

UKCISA - Student Activity Abroad: Risk Assessment

Frequently Asked Questions

The following guidance was produced for UKCISA by Tim Birtwistle of Leeds Metropolitan University and Dennis Farrington, following up a survey of institutions about their policies and practices with regard to student activity abroad.

Note - nothing in this text constitutes legal advice. Every effort has been taken to ensure the accuracy of the information and the validity of the opinions but no responsibility can be taken for any errors or omissions. In every case legal advice should be sought.

The questions and answers are sequenced as:

- Section A - Setting up the activity (Q 1-7)
- Section B - Pre-departure activity (Q 8-14)
- Section C - General legal issues (Q 15-24)
- Appendix: Examples from the Disability Rights Commission Draft Code of Practice for Post 16 Providers

Section A - Setting up the activity

Q1: What is meant by student activity abroad in the context of this paper?

A1: This encompasses all types of activity e.g. study, placement, medical elective, intensive programme, field trip etc.

Q2: What liability do institutions have generally with respect to student activity abroad?

A2: There is the contract with the student to deliver in accordance with the terms of the agreement (prospectus, website, promotional materials, charter etc). In addition there is a sufficiently close relationship between the university and the student (proximity) for a duty of care to be owed.

This means that the normal law of negligence applies - a duty of care (acting as a reasonable person acting in that capacity would) is owed; if there is a breach of duty of care (lack of reasonableness) and damage results, then there is liability. This also relates to vicarious liability (employer liable for the acts of employees "acting in the normal course of employment). There is liability for negligent statements.

The extent of the duty of care an institution has for student activity abroad will vary according to the extent to which it undertakes actively to provide placements, as opposed to sanctioning those arranged by students. The greater the degree of institutional involvement in the placement, the greater its duty of care.

The recent decision in *McLean v The University of St Andrews* heard in the Scottish Court of Session (25/02/2004) to a large extent confirmed the orthodox view regarding university liability. It is generally acknowledged that a university does owe a duty of care to those it is reasonably foreseeable may be affected by its acts or omissions. The difficult analysis is to determine where the boundaries of that liability lie.

In the *McLean* case it does appear to reinforce the notion of boundaries. The university will be liable for that which it is responsible for if the duty of care is not met and damage results. The university will not be liable for those things "outwith University control" (para 10). If a person "removes themselves" from the duty of care then this is beyond the scope of the duty of care.

Universities will no doubt look at this case, place it in the overall context of negligence and arrive at the conclusion that care must be taken, responsible and robust procedures must be in place and a responsible attitude maintained BUT given all of this activities, placements, field trips, study exchanges, joint programmes etc can be continued. Normal risk assessment procedures plus a realistic mapping of the boundaries should result in the duty of care being fulfilled.

Q3: Who is responsible for students while undertaking activity abroad?

A3: The home institution will retain the prime responsibility because the student remains registered with it. However the inter-institutional agreement should detail who is responsible for what during the period abroad. Both institutions will owe a duty of care including for the briefing and per-departure documentation. The matter is complicated by the intervention of the local jurisdiction, and host institutions' rules.

Q4: Should there be a written agreement between the partners of the university with the university regarding the activity?

A4: Yes. It would be sensible to have documentary evidence of any agreement. This also matches best practice and ensures compliance with the various QAA Codes.

Assuming that whoever negotiates the agreement and signs the agreement does work for the university, or acts on its behalf in some way and is known to do so by the other party, then it will be difficult for the university to disown the agreement even if its own internal procedures have not been followed.

Q5: What sort of things should the agreement cover?

A5: It is necessary to know exactly who is responsible for what both in terms of the normal operation of any collaboration but also in the event of any accident or dispute between any of the parties. It should make clear whether, and how, services such as accommodation and pastoral support will be provided by each party.

The students should be briefed about all relevant parts of the agreement so that they are aware what is and is not available, and which institution is responsible for which aspects of their period abroad.

Q6: Who are the parties to the agreement?

