TEACHER TORT LIABILITY:

A LEGAL AND CONCEPTUAL STUDY

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by

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Without being melodramatic and deviating too far from standard procedure, I would like to dedicate this thesis to the many devoted public school teachers who give of their time and work untiringly. Many of these individuals have forgone more financially rewarding careers to commit their lives to the public service of our most valuable resource, the young people of this nation. Although society can never fully measure their contribution monetarily, their success can only be measured in the lives of the students they helped influence.

Chapter 1

INTRODUCTION

The professional instructor is involved in many social, political, and legal relationships. Many of these are evident even to the casual observer, while others are more subtle and inconspicuous. The general format of this thesis will center on the legal relationships involving teachers. This study will narrow the research to include mainly the dimensions of tort liability involved in negligence and disciplinary action. Much of tort litigation in school law is a result of inadequate supervision. Teachers should be aware of the legal consequences which develop from lack of supervision. The assumption is made that an increase in knowledge will also make the teacher more effectively aware of his legal relationships.

The specific topic will focus on teacher liability. A descriptive method of case study analysis will be utilized to investigate this particular body of school law. The analysis of this variable will concentrate on the body of school liability laws and court decisions. It should be apparent at the conclusion of this investigation that the following hypothesis is relevant: There is a distinct relationship between teacher supervisory behavior and the controlling opinions, decisions, and cases of school law. It should be noted that these relationships have profound implications for state politics, legislatures, school boards, parents, students, administration, and teacher education.

The methodology of descriptive analysis will include various collections of litigated cases related to teachers. This data will be compiled in narrative fashion to describe any consistent patterns of legal principles and conduct. In the following paragraph attention will be made to prepare the reader for what lies ahead in regards to specific topics, cases, and legal relationships.

This thesis investigates the legal status of teachers, teacher-pupil relationships, and the traditional in loco parentis doctrine. A special emphasis in chapter one will be on tort liability in public law. It is significant that some attention is given to this topic since teachers are usually considered public employees subject to public laws. Tort liability will be discussed in the context of relationships to school boards, administrators, and students. Negligence becomes the identifiable aspect of tort liability in the subsequent chapter. This segment will present the elements of negligence and then proceed to critique a number of cases related to teacher negligence.

The final chapters will explore the disciplinary function of the teacher. This role will be examined in light of possible tort action against the public instructor. Special attention will be given to suspension, expulsion, and corporal punishment as legal disciplinary measures. This thesis will conclude with a summary, conclusion, and pertinent recommendations for future teacher conduct.

LEGAL STATUS OF TEACHERS

The purpose of chapter one will be to investigate the legal status of teachers in relation to public law. It is significant to understand under what public laws the instructor is controlled and

influenced. Several legal authorities will be cited to place the teacher's position in perspective to other public employees. The initial intention is to proceed from a general description of this variable to a narrower investigation of tort liability as it relates to the teacher.

Any public position may be classified as either a public office or public employment. The fundamental distinction between employee and officer is very important since teachers will be affected differently depending upon the appropriate category they fit into.

The position of public school teacher is created by the legislature directly and by state constitution indirectly through provisions requiring the legislature to establish and maintain schools. Education, therefore, is a definite governmental function and is directly concerned with the public benefit. Powers, duties, rights, responsibilities, and privileges are, to some degree, outlined and established by state laws. Many of these state laws are circumscribed by judicial interpretations and opinions. The teacher's public position has permanency and continuity even if there is a turnover in actual personnel.[1]

There are many other characteristics which suggest that the public instructor position is a public office. The demarcation line between public officer and employee is very difficult to comprehend and trace. However, according to M. Chester Nolte, who is an authority on school law:

> "Since teachers are not elected by popular vote, they are not considered public officials. Rather, the relationship of teachers to the board of education is contractual; that is, they are considered to be employees."[2]

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[1]Madaline Kinter Remmlein, School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1962), pp. XXIX-XXX.

[2]M. Chester Nolte, Guide to School Law (West Nyack, N. Y.: Parker Publishing, Inc., 1969), pp. 19-20.

The most decisive difference between an employee and officer hinges on a legal opinion which states that "an employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature."[3] The absence of authority to exercise sovereign power has been one of the major distinguishing characteristics of the teaching position. Courts have been almost unanimous in classifying teachers as employees rather than officers.

Although it is probably safe to assume that there has been a wide-spread disagreement among the general public as to whether a teacher is a public officer or employee, there is no evidence that this controversy exists in legal circles. While this preceding proposition may appear tedious and irrelevant, it will help facilitate the delineation of boundaries under which teacher liability may occur. It will be easier from this vantage point to perceive the conditional similarities between tort liability of teachers and other public employees.

Tort liability appears to be the one area of school law which affects the teacher significantly. It is, in most educational circles, the one legal aspect that causes the greatest concern. Furthermore, in a majority of states, it is the prime consideration in most litigated cases.

As employees, nevertheless, teachers often serve in a dual capacity. According to contractual obligations, one capacity must by necessity be a master-servant relationship. The master-servant relationship is completed through contractual obligations and the performance of duties. On occasion the school board renders the teacher special permission explicitly or implicitly to act as its agent. For instance, when the

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[3] State ex. rel. Holloway v. Sheets, 78 Fla. 583 (1919).

teacher acts in a disciplinary function it is primarily as an agent of the board of education. Consequently, the principal-agent relationship in law may also prevail.[4] The distinction between these two concepts has been subject to judicial ruling as many of the following cases will point out.

Considering, now, the previous analysis, one can begin to acknowledge the potential complications involved in the legal role of the public educator. While there seems to be a consensus among legal scholars that teachers are public employees, the interested observer hesitates to admit the same consistency in weighing the various legal avenues applicable to teacher performances. Because of the constant interest of education to the public at large, one may assume that the public teacher is required to fulfill a legal role much greater than the average public employee. The failure to meet these enormous responsibilities carries with it potentially great consequences.

TEACHER-PUPIL RELATIONSHIP

An intensive survey of the various legal relationships involving the teacher must be investigated before one can fully speculate on the linkage between student rights and professional conduct.

In the legal teacher-pupil relationship the pupil is an involuntary party. This affiliation creates a confidential relationship between the pupil and teacher, both in terms of moral and legal criteria. Obviously, this type of relationship imposes a higher standard of conduct

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[4] M. Chester Nolte, Guide to School Law (West Nyack, N. Y.: Parker Publishing, Inc., 1969), pp. 19-20.

that would exist if the two parties were viewed as being equals. Because of this significant association, the teacher is responsible to see that he discharges his duty to the pupil with utmost good faith. Good faith means that the teacher must restrain himself from taking advantage of the student. The instructor is also required to act honestly with honorable motives and intent, without fraud, collusion, or deceit. He must also make a concentrated effort to ascertain and act upon the truth in any matter involving the pupil.[5]

According to the views of Daniel and Richard Gatti, an educator is an employee and, in essence, an officer of the state when dealing with students. In attempting to analyze a teacher's duty to his students one should consider the following items:

1. Written school board policies;
2. Past customs and practices within the school;
3. Specific rules and regulations;
4. Reasonable and prudent behavior in similar situations.[6]

As a public employee, the legal capacity of duty and authority gives the teacher the right to make reasonable rules which regulate student conduct. Being a public instructor makes the person responsible not only for instruction, but supervision and safety as well. If this responsibility is not fulfilled, one may be held liable.[7]

In many instances, legal norms often act independently of moral or ethical considerations. While moral obligations often take secondary

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[5]LeRoy J. Peterson, Richard A. Rossmiller, and Marlin M. Volz, The Law and Public School Operation (New York: Harper and Row, Publishers, Inc., 1968), p. 322.

[6]Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law (West Nyack, N. Y.: Parker Publishing Company, Inc., 1972), pp. 19-20.

[7]Ibid., p. 19.

importance in courtroom dynamics, there have been trends in many realms to bring into consonance the two abstractions. Let us briefly observe the efforts of the educational community to define the ethical responsibilities of the instructor to his student. Many of these objectives, although lacking specific judicial sanctioning, could be used by the educator in evaluating his performance as related to legal principle. These obligations, adopted by the National Education Association's Representative Assembly in July of 1968, include the following conduct relating to the student. The educator:

> 1. Shall not without just cause restrain the student from independent action in his pursuit of learning, and shall not without just cause deny the student access to varying points of view.
> 2. Shall not deliberately suppress or distort subject matter for which he bears responsibility.
> 3. Shall make reasonable effort to protect the student from conditions harmful to learning or to health and safety.
> 4. Shall conduct professional business in such a way that he does not expose the student to unnecessary embarrassment or disparagement.
> 5. Shall not on the ground of race, color, creed or national origin exclude any student from participation in or deny him benefits under any program, nor grant any discriminatory consideration or advantage.
> 6. Shall not use professional relationships with students for private advantage.
> 7. Shall keep in confidence information that has been obtained in the course of professional service, unless disclosure serves professional purposes or is required by law.
> 8. Shall not tutor for remuneration students assigned to his classes, unless no other qualified teacher is reasonably available.
> 9. Measures his success by the progress of each student toward realization of his potential as a worthy and effective citizen.[8]

While this list of criteria for professional conduct is neither comprehensive nor exhaustive, it does serve as a subjective foundation.

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[8] E. E. Loveless and Frank R. Krajewski, The Teacher and School Law (Danville, Illinois: The MacMillan Company, 1960), pp. 145-146.

We have explored the general dimensions of teacher behavior in this legal relationship. Let us now delve into the more limited concept of student involvement in this relationship. It has often been conceded that a child has the right to a public education. While this may be evident on a general plane of thought, Bissell v. Dawson espouses this principle in a more restricted form. "Education is not so much a technical right possessed by a child or his parents, as a privilege or advantage granted by the state to be used or enjoyed upon such reasonable terms and conditions as the lawmaking power, within constitutional limits, may see fit to impose."[9]

A child possesses various constitutional and civil rights as does any citizen or inhabitant in a particular state.[10] These statutory provisions encompassing a legal affinity between student and public school are, basically, a governmental function. This governmental umbrella is founded on the concept of school as an explicit extension of the state.

