 2 SA 147 (SAC). Also see Gibson JTR (2003). *South African Mercantile & Company Law* (8th Ed), Cape Town: Juta (hereinafter "Gibson") *op cit* 505 and Reinecke 110 (para 173) for a broader discussion in this regard.

[7] Section 17 of the Children's Bill [B 70 – 2003(Reintroduced)] reduces the age of majority from 21 to 18 for minors in South Africa. It is anticipated that the Bill will be passed into legislation during the course of the year.

[8] Section 23 Constitution, 1996.

[9] Section 27(1), Constitution, 1996.

[10] Gibson JTR (2003). *South African Mercantile & Company Law* (8th Ed), Cape Town: Juta (hereinafter "Gibson") *op cit* 593.

[11] Gibson 591.

[12] Section 213 LRA. The members of the defence force, police, intelligence and secret service are also excluded from the application of the LRA. Sections 200A of the LRA and 83A of the BCEA establish a presumption regarding the meaning of employees, but a discussion of the same falls outside the scope of this article.

[13] Section 3 BCEA.

[14] Section 1(xviii) COIDA. Again, independent contractors will not benefit under this Act. However, temporary workers, so-called casuals, fixed term contractors and even directors and members of juristic persons are covered under this definition.

[15]http://www.capegateway.gov.za/eng/directories/services/11586/47485#who. In 2004, the means test was the following: An unmarried person's assets must be less than ZAR 266 400 (excluding the home in which the person lives) and a monthly income of less than 1 502 p.m., and the maximum combined assets and monthly for married persons were ZAR 532 800 (excluding the value of the home in which the couple live) and ZAR 2 782 per month, respectively.

[16] http://www.capegateway.gov.za/eng/directories/services/11586/47485#how_much

[17] See Runquist LA & Zybach J F *Volunteer Protection Act of 1997 – An Imperfect Solution* http://www.runquist.com/article_vol_protect.htm