A6: There will be a variety of partners to the agreements in place. With student exchanges there will be the university to university agreement detailing such things as waiving of fees (and which fees), credit transfer, numbers involved etc, the student under English law may also be a party to this agreement under the Contracts (Rights of Third Parties) Act 1999 unless this has been contractually excluded by the institution (this is easily done and the Act makes provision for this to be done). If rights of third parties under the Act are not excluded then the student may take action in the courts to enforce the agreement. The Act does not apply in Scotland. With work placements there may be a contract between the university and the employer. Separately, there will also be the contract between the university and the student.

Q7: Can we limit or exclude liability in any way?

A7: This is not easy to do because the courts will almost certainly view the position as being between a stronger party (the university) and a weaker party (the student), this disparity of bargaining power will mean that any clause will not be viewed with any enthusiasm. The Unfair Terms in Consumer Contracts Regulations 1999 require plain language and good communication of terms even if they are to be allowed (which in this case is doubtful). This further limits the possibility of having a clause that has any effect.

Excluding liability for death or personal injury is not possible (Unfair Contract Terms Act 1977); excluding liability for other damage caused by negligence in a consumer contract (which this almost certainly is) must be reasonable. If you are used to dealing with American universities do not imagine that because they use extensive limitation clauses that UK universities would also get away with this. This is simply not the case.

Section B - Pre-departure activity

Q8: Should students be briefed prior to departure?

A8: Yes, it is good practice to ensure students receive suitable preparation in the lead up to their departure, through a range of means which might include newsletters, handbooks and pre-departure briefings. This should be done to ensure that the Institution meets its responsibilities, both contractual and regarding the duty of care, meets the benchmark of good practice (e.g. the relevant section of the QAA Code of Practice) and provides a good service to its students. This is a matter of preparing the students well for the experience and ensuring that the university has acted in a proper manner, thus minimising the possibility of being sued for negligence.

Q9: What aspects of the activity abroad should the institution cover in its briefing?

A9: The briefing should be as comprehensive as possible on both academic and pastoral matters (though see below on the question of staff advising within their areas of competence). The former should include matters relating to the home study programme and the impact of the activity abroad, credit accumulation, grade conversion, assessment, re-assessment procedures, choice of modules etc. The latter should include accommodation, travel, safety, local criminal law matters, immigration requirements for UK and other nationals, etc.

Q10: Should there be some written acknowledgement by the student of the briefing?

A10: This is sensible to avoid any claim that the student was not briefed or was inadequately briefed (there will be proof of the briefing received).

Q11: What is an adequate briefing?

A11: One that covers the main points that a reasonable professional would expect to be covered (academic and pastoral) in a competent way - having sought advice, for example Foreign Office advice for a country that has been experiencing difficulties. The QAA Code of Practice section on Placement Learning should be complied with. It is advisable to ensure students are given key information in written form to take away. This also then ensures that students who are unable to attend oral briefings in person can be given the information.

Institutions should inform students of the Agreement with the partner and what it entails.

Q12: What liability is there regarding the briefing issue?

A12: Assuming that the member of staff doing the briefing is acting within the course of their employment the university (as the employer) will be vicariously liable for the acts of the employee in terms of negligent statements. Staff must ensure that they only advise within their competence, and institutions must ensure they provide staff with adequate training to cover the necessary topics.

The university must also ensure that it is fulfilling its contract with the student regarding provision of the course as advertised and registered for.

Q13: When the student returns should feedback be collected and processed regarding the experience?

A13: Yes this would be sensible in terms of showing that the experience is being evaluated and that the results of the evaluation inform future decisions about the activity.

Section C - General legal issues

Q14: What contract exists between the student and the sending and receiving institutions?

A14: The contracts will be the existing contract between the student and the home institution and a contract between the student and the host institution created at the time of registration with the host. The contracts will include all statements made in prospectuses, course handbooks, websites, promotional materials, oral statements as well as written etc.

Q15: What law will these contracts be subject to?

A15: Normally the relevant law is that of the place where the contract is to be performed. The student will therefore normally be subject to the law of the host country for the contract with the host institution whilst the home contract will still be subject to the home country law.

Agreements across legal jurisdictions (see Q23) can always cause problems. It is not uncommon in commercial agreements for there to be a "choice of law clause" but of course both parties have to agree to this.

Q16: What standard of care is expected of the university in order to avoid an action for negligence?