Theoretically speaking, a student is responsible for his actions. If a student hits another, he is liable, and generally his parents are not. This can develop into a complicated situation if the school district is responsible for supervising the children when injury occurs. There are times when the teacher in charge, or the school district, can be liable along with the offending student.[11]

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[9] Bissell v. Dawson, 65 Conn. 831 (1894).

[10] Lawrence J. Nelson, "Right of a Teacher to Administer Corporal Punishment to a Student," Washburn Law Journal, Vol. 5, No. 1, Winter 1965, p. 35.

[11] Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law (West Nyack, N. Y.: Parker Publishing Company, Inc., 1972), p. 35.

What, then, is the child's relationship to the instructor? Practically speaking, if a teacher is injured by a child, either intentionally or unintentionally, the teacher has few ways of being compensated other than by insurance.[12] Furthermore, a child's standard of conduct is commensurate with his age, intelligence, and experience which we will examine in more detail later.

IN LOCO PARENTIS

In the preceding statements, we have seen the immense difference between the expectations and realities of teacher conduct as distinct from pupil behavior. This study will continue its examination of legal relationships by admitting a third factor to this thematical discussion. A primary purpose in doing so is to acquaint the reader with various forms of traditional principles in school law. The component to be surveyed next is the realm of parental control and authority. Within this context the often disputed doctrine in loco parentis will be inspected and related to teacher authority.

There are many extenuating circumstances and factors which balance parental control and teacher authority in relationship to the child. According to legal concepts parents have an ultimate interest in the welfare and behavior of the child. This original interest is not automatically delegated to school authorities when the child enters school.

First of all, legally cognizable interests can be discerned from the concept of ordered liberty and the Constitution itself. In other words, a child does not shed all his constitutional rights upon entering

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[12]Ibid., p. 23.

the schoolroom. However, the student's rights may be limited in the interest of the welfare of the entire student body. The child has an inherent right to be left alone except as necessary for the survival of the state. Second of all, the parents have the right to supervise the future of the child insofar as it does not conflict with some compelling interest of the state.[13] In other words, there are definite limits to the state's authority, even over the individual child in school.

To continue this presumption further, one may examine a few incidents to illustrate the division of authority. For example, school officials can lawfully prescribe a curriculum that includes such activities as dancing but parents retain the right to exclude their child from that activity if it invades moral or religious training.[14]

In a North Dakota case the tension between parent and school authority erupted into a legal controversy. The parents of a secondary school student objected to a school rule preventing pupils from wearing metal heel plates to school. The boy acknowledged his awareness of the rule, but insisted that his parents commanded him to disregard it. The Supreme Court of North Dakota declared that the board was entirely within its right in insisting that the rule be obeyed. "In most instances, the right of the parent is paramount," voiced the court, "but sometimes the interests of the public generally require that the parent shall give way."

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[13]Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education. (San Francisco: Matthew Bender and Company, Inc., 1973), pp. 9-12.

[14]Hardwick v. Board of School Trustees of Fruitridge School Dist., Sacramento County, 54 Cal. App. 696 (1921).

The trial court found, that under the circumstances there was no abuse of authority and the rule was proper and reasonable.[15]

The doctrine of in loco parentis has often been cited to explain the school position in relationship to the student. Professional and lay people as well, have used this "in place of the parent" doctrine to justify and rationalize many issues. As early as 1916, it was judicially acknowledged that the principal of a public free school, to a limited extent at least, stood in loco parentis to the pupils attending there. He was designated as one having powers of control, restraint, and correction over such pupils as may reasonably be necessary to enable the teachers to perform their duties and to implement the general purposes of education.[16]

In the publication, School Law for Teachers by Nolte and Linn, the limits of in loco parentis were given a further interpretation. The teacher's exercise of this doctrine is restricted to those powers which are just, proper, and necessary for the welfare of the child under different circumstances. They state that:

> As a substitute for the parent, the teacher's authority is less broad than that of the parent, because his control is limited to situations with his jurisdiction and responsibility as a teacher. The parent, on the other hand, retains control of such parental prerogatives as the determination of the manner and mode of moral and religious training of the offspring, and the type of medical treatment which the child shall receive. Since these are not educationally connected prerogatives, they are outside the authority of the teacher to determine. The teacher, in the in loco parentis relationship, may control the

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[15] Stromberg v. French, 60 N. D. 750 (1931).

[16] Hailey v. Brooks, 191 Tex. 781 (1916).

> pupil in matters relating to school and education only, but this control extends to pupils outside school hours when the good name and respect of the school's authority is involved.[17]

Recently, a number of lawyers and judges have challenged the traditional reasoning behind the in loco parentis declaration. In a Wisconsin case the judge criticized this reasoning as embracing a tired, worn out slogan. He accused the in loco parentis belief as being a "nefarious doctrine" employed by judges as well as educators. In his paraphrased viewpoint, the prejudice and frustrations of people in power cannot be given unbridled license as practiced against children under the hypocritical guise that the acts committed against them are for the children's own good.[18]

An often quoted Vermont case, Lander v. Seaver, brings the crux of the matter into better focus. In this opinion, the parent is answerable primarily for malice, wicked motives, or an evil heart when punishing his child. This awesome power of control and correction is invested in the parent by nature and necessity. It emerges from the natural relationship of parent and child. Most parents would look on this as a duty rather than a power. "This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning." The school teacher, in the other position, has no such natural restraint nor acts from the instinct

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[17] M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963), p. 207

[18] Wisconsin ex. rel. Koconis v. Fochs, Oct. 14, 1969.

of parental affection. Therefore, he may not safely be entrusted with all of a parent's legal authority.[19]

What then can one say which would relate the way teachers as public workers ought to perform in knowledge of this general principle of law? In a general way, they should be guided and restrained by professional judgment and wise discretion. Actions are justifiable, even if they affront a parent, provided they are done in a reasonable manner and within the scope of duty. A public teacher has the specific powers of a parent in school related matters of work performance, student conduct, discipline, and the students' immediate welfare. A teacher also utilizes reasonable force when defending school property, other people, or himself.[20] Evidence indicates that parents tend to retain a large measure of control in the specific areas of medical treatment, psychiatric testing, and the religious training of their children.[21] However, one can generally balance this identifiable control by stating that the parent of the child is equally powerless to interfere in school matters that are reasonable and for the purpose of education.[22]

In summary, the expected authority for parent and teacher often vascillates back and forth with only a few fundamental areas of unchallenged control. The legal postulates tend to range from general maxims of reasonableness to specific innuendos of sovereign power.

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[19] Lander v. Seaver, 32 Vt. 114 (1892).

[20] Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law (West Nyack, N. Y.: Parker Publishing Company, Inc., 1972), p. 47.

[21] M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963).

[22] Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law (West Nyack, N. Y.: Parker Publishing Company, Inc., 1972), p. 47.

Chapter 2

TORT LIABILITY

GENERAL DESCRIPTION

Through a method of definition, exposition, and comparison the intent will now be to explore the body of public law known as tort liability. Essentially, only the principles that would influence teacher conduct as public employees will be dealt with to any measurable degree.

Tort liability is the substance of many public school cases. It is probably one of the least understood concepts in school law yet the one that may affect the teacher the most. A foremost authority on tort law, William L. Prosser, acknowledged that there is no satisfactory definition of tort to be found in legal terminology. The efforts to define a tort have been either too narrow for inclusion of all torts, or too broad and include items other than torts.[1] At one time the use of the word tort was synonymous with "wrong." Generally speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action. Prosser cogently admits the intellectual futility of attempting to define or characterize the law

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[1]William L. Prosser, Law of Torts (St. Paul, Minnesota: West Publishing Co., 1971), p. 1.

of torts.[2] Another source identifies a tort as a "wrongful act, not including a breach of contract or trust, which results in injury to another's person, property, reputation or the like, and for which the injured party is entitled to compensation.[3]

The law of torts is concerned with the allocation of losses arising out of human activities. Liability then must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others. In many cases, of course, what is socially unreasonable will depend upon what is unreasonable from the point of view of the individual. The tort-feasor, one who commits the wrong, is commonly held liable because he has acted with an unreasonable intention, or because he has deviated from a reasonable standard of care.

By implication the law looks at the defendant's own state of mind and the appearances which his own conduct presented or should have presented to him. It must weigh his conduct and the harm he has rendered by an objective, disinterested, and social standard. It may even consider his behavior, although reasonable in itself from the point of view of any man in his position, to see if it "has created a risk or has resulted in harm to his neighbors which is so far unreasonable that he should nevertheless pay for what he breaks."[4]

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[2]Ibid., p. 4.

[3]"Negligence: When is the Principal Liable?" A Legal Memorandum, (January, 1975), p. 2.

[4]William L. Prosser, Law of Torts (St. Paul, Minnesota: West Publishing Co., 1971), p. 6.

Torts may be either intentional or unintentional. The majority of cases involving school employees concerns unintentional torts. Liability in these types of tort cases stems from relationships among different classifications of people. They may emerge from large groups, small classes, or individual situations. One cannot sidestep the legal maxim that, no matter the conditions, everyone, regardless of his position, is liable for his own torts.[5]

Enough has been said to indicate that definition or description of a tort in terms of generalities distinguishing it from other branches of the law is difficult, or at worst impossible. While it is somewhat easier to consider the function and purpose of the law of torts, for the purposes of this study we will use only concepts and terminology inherently pertinent to the study of unintentional torts. Such torts are the substance of which negligence laws are composed.

One cannot overlook factual magnitude involved in tort liability. Each year national estimates of school-involved lawsuits give the number as being higher than six-thousand per year. One or more persons in these school suits sought money damages amounting to more than twelve million dollars. Jury dollar awards often come directly out of taxpayer funds. Warren E. Gauerke, who has published a legal commentary on school law, also categorizes the irreparable losses through intangible factors such as lowered teacher morale, neglected children, and impaired school programs.[6]

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[5]Robert Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn, N. Y.: The Foundation Press, Inc., 1959), p. 6.

[6]Warren E. Gauerke, School Law (New York: The Center for Applied Research in Education, Inc., 1965), p. 98.

In this writer's opinion, the preceding statements would be justification enough to study and analyze the body of public law related to teacher liability. The teacher in Kansas has not appeared to any significant extent in the field of tort law and, therefore, may not be aware of some of the legal ramifications. Likewise, the school, as a party, has had little mention in the tort law of Kansas. This recognition, however, is not to underestimate the numerous threats and settlements which have been made out of court. Legal experts predict, however, that there will be an inevitable increase in the types of tort litigation related to negligence cases for such things as improper supervision, because of trends in various states.[7]

SCHOOL BOARD LIABILITY

Because the performance of the public teacher is so intertwined with the legal mandates and policy directives of the school board, it would be beneficial if we examined, to some extent, school board liability. It is important that a public instructor know when a school board could be potentially liable, because in acting as an agent of the board, the teacher may also become liable.

The maintenance and operation of public schools has been commonly regarded as a governmental function. Local districts are usually serving as representatives of the state and, therefore, share common-law immunity from tort liability. This theory derives from the English custom that the king or government could do no wrong. In a 1972 Ohio case this corresponding principle of common law was reaffirmed when school districts and

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[7]Lawrence J. Nelson, "Right of a Teacher to Administer Corporal Punishment to a Student," Washburn Law Journal, Vol. 5, No. 1, Winter, 1965, pp. 75-88.

municipalities were found not to be usually liable "to pupils or other persons for injuries resulting from the negligence of their officers, agents, or employees engaged in the operation of public schools."[8]

There are a few common law exceptions to the governmental immunity doctrine. A prime example of this would be common law nuisance actions or for certain types of active or willfull torts. For instance, some courts have held a school district liable for injuries caused by not maintaining school premises in a safe condition. The most notable of these case law nuisances include the discharge of sewage into a stream,[9] the maintenance of a defective privy well on school property,[10] and the maintenance of a flagpole in an unsafe condition which fell and injured the plaintiff.[11]

There does not, however, appear to be a universal agreement on what constitutes a nuisance or legal menace. In Anderson v. Board of Education a pupil was struck on the head by a swing and killed while legally present on the playground of a school. It was claimed that the school board negligently permitted a dangerous situation to exist and that the death of the child resulted from the negligence. The court, nevertheless, refused to allow damages.[12]

Many observers have perceived an increasing tendency to distinguish between a school district's governmental and proprietary functions.

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[8] Hall v. Columbus Board of Education, 32 Ohio App. 2d 297 (1972).

[9] Watson v. New Milford, 72 Conn. 561 (1900).

[10] McCarton v. New York, 516 N. Y. S. 939 (1912).

[11] Anderson v. Board of Education, 49 N. D. 181 (1932).

[12] Ibid.

When in the beginning school districts claimed governmental distinction for all related purposes, now some activities have been viewed by several courts as falling outside the government's purpose according to statutory law. A number of lawyers and judges have predicted this as the first step in the total abrogation of governmental immunity. For the time being, it is often unnecessarily confused with the further advancement of district responsibility.

In many cases the inclination to differentiate between governmental and proprietary activities is not often attempted. In the overwhelming majority of cases it is usually impossible to tell into which category the case will fall. The uselessness of the distinction is evident when it is observed that very few cases have held any act done in good faith in the operation of the school system to be other than governmental. Robert K. Hamilton and Paul R. Mort who have done much research on this topic believe that the legal doctrine of non-liability is so widely accepted that there is little disposition by courts to impose liability by declaring particular acts proprietary in nature.[13]

Let us inspect a few illustrations where an effort was made to characterize a proprietary function. As early as 1925, a strict governmental function was defined as a public duty assumed not for profit, but for the public good.[14] Conversely, where two school districts rented a stadium from a third school district, a spectator who was injured due to a defective railing was allowed to recover against the school district

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[13]Robert Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn, N. Y.: The Foundation Press, Inc., 1959), p. 282.

[14]Kruger v. Board of Education, 310 Mo. 239 (1925).

which owned the stadium. By renting its stadium, the school district had abandoned its governmental role and assumed a proprietary posture.[15] In another court case it was held that conducting a summer recreation program open to the public for a fee was a proprietary act. They defined a proprietary act as "one which a local government unit is not statutorily required to perform, or . . . (that) may also be carried on by private enterprise, or . . . that is used as a means of raising revenue . . .[16]

The Kansas Supreme Court held in July, 1969, that it is appropriate for it to abolish governmental immunity for torts when the state or its governmental agencies are engaged in proprietory activities. The Court believed that this was so because the governmental immunity doctrine is of judicial origin rather than of legislative beginnings.[17] The court also took the time to reiterate why it was generally allowing governmental immunity to still exist. It said, "Under our form of government the legal sovereignty is in people, and the people, in the exercise of their governmental power, through the states, did not wish to be sued and harrassed in carrying out their governmental functions."[18]

Abrogation of governmental tort immunity has occurred in about half the states. In most of these states abrogation has been achieved by statute, although judicial opinion has been the determining factor in

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[15] Sawaya v. Tuscon High School Dist., 78 Ariz. 389 (1955).

[16] Morris v. School Dist. of Township of Mount Lebanon, 393 Pa. 633 (1958).

[17] Lee O. Garber and Reynolds C. Seits, The Yearbook of School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1971).

[18] Carrol v. Kittle, 21 Kan. 2d 457 (1969).

these other decisions. As has been stated previously in a Kansas Case, Carrol v. Kittle, the assumption of reducing governmental immunity is a judicial prerogative since it is of original common-law precedence. However, the Supreme Court of North Dakota represents a divergent persuasion. Their philosophical position was that "until the Legislature sees fit to wave immunity for public agencies other than those directly administered by the central State government, then such immunity will continue for all such public agencies performing a governmental function of the sovereign."[19] In other state cases the Nebraska Supreme Court abrogated the doctrine of governmental immunity as of July 21, 1969.[20] Iowa circumvented its governmental immunity in Anderson v. Calamus Community School District.[21] Kentucky and Georgia still recognize the doctrine of governmental immunity.[22]

For the most part, school board members envelop broad immunity from personal liability for torts committed by the board of education and its officers, agents, and employees. It may be asserted that board members when acting in the scope of their authority involving judgment and discretion will not be held personally liable for the negligent acts of employees in the district.[23]

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[19]Fetzer v. Minot Park District, 138 N. D. 601 (1974).

[20]Root v. School District, 169 Neb. 464 (1971).

[21]Anderson v. Calamus Community School Dist., 174 Iowa 643 (1971).

[22]Board of Education v. Lewis, 449 Ky. 765 (1971) and Smith v. Board of Education, 167 Ga. 615 (1971).

[23]Lipman v. Brisbane Elementary School District, 359 Cal. 465 (1961).

On the other hand, tort immunity does not always protect individual school board members. A school board member, like any other individual citizen, is accountable for his own personal torts. This may include liability for loss or damage which results from his own negligent acts, as well as the negligent acts of an agent or employee who is acting under his direct supervision.[24] In comparative terms, however, it has been consistently held that no master-servant relationship exists between board members and employees of the district. An Oregon case will illustrate this legal premise. The plaintiff while playing in a high school football game suffered a broken neck and sought to recover damages from the members of the board of education among others. The court held that the individual members of the school board were not liable.[25]

In addition to the aforementioned examples, a school board member may be found negligent by imposition of statutory duties where board members have no option as to whether or not to perform the duties. Similarly repeated, if a school board member's tortious act was deemed fraudulent or malicious, he may, of course, be held personally liable.[26]

With this framework to guide us, this section will now deal with the legal consequences related to board and employee liability. While the immunity of school districts is still generally recognized in law, this immunity does not extend to its public employees. However, the district is not liable under the doctrine of respondent superior, by

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[24] Whitt v. Reed, 239 Ky. 489 (1951).

[25] Vendrell v. School District No. 26C, 233 Ore. 282 (1962).

[26] Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education. (San Francisco: Matthew Bender and Company, Inc., 1973), p. 55.

which the master must answer for the wrongs of his servant. Each teacher, bus driver, custodian, principal, and superintendent is held accountable, either singly or severalty, for injuries caused by his negligence.[27] Subsequently, teachers as public employees of the board are not classified as servants or agents since teaching is not a function imposed directly upon the board.[28] While critics may argue with this essential reasoning, at this juncture the rule is still widely accepted in legal formalities.

In what circumstances then does an employee act as an agent of the board of education? It must first of all be determined that the agent or employee is performing a duty imposed by law on the board itself. If teaching is not one of the statutory functions imposed on the board, it is conversely true that the control and care of school property is such a statutory duty of the board. In other words, while a teacher could conceivably be held liable for his poor instruction, a school board could not. Poor control and care of school property by a teacher would make the board liable, also. Any negligence imputed to the board's agents in this specific performance is also the negligence of the board.[29] The classroom and premises of public schools at all levels comes under the control of the State, which has the power to regulate the use of such property in accordance with the purpose for which each institution was established. Regulatory control must, however, be reasonable, fair, and non-discriminatory as between users of the same kind. Any denial of

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[27]M. Chester Nolte and John Phillip Linn, op. cit., pp. 245-247.

[28]Johnson v. Board of Education, 206 N. Y. S. 610 (1924).

[29]Newton Edwards, The Courts and the Public Schools (Chicago: The University of Chicago Press, 1955), p. 360.

access to school property has usually been held to be permissible if the terms of denial are carefully and clearly developed. The rule is often strengthened considerably if the reasons for the limitations are described as well. Robert E. Phay in an issue of the School Law Bulletin briefly refers to three determining factors that courts generally consider in deciding whether a school district can be sued for negligence. In many cases, one may perceive that these elements would be applicable to teachers as well as other public employees. They include the tendency of the duty to be discretionary; whether the act directly violates plaintiff's constitutional rights; and the foreseeability of damage to the plaintiff.[30]

The implications of liability insurance on the general acceptance of district immunity has been a subject of much controversy. According to a well-documented study on public school law, the purchase of liability insurance does not automatically forfeit tort immunity unless, of course, statutory authorization waives the immunity.[31] There appears, at the same time, to be a definitive trend in case law to hold school districts accountable up to the amount of liability insurance purchased. The first really significant case in Kansas related to the liability insurance issue was in Smith v. Board of Education. The court indicated in this action that the purchase of insurance did not constitute a waiver of immunity. A waiver of immunity must come from statutory provisions according to this court's legal opinion.[32]

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[30]Robert E. Phay, School Law Bulletin, Vol. No. 4 (Oct., 1973), p. 4.