A16: The standard of care of a reasonable professional acting in that capacity. The onus is on the employer to ensure that staff are adequately trained for the function that they are carrying out.

Q17: In terms of health and safety what should be done?

A17: The obligations regarding this will, in principle, fall on the host institution. It is advisable for the sending institution to advise students of this fact and stress the fact that it is advisable to have insurance cover. However, care should be taken in any literature and briefing to make sure that extravagant claims are not made regarding facilities, working environment etc.

As with many things accurate information is the key. To be able to give this the university must take reasonable steps to ensure that it is sending the students to a safe environment, for example with lab work the sender should assure themselves that the labs in which students will work conform to adequate safety levels.

Regarding social activities the students are adults, the university is not in loco parentis and the students will make their own decisions.

Q18: In what ways does the law on data protection affect this activity?

A18: The university must comply in the normal way regarding the storage and use of data on a student BUT in addition IF the data is to be sent outside the European Economic Area (15+3 states) then the university must also ensure that the state to which the data is being sent has the same standard of rules as the EEA.

Q19: What data might this include?

A19: The most likely is to be student academic records, but it could include health records (for placements etc).

Q20: What other legislation might impact on activity abroad?

A20: The Human Rights Act 1998, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995 as amended by the Special Educational Needs and Disability Act 2001 will need to be taken into consideration. This will be in particular with regard to ensuring equal opportunities and the series of implementation dates for the 2001 Act (through to 2005). Examples of relevant guidance from the Disability Rights Commission's Code of Practice are included as an Appendix to this document.

The Independent Reviewer was established in December 2002 in Scotland, as a voluntary scheme run by Universities Scotland; for further details see <http://www.universities-scotland.ac.uk/Publications/IRSC.pdf> The Office of the Independent Adjudicator for Higher Education ("OIA"), for England and Wales, opened for business on 29 March 2004 (see <http://www.oiahe.org.uk/index.asp> for details of what complaints can be heard and how). Until new legislation is put into place the scheme is voluntary (see the website for details). For those universities without a Visitor complaints which exhausted an HEI's internal complaints procedures prior to 30 December 2003 will not normally be considered under the Scheme. For universities with a Visitor the OIA will not be able to consider any complaints which were referred to the Visitor prior to 29 March 2004.

Q21: What about the host country law for the students?

A21: The students will be subject to the laws of the host state. This will encompass their academic life, for example rights of academic appeal, health and safety, data protection etc; the wide range of criminal law of the community, for example drink, drugs, driving, breach of the peace etc; the consumer laws, for example regarding credit, contracts etc.

Q22: What briefing about the host laws should be given to the students?

A22: Care should be taken to ensure that the students know that they are subject to the host laws. Beyond that there is the matter of judgment regarding how much specific accurate information can be given without risking giving the wrong advice, whilst at the same time adequately briefing the students. Perhaps give exemplars of differences, for example the local age required to legally drink alcohol or the age of consent (fairly easily verifiable facts) whilst stressing the need to get accurate local advice.

Q23: What aspects of the host country law will affect the institution?

A23: Care should be taken regarding a number of issues, for example:

With the contracts entered into - which jurisdiction are they subject to?

If reference is made to other documents (Codes of Practice, legislation etc) - are the full implications of these realised?

If disclaimers are used - what effect might this have on the liability of the sending (home) institution

Appendix 1

The following examples are drawn from the Disability Rights Commission Draft Code of Practice for Post 16 Providers - published 17th. December 2001.

<http://www.drc-gb.org/drc/InformationAndLegislation/Page34A.asp>

Example 3.5D

As part of an Art History course at a university in Great Britain, students spend a month in Italy on a programme run by an Italian university. It is the British university's responsibility to ensure that the Italian university can provide access to a disabled student who uses a wheelchair.

Example 3.7B

Students on a language course spend two months studying at a partner institution in Europe. Despite the work that the British institution has done with the European institution to explain the needs of disabled students on the programme, disabled students continue to complain that they have been discriminated against during their stay. The British institution is responsible for preventing the discrimination continuing or recurring. In this case, the British institution might decide to sever its links with that institution, and find an alternative partner.

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www.ukcisa.org.uk/about/liability.php