[31]Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin and Ephraim Margolin, op. cit., pp. 3-54.

[32]Smith v. Board of Education, 155 Kan. 588 (1942).

Edward C. Bolmeier, who has written on the relationship of public schools to our legal structures, believes that the legalizing of liability insurance and the waiving of district immunity are subjective matters best dealt with on a legislative level. However, he decisively states that local school officials must assume responsibility for the safety of the pupils. They must be responsible for the selection of school personnel so that children will not be made subjects of recklessness. Furthermore, it is their imperative duty to inform school personnel of their personal liability in the event of accidents and injuries resulting from negligence.[33] One case sums up Bolmeier's position when it says, "The mere fact that school officials are exempt from legal liability for the tortious acts of their employees imposes upon them a greater moral liability to avoid and eliminate, as much as possible, the dangers involved in the operation and conduct of the schools."[34]

Since the liability of teachers and other school employees relates so integrally to the various conditions of school district immunity, this research will review the argumentation surrounding this fundamental issue.

Robert A. Schaerer and Marion A. McGhehey in publication, Tort Liability of School Districts, list an amalgam of justifications for nonliability to school districts. Even though a number of the reasons might be considered biased or out-of-date, it would merit a brief description in light of the inherent purposes of this study. They are:

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[33]Edward C. Bolmeier, School in the Legal Structure (Cincinnati, Ohio: The W. H. Anderson Company, 1968), p. 116.

[34]Boyer v. Iowa High School Athletic Association, 127 Iowa 606 (1964).

1. Sovereignty. The school district exercises sovereign powers as it acts through its board of education, and is as immune from suit as the sovereign itself.
2. Stare decisis. Immunity has been settled by the tort liability principle of the common law.
3. Governmental function. School districts exercise governmental functions for the benefit of the public.
4. Legal inability to pay. The school district cannot be liable for torts because it has no corporation fund from which it can legally satisfy tort judgments.
5. Involuntary agency. It is an involuntary agency of limited powers and prescribed duties, and without choice of whether it will function.
6. Respondent superior. The master-servant relationship does not apply to school districts.
7. Ultra vires. Any tortious acts of its officers, agents or employees is ultra vires or beyond the powers of the district.
8. Immunity as a charity. School districts should enjoy the tort immunity traditionally accorded to charitable institutions.
9. Impairment of school functions. School district tort liability is undesirable on the grounds of public policy because it would result in a multiplicity of suits and serious impairment of the functions of some schools.
10. Prohibitive cost. Tort liability of school districts is undesirable because it would increase the financial burden of maintaining schools.[35]

Some courts have ruled that districts have no fund from which damages may be paid and have no power to raise funds for that purpose. This reasoning presumes that school funds are to be held in trust for the sole purpose of maintaining schools and may not be diverted from that purpose.[36]

There has evolved vocal criticism. Governmental immunity in tort action has been described recently as an anachronism, outmoded, and indefensible.[37] When the abrogation of school district immunity has

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[35]Eugene Bendetti, School Law Materials: Cases and Problems (Dubuque, Iowa: M. C. Brown Company Publishers, 1961), p. 111.

[36]Chester W. Harris, ed., Encyclopedia of Educational Research (3rd ed; New York: The MacMillan Company, 1960), p. 1187.

[37]Ibid.

occurred, the main reason given is because it is unduly harsh and unjust in requiring the individual alone to suffer the wrong. Society should afford, in this opinion, minimal if not absolute relief.[38]

In this most abrasive critique the following was presented:

> The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation. It is almost incredible that in the modern age of comparative sociological enlightenment and in a republic, the medieval absolutisms supposed to be implied in the maxim, "the king can do no wrong," should exempt the various branches of government from liability for their torts, and that the entire burden of damages resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community, constituting the government, where it could be borne without hardship upon the individual, and where it justly belongs.[39]

A contemporary viewpoint was espoused in Thomas Molitor v. Kaneland Community District No. 302. In this case, involving the negligence of a bus driver employee, it was held that a basic concept underlying the entire body of tort law was that individual persons as well as corporations are responsible for the negligence of their agents and employees acting in the course of their employment. The assumption of governmental immunity runs counter to that basic concept. It was the opinion of the court that school district immunity could not be justified on this theory. Another pivotal contention of the court was the belief that abolition of immunity may tend to decrease accidents by coupling the district's powers with the responsibility of exercising care in the selection and supervision of public personnel.[40]

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[38]Edward C. Bolmeier, School in the Legal Structure (Cincinnati, Ohio: The W. H. Anderson Company, 1968), pp. 112-113.

[39]Hoffman v. Bristol, City of, 113 Conn. 386 (1931).

[40]Thomas Molitor v. Kaneland Community District No. 302, 18 Ill. 2d 11 (1959).

An observer on legal principles has stated:

> A municipal corporation today is an active and virile creature capable of inflicting much harm. It's civil responsibility should be co-extensive. The municipal corporation is definitely and emphatically in our law, and what is more, it can and does commit wrongs. This being so, it must assume the responsibilities of the position it occupies in society . . .[41]

In this political and legal labyrinth, just what position should the public educator formulate in his professional role? Some states have taken the initative by enacting "save harmless" statutes. For instance, public employees in states such as California, Connecticut, Massachusetts, Minnesota, New Jersey, New York, and Wyoming are protected from negligent claims arising within the course and framework of their employment. If suit is filed against the employee and a judgment awarded against him, the school district must "save harmless" the employee by paying the judgment.[42]

Safe place laws tend to protect the employee also in his relation to the students. These statutes provide in essence that every owner of a public building shall so construct, maintain, and repair the building in such a manner as to make the facility safe for employees and frequenters thereof. In a minimal way, these statutes appear to encroach on the effectiveness of tort immunity enjoyed by most school districts.[43]

Governmental immunity in school districts is still a strong doctrine that takes precedence in many instances. Most states have been

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[41]E. E. Loveless, and Frank R. Krajewski, The Teacher and School (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1974), p. 10.

[42]Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials (St. Paul, Minnesota: West Publishing Co., 1969), p. 379.

[43]Ibid., p. 380.

reluctant to infringe upon this doctrine for fear of upsetting the educational process. It is believed in some circles that the educational programs may be severely hampered if a wholesale destruction of governmental immunity were allowed.

Although technically a teacher may not be held liable for student injuries unless it can be proved that he was negligent, there are as we have seen, far-reaching implications of liability involved. It would seem logical that in a state, which by law allows the school district to assume liability for injuries, injured pupils and their parents would be less likely to bring legal action against the teacher.

Before drawing any inferences, conclusions or recommendations, the question must be raised as to whether or not teacher immunity from court costs, attorney fees, and the damages evolving from accidents to pupils under their supervision might result in increased teacher negligence, carelessness, or complacency. Denis J. Kigin, in a 1963 edition on teacher liability, reports that it has been discovered, on the contrary, "that the protection itself does not generally contribute to carelessness on the part of the individual, but affords opportunity to develop more poised, happy, successful, and useful teachers. Regardless of the protection against financial loss a teacher may enjoy, there is always the moral obligation for making the learning process safe and for avoiding injury to pupils."[44]

From the previous statements, inferences, and postulates, it is evident that this particular aspect of public law affecting teachers as public employees is in a state of flux and institutional development.

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[44]Denis J. Kigin, Teacher Liability in School-Shop Accidents (Ann Arbor, Michigan: Prakken Publications, Inc., 1963), p. 69.

This body of public law seems to be in a transitional stage that varies dramatically from laws affecting corporations, businesses, and other types of employer-employee relationships. It is the author's conclusion and subsequent recommendation that the forms of public law influencing teachers and school districts should be brought in line with other existing laws of employment. This act of legal consistency would help to legitimize this corporate body of educational law. If this is not done, the public teacher, will continue to conflict with the viewpoints of unionism and professionalism in the eyes of the state.

Chapter 3

NEGLIGENCE IDENTIFIED

To systematically analyze the body of public law affecting teachers as public employees, this study will now revert back to the fundamental principles of tort liability. The focus of this chapter will center on the legal aspects of negligence liability. Once again, the main objective will be to relate the descriptive method of analysis between negligence law per se and the factual examples of teacher performance. The basic purpose will be to discuss negligence principles in relation to teacher behavior.

Negligence was scarcely recognized as a separate tort before the earlier part of the nineteenth century. Prior to that historical period, the word had been used in a very general manner to describe the breach of any legal obligation, or to designate a mental element, usually of an inadvertence or indifference, entering into the commission of other torts.[1]

Negligence itself has been identified in a multitude of definitions and conditions. The 1919 Harvard Law Review described negligence as conduct and not a state of mind.[2] In most instances, it is caused by heedlessness or carelessness, which makes the negligent party unaware of

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[1]William L. Prosser, Law of Torts (St. Paul, Minnesota: West Publishing Co., 1971), p. 139.

[2]Terry, "Negligence," 29 Harv. L. Rev. 40 (1915).

of the results which may follow from his act. On the other hand, it may also exist where he has considered the possible consequences carefully and exercised his own best judgment.[3] The standard of conduct or performance imposed by society is an external one, which is not necessarily based upon any moral fault of the individual; and a failure to conform to it is negligence even though it may be due to stupidity, forgetfulness, an excitable temperament, or even sheer ignorance.[4]

Legal scholars, philosophers, and practitioners continue to seek a more sophisticated and measurable degree of human negligence. An informative source on school law defines negligence in the following terms:

> Negligence is conduct falling below an established standard which results in injury to another person. It involves an unreasonably great risk which causes damage or harm to others . . . Negligence differs from an intentional tort in that negligent acts are neither expected nor intended, while an intentional tort may be both anticipated and intended. With negligence, a reasonable man in the position of the actor could have anticipated the harmful results.[5]

It is imperative to comprehend at this point that a negligent act in one situation may not be negligence under a different set of circumstances. No definitive rules as to what constitutes negligence can easily apply. The often ambiguous concept representing the standard of conduct of the actor is usually the key element.

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[3]Edgerton, "Negligence, Inadvertence and Indifference," 39 Harv. L. Review 849 (1926).

[4]William L. Prosser, op. cit., p. 204.

[5]Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials, 1973 Supplement (St. Paul, Minnesota: West Publishing Co., 1973), p. 83.

The Cyclopedia Law Dictionary offers some clarification to our discussion of negligence law. This particular source says that negligence is an "inadvertent imperfection by a responsible human agent in the discharge of a legal duty, which produces, in an orderly and natural sequence, a damage to another."[6] Negligence could also mean "any lack of carefulness in one's conduct, whether in doing, or in abstaining from doing, wherefrom by reason of its not filling the full measure of the law's requirement in the particular circumstances there comes to another a legal injury."[7]

In A Legal Memorandum publication negligence is explained as the failure to exercise that degree of care which, under the circumstances, the law requires for the protection of other persons. Stated simply, negligence is the absence of care. It may be an active or passive response. In legal jargon, it is summarized as an act of commission; "something you do that you should not have done or something you do not do that you should have done."[8]

As noted in Cianci v. Board of Education of City School District of Rye, "Quite apart from liability imposed by statute, under the common law there was imposed both the duty to be reasonably vigilant in the supervision of the pupils and the liability for negligent performance of such duty."[9]

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[6]Walter A. Shumaker and George Foster Longsford, The Cyclopedia Law Dictionary, (3rd ed.; Chicago: Callaghan and Company, 1940), p. 746.

[7]Ibid.

[8]"Negligence--When is the Principal Liable?" A Legal Memorandum (January, 1975), pp. 2-5.

[9]Cianci v. Board of Education of City Sch. Dist. of Rye, 238 N. Y. S. 2d 547 (1963).

ELEMENTS OF NEGLIGENCE LAW

From the previous statements we can now deduce that one of the essential elements of negligence law is duty. The duty to act with reasonable vigilance is most often described as the duty to act as a reasonably prudent person would under all of the circumstances.[10] No duty usually exists where the defendant could not have reasonably foreseen the danger of risk involved. A duty may intensify as the risk increases.

Certain school functions require an increased obligation on the part of the teacher. For instance, the performance of a dangerous experiment would demand a greater obligation on the part of the teacher than supervising a study hall. The law states that a person is not generally liable for failure to act when there is no definite relationship between the parties. To a public employee acting as a common citizen, there is no general duty to aid a person in danger. There is no legal duty to aid someone that is drowning even though a moral duty should definitely be considered. Once a person affirmatively decides to act no matter what official capacity he is in, he assumes a duty to the person and must make sure that all his proceeding acts will be performed reasonably. Because of the teacher-student relationship, a teacher may be held liable for an omission to act as well as for an affirmative act. In such case, though, the teacher is only required to provide such assistance as a man with his training and experience in similar circumstances could reasonably provide.[11]

The California Supreme Court developed the specific principle of duty as follows:

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[10] Ibid., p. 3.

[11] Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials, 1973 Supplement (St. Paul, Minnesota: West Publishing Co., 1973), pp. 85-86.

> It was not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities in order to establish that their failure to provide the necessary safeguards constituted negligence. Their negligence is established if a reasonably prudent person would foresee that injury of the same general type would be likely to happen in the absence of such safeguards.[12]

The ideas of negligence and duty are strictly measured in correlation to each other. A Maryland railroad case affirmed this position when it stated, "In every instance, before negligence can be predicted of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury."[13]

Our concentration will now develop into the second primary element of negligence law called standard of conduct or standard of care. Ordinarily an employee becomes negligent when in his conduct he does something or fails to do something which a reasonably prudent person under the same or similar circumstances would not have done or would not have omitted to do. In this type of situation the law accepts what is a common standard of conduct as the legal standard on the topic. However, one must be careful to logically parallel the reasonably prudent person model as it would relate to the public teacher employee.[14] The generally accepted standard of care for the education profession would be that of a reasonably prudent teacher, not that of a reasonably prudent layman. In addition, as the foreseeable risk increases, the standard of care of the

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[12]Lehmuth v. Long Beach Unified School Dist., 53 Cal. 2d 544 (1960).

[13]McSherry in West Virginia Central and P. R. Co. v. State, 96 Md. 652 (1945).

[14]Bernard C. Gavit, ed., Blackstone's Commentaries on the Law (Washington D. C.: Washington Law Book Co., 1941), p. 569.

actor involved increases likewise.[15] For instance, the standard of care of a woodshop teacher for the protection of students is generally greater than that of the school librarian.

The third characteristic of negligent actions is a concept known as proximate or legal cause. Proximate cause is the sequential connection between the teacher's negligent conduct and the resultant injury to a student. There must be an integral relationship between the teacher's negligence and the student's harm. To show proximate cause, the teacher's negligent act must be in continuous and active force up to the actual harm. The lapse of time between the act and the injury must not be so great that contributing causes and intervening factors render the original negligent act to be an unsubstantial or insignificant force in causing the harm. The intervening act must supersede the original negligent act in order to disconnect the chain of events causing the injury. The negligent act of another, nonetheless, does not necessarily supersede the liability of the original act. A prime example of this would be to send a child across the street on an errand and the child is struck by a car. This act does not usually eliminate the liability of even the teacher though the car driver was negligent himself. Another way to perceive this situation is that many times a continuing obligation remains no matter what somebody else might do to break the causal chain.[16]

According to the eminent defense lawyer, William M. Kunstler, the proximate cause doctrine has two chief aspects--causation and foreseeability. Causation means that, but for the actor's negligence, the

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[15] Cirillo v. Milwaukee, 34 Wis. 2d 705 (1967).

[16] Mikes v. Baumgartner, 277 Minn. 423 (1967).

accident would not have happened. Here, too, omissions as well as commissions may directly cause an accident.[17]

To further illuminate the proximate cause foundation let us observe the opinion of the court in Holler v. Lowery. In this judicial opinion, one discovers:

> There is no mystery in the doctrine of proximate cause. It rests upon common sense rather than a legal formula. Expressed in the simplest terms it means that negligence is not actionable unless it, without the intervention of any independent factor causes the harm complained of. It involves of course the idea of continuity.[18]

The fourth and final element of negligence law is the injury or actual loss must have occurred as a result of the actor's own negligence. A defendant is not liable for injury unless he has in fact caused the injury. The plaintiff must actually show loss or injury from the resulting act. If the harm suffered is caused by more than one person, then damages may be apportioned among the tort feasors. Professor Dean Gavit describes this legal postulate in these words, "If there is actual physical injury to the person, the defendant is liable whether his conduct was intentional or negligent."[19] This reaffirms the purpose of the law in imputing liability only under intentional or negligent actions is to make a fair distribution of the loss arising out of injury to another or his property. It is generally concluded that a person should be legally responsible to another for an intentional or negligent injury but that

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[17]William M. Kunstler, Law of Accidents (New York, N. Y.: Oceana Publications, 1954), pp. 18-19.

[18]Holler v. Lowery, 175 Md. 353, 358 (1938).

[19]Bernard C. Gavit, ed., Blackstone's Commentaries on the Law (Washington, D. C.: Washington Law Book Co., 1941), p. 569.

one who is injured as the result of an inevitable accident should bear the loss of that type of injury.[20]

Before the public school teacher is hindered in all creative attempts due to the alarming effects of negligence, one must first observe the unrecorded evidence of acts that are never brought to trial. Indeed, one is not liable for every accident. An accident which is unavoidable and could not have been prevented by reasonable care does not constitute negligence. No liability exists for sudden and unavoidable accidents.[21] In a Detroit school a teacher of a nature study allowed students to care for certain plants. An eight-year old girl was directed to water some plants in an adjoining room by the teacher. To reach the plants the child used a chair and fell from it. In the process, she ended up cutting herself severely from a broken milk bottle in which the water had been contained. The court ruled that there had been no reason to anticipate the danger in the performance of the act. "The mere fact that an accident occurred, and one that was unfortunate, does not render defendant liable."[22]

Before investigating the more specific court actions indicating the degree of consistency of legal principles as they are applied to teacher conduct, let us summarily review the elements of negligence. The standard of supervisory conduct on the part of the teacher is that

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[20]Ibid.

[21]Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials, 1973 Supplement (St. Paul, Minnesota: West Publishing Co., 1973), p. 83.

[22]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963), p. 248.

prudence and care which the normal parent might exercise under the same or similar conditions. This often reiterated formula of in loco parentis has covered a multitude of inconsistencies in principle and practice. Professor Paul O. Proehl points out a valid distinction that while the teacher may stand in loco parentis as regards the enforcement of authority, a teacher does not stand in loco parentis with regard to negligent acts, for the teacher remains potentially liable for the negligent injury of a child, while a parent does not.[23]

The fundamental issues in a negligence case encompass a significant variety of standard procedures. First of all, the court must explore the sufficiency of evidence to permit a finding of the facts before any duty or standard of proof of facts can be established. "It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued."[24]

Second, the weight of evidence as to establishing the facts lies in the hands of the jury. The probative value of evidence and the conclusion to be drawn from it reside in the minds of twelve chosen laymen. M. Chester Nolte and John Phillip Linn superbly illustrate the various trends of legal inconsistencies in applying liability law because the

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[23]Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Co., Inc., 1973), Ch. 5, p. 34.

[24]Terry, "Negligence," Harvard Law-Review, 40 (1915) in Kern Alexander, Ray Corns, and Walter McCann, Public School Law Cases and Materials, 1973 Supplement (St. Paul, Minnesota: West Publishing Co., 1973), p. 83.

human factor in juries is often impossible to calculate. Generally speaking, negligence is what a jury of twelve laymen say it is. It would be presumptious to charge the teacher with never committing a mistake. Therefore, the jury in its non-expert status has the duty of interpreting whether the defendant acted as reasonably prudent teacher would have acted under the same or similar circumstances. "Hence," according to Nolte and Linn, "it is not always easy to predict under what circumstances juries will consider the teacher negligent, and under what circumstances they will exonerate the teacher."[25]

Third, there must be an existence of a duty. Does such a relationship exist that the community will impose a legal obligation upon one for the benefit of the other? This is not only a question of law to be determined by reference to statutes, rules, principles, and precedents but a question of facts surrounding each particular case.

Fourth, the litigation process must view the standard of conduct as a necessary complement of duty. Once a duty is discovered, in theory, the duty always requires the same standard of conduct, that of a reasonable man under similar circumstances. What are the legal characteristics of this reasonable, but fictional man model? In Lehmuth v. Long Beach Unified School Dist. the court described the reasonable individual as a "prudent man, average man, a man of ordinary sense using ordinary care and skill." His characteristics must include the physical attributes of the defendant himself. He must possess normal intelligence, perception,

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[25]M. Chester Nolte and John Phillip Linn, op. cit., p. 247.

and memory or else have such superior skill and knowledge as the actor has or holds himself out as having.[26]

Fifth, the particular standard of conduct must be filled in with the details of each specific case. While this is a question of fact under our system of procedure, this issue is to be determined in all doubtful cases by the jury.

The plaintiff does not have to prove his case beyond a reasonable doubt as one would have to in a criminal case. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. Furthermore, the fact of causation cannot be proved mathematically, since no man can say with undeniable certainty what would have occurred if the defendant had acted differently.[27]

One can surmise from the previous assertions with a degree of certainty that there is a consistent agreement only among generalized legal procedures. Otherwise, the discrepancy between principle and application, performance and interpretation, rests upon the diversity and merits of each individual case. The meticulous observer who relies on mathematics, statistics, and computations as consistent instruments of measurements will become disappointed in the lack of precision and regularity in the following negligence cases. It is important at this point to acknowledge that the variable human element in teacher performance, court adjudication, and jury interpretation creates an uneven legal pattern.

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[26] Lehmuth v. Long Beach Unified School Dist., 53 Cal. 2d 544, (1960).

[27] William L. Prosser, Law of Torts (St. Paul, Minnesota: West Publishing Co., 1971), p. 242.

A CASE STUDY CRITIQUE OF NEGLIGENCE

The following section will utilize specific cases to illustrate fundamental principles of negligence. A major purpose will be to depict the legal relationships and circumstances which surround every instructor. It will also point out the potential areas of litigation.

Public school teachers have no special immunity because they are public employees. In essence, they may be held more accountable than the ordinary individual because pupils are in their care and they have a responsibility to prevent pupil injuries wherever possible.[28] Blackstone's Commentaries on the Law further exemplifies this public position when it says, "It is inferred, that every one who undertakes any office, employment, trust or duty, contracts with those who employ him, to perform it with integrity, diligence, and skill. And if by his want of one of these qualities, any injury accrues to individuals, they have their remedy in damages by a special action on the case.[29]

The possibilities of negligent action by teachers are increasing drastically due to the number of activities pupils engage in. Injuries resulting from manual training, laboratory work, and physical training have been sources for the largest number of suits for damages against both the district and the teacher. Kern Alexander, professor of educational administration at the University of Florida, enumerates four

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[28]Madaline Kinter Remmlein, School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1962), p. 227.

[29]Bernard C. Gavit, ed., Blackstone's Commentaries on the Law (Washington, D. C.: Washington Law Book Co., 1941), p. 585.

areas of greatest risk to the public school teacher. They include the controlled supervision of playgrounds, interscholastic activities, physical education, and shop classes.[30]

Within these areas of greatest risk, adequate teacher supervision remains the key factor in negligence cases. William L. Prosser concurs that a teacher could be liable to an injured student whether or not the teacher could have prevented the injury, if the injury is a consequence of absence or failure to supervise.[31]

Courts have held that teachers owe three basic duties to their classes. They are adequate supervision, proper instruction, and maintenance of all equipment used in a state of reasonable repair.[32] In the words of Alexander, Corns, and McCann:

> It is the teacher's duty to adequately supervise her pupils at all times. This is especially important in shop classes, laboratory classes, driver training education courses, and related activities. Proper instruction is particularly necessary in shop classes and athletic classes. The pupils must be taught properly how to use the chemicals, how to play games and how to use equipment so as to minimize personal injuries. Athletic equipment should be checked periodically to see if it is in good working condition. Equipment used on the playground during recess and at the noon hour should be checked periodically to ascertain if it is reasonably safe for use.[33]

Inadequate supervision of playgrounds has been a persistent cause of litigation. To the public instructor it should be more than

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[30]Kern Alexander, "Trends and Trials," Nation's Schools, Vol. 87, No. 3 (March, 1971), pp. 57-58.

[31]William L. Prosser, Torts, 51 (3rd, 1964) at 309, found in Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Company, Inc., 1973), p. 37.

[32]Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials (St. Paul, Minn.: West Publishing Co., 1969), pp. 363-364.

[33]Kern Alexander, Ray Corns, and Walter McCann, op. cit., p. 365.

just an additional chore over and above his normal duties. Supervision of recess and lunch periods has been recognized as a fundamental necessity for the maintenance of discipline and the regulation of student conduct. A principal task of supervisors according to court reasoning is to anticipate and restrict rash student behavior. Courts have often held that failure to prevent injuries caused by the intentional or reckless behavior of the victim or fellow student may comprise negligence.[34]

A teacher, however, is not liable for injuries resulting from a sudden and unpredictable act. For example, when a small girl unexpectedly ran into the swing of an older batter in a softball game, the court held the teacher was not negligent.[35] Furthermore, "there is no requirement that the teacher have under constant and unremitting scrutiny the precise spots wherein every phase of play activity is being pursued; nor is there compulsion that the general supervision be continuous and direct."[36]

During a scheduled recess it has been deemed negligent for a teacher on playground duty to be stationed inside the building. Absence from the playground duty for another equally valid educational task is no excuse in a negligence case. However, the teacher will not be held personally liable if the principal has assigned him to two areas at once. Another requirement of supervision is a reasonable number of qualified supervisors. Courts have been reluctant, nevertheless, to establish a specified number ratio to students. Teachers have been held liable for playground injuries resulting from roughhouse games such as "keep away"

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[34] Dailey v. Los Angeles Unified School District, 87 Cal. 376 (1970).

[35] Germond v. Board of Education, 10 A. b. 2d N. Y. S. 139 (1960).

[36] Nestor v. City of New York, supra., 28 Misc. 2d N. Y. S. 70 (1961).

and "block-out," standing on swings, playing near driveways, and standing on fire escapes. Duty also requires that a teacher take affirmative steps to protect pupils under their care from dangerous conditions no matter where they might be.[37]

What are the time limits for supervision on public school grounds? Courts have not required supervision of pupils on school grounds before or after formal class hours, except when the situation takes on the characteristics of a recess, there is a dangerous condition present, or the school sponsored activity is dangerous.[38] E. E. Loveless and Frank R. Krajewski in their work, The Teacher and School Law, firmly state a somewhat opposing viewpoint. Their contention is that supervisory duty begins when the child comes to school even if the doors are not officially opened.[39]

A case which best illustrates the previous assumption by Loveless and Krajewski is Titus v. Lindberg. The Supreme Court of New Jersey was confronted with a case where a thirteen-year-old student injured a nine-year-old student with a paper clip shot from a rubber band. When the principal arrived at work around eight a.m., he was vividly familiar with students congregating around the school doors. It was this type of circumstantial surrounding in which the young child was injured. In upholding the jury verdict against the principal, a legal maxim was cited which is applicable to all school officials including classroom teachers. The

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[37]Laurence Kallen, Teacher's Rights and Liabilities Under the Law (New York: Parker Publishing Co., 1971), pp. 29-39.

[38]Ibid.

[39]E. E. Loveless, and Frank R. Krajewski, The Teacher and School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1974), p. 196.

court stated, "He had not announced any rules with respect to the congregation of his students and their conduct prior to entry into the classroom."[40] Supervisory precautions while often initiated by the principal cannot be neglected by the professional instructor who must also carry out his duties in a reasonably prudent manner.

Is there any consistency of agreement on the utilization of non-professional personnel to supervise activities? In a 1937 New York case a child was injured during lunch hour in the school gymnasium while under the supervision of the school janitor. While no teacher was deemed responsible, the school district was found negligent on the theory that the duty to provide competent supervision had not been met.[41] Laurence Kallen, in his book, Teachers Rights and Responsibilities Under the Law, has given his professional opinion concerning non-professional aids in a less cautionary manner. He believes that even in the absence of statute the teacher will not be held liable for a pupil injury simply because the teacher has assigned an aide or student-teacher to supervise the pupils unless the activity is one of dangerous risk or unless the teacher should know that the person assigned is not capable to retain control over the class.[42]

Most states do not specifically relate the statutory obligations to playground supervision. The California Administrative Code, Title 5, Article 3, Section 18 reveals a model of supervisory duties. It says, "Where playground supervision is not otherwise provided, the principal of

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[40] Titus v. Lindberg, 49 N. J. 66 (1967).

[41] Garber v. Central School District, 295 N. Y. S. 850 (1937).

[42] Laurence Kallen, Teachers Rights and Liabilities Under the Law (New York: Arco Publishing Company, Inc., 1971), p. 39.

each school shall provide for the supervision, by teachers, of the conduct and direction of the play of the pupils of the school or on the school grounds during recesses and other intermissions and before and after school."[43] It may be that laws will need to become more specific throughout the United States in regard to playground supervision.

The second conspicuous area of risk resides in interscholastic activities because it encompasses the largest ratio of injuries per person. This area will be dealt with through examinations of a series of situations in which there is a high potential of both risk and negligence. Several key legal principles will be drawn from these experiences. In most athletic encounters, the student assumes the normal risks of the game and cannot recover damages for injuries sustained therein. A coach could become negligent when an act creates a risk which is greater than can be expected in the normal routine of the sport, "But it is nevertheless true that what the scorekeeper may record as an 'error' is not the equivalent, in law, of negligence."[44]

Several cases of negligence have been brought against coaches who have forced athletes to play while they are still suffering from extensive injuries.[45] For the purposes of this study, many of the legal or quasi-legal principles concerning medical treatment will be investigated in a subsequent section. In addition what is applicable to interscholastic

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[43]Michael S. Sorgen, Patrick S. Duffy, Milliam A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Co., Inc., 1973), Ch. 5, p. 55.

[44]McGee and Morris v. Union High School, District A, 160 Wash. 121 (1931).

[45]Ibid.

activities is also adaptable to a third area of enormous risk, the physical education class.

In the physical education classes, the "assumption of risk" tenet as a defense procedure is not usually feasible since most physical education classes are not voluntary. Activities, consequently, should not be prescribed which pupils could not reasonably be expected to perform. Let us explore two cases which illustrate this point.

Wire v. Williams is a case where the majority of the court concluded that a physical education teacher could not anticipate that the wooden handle attached to a six-foot rope used for rope-jumping would be jerked from her hand accidentally hitting and injuring a student.[46] It has also been held that, where a type of physical education activity requires special training, the physical education teacher should not permit or require untrained students to participate in such activity. In La Valley v. Stanford a teacher was held liable in tort for injuries suffered by a student while engaged in boxing, an activity for which the student had no training.[47]

Supervisory aspects remain an integral part of physical education classes as it does in any public school activities or academics. In a 1967 case a student was injured during a physical education class when a basketball game deteriorated into a "roughhouse game." The accident occured while the class was unsupervised due to teacher absence for some twenty-five minutes. According to the Wisconsin court the teacher made several mistakes. First, he failed to provide rules to guide the class.

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[46] Wire v. Williams, 133 Minn. 840 (1965).

[47] La Valley v. Stanford, 70 N. Y. S. 2d 146 (1965).

Second, he attempted to teach an excessive number of students which, of course, could have administrative implications. Third, he dismissed himself from the gym when it was "common knowledge" the forty-eight adolescent boys would tend to become reckless and wild in his absence.[48]

A fifteen-year-old high school student was struck by a garbage truck proceeding on school grounds at about twenty-five miles per hour. In this incident, the students were running from the gymnasium to the playing field which had been a routine course for physical education classes for more than seven years. In verifying a judgment for the student against various parties, the court explicitly stated that school authorities, including teachers, have the duty ". . . to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary for their protection."[49] The court was critical of school officials who knew the seriousness of the situation, but ". . . nevertheless took no precautions to minimize the danger of injury to the students . . ."[50] This case contains further admonitions for school officials. The opinion of this court clearly stated the premise that "precautions required to be taken by school administrators vary with the age and understanding of the student." The court framed the legal principle in these words, "Plaintiff (student) is bound only to that duty of care which a normal child of the same age would be expected in such a situation."[51]

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[48] Cirillo v. City of Milwaukee, 34 Wis. 2d 705 (1967).

[49] Taylor v. Oakland Scavenger Co., 17 Cal. 2d 594 (1941).

[50] Ibid.

[51] "Negligence--When is the Principal Liable?" A Legal Memorandum (January, 1975), p. 3.

A rather unique case occurred in McDonell v. Brozo et. al. where the plaintiff was injured when she was struck from behind by a runner in a physical education class. The older woman was hit by the student while walking on the sidewalk. The pupils had been warned not to run when there were other people on the sidewalk. The supervising attendant attempted to stop the race when he saw the plaintiff, but to no avail. Because there was no evidence prior to this incident that the public had been annoyed or injured by these races, it could not be held, according to this court, that there was a nuisance created by defendants for which they are liable. The negligence of the student caused the injury and, therefore, the acts of teacher, attendant, and principal were not judged negligent.[52]

A physical education instructor has a number of basic duties to perform. Generally speaking, the teacher must supervise physical activities at all times. Thorough preparation of his pupils in the use of equipment appears almost mandatory to avoid later charges. The equipment itself should be in suitable working order. Usually, he will not be held liable for equipment failure which cannot be foreseen. Legal rulings have acknowledged tag, tennis, handball, and touch football as not being dangerous sports when played by skilled participants. Boxing, wrestling, and a dive and roll over two students have been found to be dangerous. In one instance, headstands were described as being "absurd, dangerous, fantastic and perilous antics."[53]

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[52] McDonell v. Brozo et. al., 285 Mich. 38 (1938).

[53] Gardner v. State, 281 N. Y. 212 (1939).

In determining the liability of a physical education instructor courts will usually deviate from course content and curriculum when formulating their decision. Interpretations and judgments are usually based on:

> a. Whether the activity was reasonable in view of the child's age, sex, physical condition.
> b. Whether the teacher provided step-by-step procedures for the activity. In other words, was proper instruction given.
> c. Whether the teacher properly assessed the knowledge and ability of the child relative to the activity required to be performed.[54]

Overall, the liability of physical education teachers is no greater than for other teachers except the opportunities for injury are greater. It is also important to remember that the standard of care in law is founded upon contemporary conditions of educational knowledge, as well as past precedents in legal cases. This may explain, then, the discrepancy between the precedence of negligence set in earlier cases and contemporary negligence standards.

The fourth area of greatest risk occupies an assortment of courses depicted under the heading of shop and laboratory classes. Classes such as auto mechanics, metals, shop, and woodworking are particularly hazardous. Risks created by the use of dangerous machinery and tools require that teachers maintain high standards for both instruction and supervision. Part of the awesome responsibility of a teacher is to outline and enforce compliance to safety rules at all danger points. In fact, repeated instruction of safety rules will often be sufficient evidence to exonerate the teacher from personal liability.[55]

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[54]Kern Alexander, "Trends and Trials," Nation's Schools, Vol. 87 No. 3 (March, 1971), p. 47.

[55]Perumean v. Wills, 96 2d Cal. 67 (1971).

It is equally imperative that adequate instruction not only includes the promulgation of safety rules, "but also involves warnings which make clear the amount of danger inherent in the undertaking."[56] Any information which does not specify the degree of danger and the gravity of injury which might result is legally inadequate instruction. Furthermore, the teacher must set a good example by not violating safety procedures already installed in the classroom. It is very valuable for the teacher to be certain he has adequately instructed each pupil and to have written evidence to this effect.

This study will now engage in evaluating some of the more exemplary cases in this area. A boy in an auto mechanics class in California was welding an automobile gasoline tank. The tank exploded killing one of the boys and seriously injuring another. The teacher was held negligent for lack of proper supervision of the activity.[57]

During a teacher's absence from class a machine in a shop was not locked up. Based upon the evidence submitted, the jury decided that the machine was left unattended for an unreasonable length of time. Further proof was such that the jury was free to discover no warning to the infant-plaintiff against using the machine in doing the work which had been assigned to him.[58] On the other hand, in a comparable New Jersey case the school board and teacher were not held negligent when a student sustained injuries operating a power jig saw in shop class. The student operated the saw negligently in contradiction to explicit safety

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[56] Laurence Kallen, op. cit., p. 43.

[57] Butcher v. Santa Rosa High School Dist., 137, 481 Cal. App. 2d 290 (1955).

[58] De Benedittis v. Board of Education of City of New York, 67 N. Y. S. 2d 31 (1946).

rules set down by the instructor. Secondly, evidence disclosed that there had been no previous accidents in class. The saw that was used was over six years old and had never been the subject of an accident before. The student's act broke the chain of causation between the asserted negligence of the school board and the injuries suffered by the infant plaintiff.[59]

A 1966 Arizona case revealed an auto-mechanic instructor's deficiency in supervision and instruction. A student severely injured his hand while moving a car top in class. It was ruled that the teacher did not exercise proper care in supervising and instructing the students about moving the car top. The court maintained that the instructor reasonably could have anticipated a resultant injury from his pupils' unorganized and unsponsored handling of a jaggedly cut metal car roof.[60]

In a New York Court the school district was held negligent because it failed to provide coveralls for pupils operating machinery in a shop. A boy's thumb was crushed when he tried to extricate his sweater, which was caught in a lathe. The court said the school was obligated to furnish the same protective clothing as required by statutes for employees in machine shops of industries in New York.[61]

Oakland, California, was the scene of a 1931 case which has been repeatedly utilized to portray the potential hazards of laboratory classes. A student was permanently injured in a chemistry class when an

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[59] Meyer et. al v. Board of Education, Middletown, Tp. New Jersey, et. al., 9 N. J. 46 (1952).

[60] Morris v. Ortiz, 103 Ariz. 119 (1968).

[61] Edkins v. Board of Education of New York City, 41 N. Y. 2d 75 (1971).

explosion occurred as a result of a demonstration given by the teacher on the production of explosive gases. In holding the teacher liable for negligence, the court pointed out that the teacher knew of the dangerous nature of the chemicals, and should, therefore, have exercised greater precaution in conducting the experiment.[62] Throughout legal history, other examples of laboratory negligence include unlabeled bottles of acid, unsafe storage areas, dangerous machines not locked up when not in use, and not providing safety glasses.[63]

CLASSROOM EXAMPLES

The research agenda proceeds from potentially highly dangerous areas to the realm of classroom teacher. While the potential for negligence may not be as great, a significant number of litigated cases is the basis for a precautionary approach to classroom conduct. To what degree is the teacher liable for disruptive behavior in class which results in injury to a student? Although this, like a myriad of other occasions, is not an easy answer, the reasonably prudent teacher should take precautions to protect the class from a known violent or aggressive student. The reason for this is that a teacher is not liable for sudden, unexpected acts of a student. Where a known tendency of a pupil for aggressive behavior exists this, of course, is less than unexpected. As a further precaution, teachers should warn substitute teachers about pupils with certain aggressive tendencies.[64]

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[62] Damgaard v. Oakland High School Dist., 212 Cal. App. 316 (1931).

[63] Laurence Kallen, Teacher's Rights and Responsibilities Under the Law (New York: Arco Publishing Company, Inc., 1971), pp. 40-47.

[64] Ibid.

Generally speaking, what is reasonable and what is foreseeable are the criteria in supervising classes. The legal standard is one of ordinary prudence. The impossible will not be required, although, as teachers realize, it is often asked. Where supervision could not have prevented the injury, its lack of supervision will of course not be held to be the cause of the injury.[65] For example, in a 1947 case it was held that a teacher's answering of a telephone was not the proximate cause of injury to a child by a stone batted by another.[66]

Another example confirms the contention that the injury of one pupil by another in the teacher's brief absence may be perhaps treated as the unseen act of a third party.[67] In other words, one must establish the connection that the negligence which caused the injury was the absence of the teacher from the classroom. In dismissing a complaint against a teacher for leaving the room to put supplies away while a thirteen-year-old was struck by a lead pencil thrown by another pupil, the New York Court of Appeals said:

> By such standards (long established and well-recognized rules of common-law negligence), a teacher may be charged only with reasonable care such as a parent of ordinary prudence would exercise under comparable circumstances. Proper supervision depends largely on the circumstances attending the event . . . This is one of those events which could occur equally as well in the presence of the teacher as during her absence.[68]

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[65] Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Company, Inc., 1973), p. 5-35.

[66] Wilber v. City of Binghamton, 296 N. Y. 950 (1947).

[67] Ohman v. Board of Education, 300 N. Y. 306 (1971).

[68] Ibid.

Before developing any notions of classroom liability, one must investigate the extreme conduct as Forgone v. Salvador Union Elementary School District represents. It was found in this instance that where the absence is extended and the omission is gross, as in the failure to supervise a lunchroom where such provision was required by prudence and statute, the plaintiff recovered for a broken arm received in a scuffle.[69]

The legal debate over a teacher's absence from the classroom progresses on with no final culmination in sight. Both educators and legal authorities have affirmed that "a teacher's absence from the classroom, or failure properly to supervise students' activities, is not likely to give rise to a cause of action for injury to a student, unless under all the circumstances the possibility of injury is reasonably foreseeable."[70]

In a related matter of legal consequences, the subject of dangerous instrumentalities is graphically portrayed in a 1962 New York case. In this instance, the court declared that whether the act was done intentionally or accidentally does not matter. What matters is whether a teacher, if present, could have anticipated the unprovoked conduct of a boy whose act was not sudden and impulsive. The court's official statement went on to read:

> The court, therefore holds that the teacher's absence from the classroom was the proximate cause of the injuries resulting from the stabbing of the plaintiff by a classmate. There was legal causation between the failure to provide supervision and the injury to the plaintiff. It is true that the efficient cause of the plaintiff's injury was the wrongful

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[69] Foregone v. Salvador Union Elementary School District, 41 Cal. App. 2d 423 (1940).

[70] Kern Alexander, Ray Corns, and Walter McCann, Public School Law Cases and Materials, 1973 Supplement (St. Paul, Minnesota: West Publishing Co., 1973), p. 94.

> act of an intervening third party, a mischievous boy. However, under the circumstances here--the dangerous instrumentality, the warning period of five to ten minutes, the stabbing of the plaintiff was an act which could have been reasonably foreseen by a teacher if he were present in the classroom . . .[71]

By viewing this classified assortment of school room cases, it appears logical to assert no hard and fast rule concerning the absence of a teacher from the classroom. Factors such as the basic tendencies of a class towards disruptive behavior, the nature of classroom activities, and the inherent control of the class by a particular teacher would usually dictate the length of time an instructor can legally afford to be away from the room. Nevertheless, one may cogently express the opinion that a professional educator should remain in the assigned room almost constantly as a teacher and supervisor. While some absences from the classroom are unavoidable, they should be kept to a bare minimum and utilized only at "strategic" points throughout the day.

Besides the normal classroom situation, what is the teacher's lawful responsibility concerning students who are conducting errands? It is well established that a teacher may be held liable for injuries to a pupil on errands, or to third parties on whom the pupil inflicts injury. On an errand under the direction of the teacher, the pupil is legally an agent of the teacher and the laws of agency directly apply.[72]

A jury would, no doubt, hold it reasonable to send a child on an errand within the school, but would probably hold otherwise if the errand

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[71] Christofide v. Hellenic Eastern Orthodox Christian Church of New York, 227 N. Y. S. 946 (1962).

[72] M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963), p. 262.

took place outside the school boundaries. Pupils should be sent outside the school's geographic boundaries only in case of an emergency. In event of an emergency, the most mature and dependable student should be chosen for this purpose to lessen the probability of injury but not necessarily of liability.[73]

Much controversy has arisen over the classroom teacher's potential liability in hallway supervision. Constant supervision of the halls is an idealistic assumption with almost impossible dimensions for the teacher. Unless assigned otherwise the instructor should be vitally alert to the hallway conditions and conduct nearest his classroom. Only when the perceptive teacher has noticed a trend towards rowdyism in the hallways must something be done to alleviate the situation. At this juncture, the teacher or school could be held liable if nothing is done. On the other hand, if a teacher happens to see a violation of the rules in the halls, he must take affirmative steps to remedy the situation.[74]

An important aspect of any educational institution is the learning stimuli gleaned from outside sources. A significant development in both conventional and progressive type schools is the enactment of educational field trips and extra-curricular activities. It is not the intellectual focus of this paper to debate the social merits of the trends, but to illuminate the definitive measures of teacher responsibility. Once again, court cases do little to provide necessary guidelines except to depict the awesome responsibility shouldering on school authorities.

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[73]Ibid.

[74]Laurence Kallen, Teachers' Rights and Responsibilities Under the Law (New York: Arco Publishing Company, Inc., 1963), pp. 29-39.

Many times the school administration or individual classroom teacher may require written parental consent before permitting a student to participate in certain school activities, such as athletic programs and field trips. These parental permission slips, nevertheless, have little legal value in relieving the teacher of tort liability. The parent cannot abrogate his responsibility for the safety of the child by "signing it away." The teacher, standing in loco parentis, has assumed a legal duty to protect the health, safety, and welfare of the student, and cannot alter or abrogate it merely by obtaining the consent of the parent.[75]

The only real value of the permission slip, in addition to its public relations worth, lies in the knowledge that the parent knows of the activity, and has indicated a willingness for his child to participate in it. Conversely speaking, the absence of the permission slip indicates that the parent does not wish his child to participate. The most that a parent can waive by signing a waiver or release is his own right to bring suit for medical costs or other expenses which result to the parent from the pupil injury. The child through an attorney may still sue for the injuries he has sustained.[76]

In relation to the last statements made, it is a policy of each state to determine limitation of time within which an action at law or suit in equity can be maintained. The statutes of limitations among the states are by no means uniform and may vary from one to four years or longer. In many states, the statute of limitations does not run against

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[75]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1937), pp. 257-258.

[76]Ibid., p. 258.

infants, but will begin to run once the child attains the age of maturity. Therefore, action may be brought against a teacher, for his negligence resulting in injury to a student, many years after the occurrence of the tortious act.

Despite all the judicial notices, opinions, and admonitions, Nolte and Linn in School Law for Teachers declare that no case has been discovered in which it was sought to hold the teacher or principal liable for pupil injury while on a field trip. All the reported cases were brought by the injured child or his parents against the agency visited wherein the injury occurred.[77]

While the essence of this statement may have been true in 1963, a later case appears to reflect a more recent trend by including teachers as well as agencies the subjects of litigation.

The substance of the case mentioned in the previous paragraph occurred in Chicago's Field Museum of Natural History. Two teachers were taking fifty seventh graders on a field trip. Children were allowed to divide up into small groups. A student strayed from the care of his observer group to a deserted wing of the museum. Outside the realm of adult supervision that young student was beaten up by a gang of older boys. Action was brought against two teachers and the museum director for willful and wanton misconduct, at the least, negligence, and not providing sufficient guards.[78]

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[77]Ibid., pp. 259-260.

[78]Mancha v. Field Museum of Natural History, et. al., 5 Ill. App. 3d 699 (1972).

The Illinois judge ruled in favor of the defendants saying that "the risk of a twelve-year-old being assaulted in a museum is minimal and couldn't be anticipated."[79] The judicial statement went on to say that "the burden sought to be imposed on the defendant school district is a heavy one which would require constant surveillance of children. It would, in effect, discourage schools and teachers from affording opportunities to children to enjoy extracurricular activities."[80] Commenting on this specific case, E. T. Ladd points out that the judge distinguished between a museum and a factory in his decision. He also believes there should have been a better ratio of supervision. Finally, Ladd affirms that the precedent for assault in a museum has been set.[81] The inference in this statement being that educational personnel must now be cognizant of the hidden dangers relative to the heretofore assumed safety of certain activities.

Recovery for damages from the agency visited usually depends upon whether the pupils are on the premises solely for their own benefit, or whether the host organization also derives some significant benefit from their visit. If the students alone benefit, then the host agency owes no care to such visitors other than to make certain that no dangerous "trap" is set for them. If the host organization stands to gain some benefit from their visit, the pupils are considered invitees, and the organization owes reasonable care for their safety.[82]

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[79]E. T. Ladd, "Allegedly Disruptive Student Behavior and Legal Authority of School Officials," Journal of Public Law, 19:208 (1970), p. 72.

[80]Ibid.

[81]Ibid.

[82]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963), pp. 259-260.

From the evidence acquired, a school law authority, Warren E. Gauerke, offers several suggestions for a professional instructor who desires to embark on a class field trip. His recommendations are included below in paraphrased notation:

1. Get the permission of parents before the trip.
2. Secure enough qualified supervisors.
3. Investigate thoroughly the particular hazards of the place to be visited.
4. Urge the board of education to accept trips as part and parcel of the educational program.
5. Every teacher should avoid assuming the responsibility for conducting pupils through an industrial plant.
6. The teacher, ideally, should take pupils only in small groups.
7. The prudent instructor should take more than ordinary care in planning properly.[83]

The final phase of our examination in which the supervisory capacity of a teacher becomes crucial deals with medical treatment. When a child becomes ill at school, or is injured, it is the duty of the teacher to call the school nurse, or the child's parents for medical treatment by the family physician. Nolte and Linn contend that a failure to provide promptly for the child's safety may result in a charge of negligence against the teacher.[84] Robert R. Hamilton and Paul R. Mort likewise declare that a failure to obtain medical attention immediately in an emergency situation would constitute negligence for the teacher.[85]

In no instance, however, should a teacher administer medical treatment unless of first aid variety and then only in case of emergency.

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[83]Warren E. Gauerke, School Law (New York: The Center for Applied Research in Education, Inc., 1965), pp. 294-295.

[84]M. Chester Nolte and John Phillip Linn, op. cit., p. 29.

[85]Robert Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn, N. Y.: The Foundation Press, Inc., 1959), pp. 294-295.

If a teacher attempts to administer medical treatment in the absence of emergency situations, it has been held that a teacher is personally liable where the treatment gives harmful results.[86] In Duda v. Gaines the court attempted to define the circumstances of an emergency situation. The court stated, "There is no emergency in the absence of proofs from which it is reasonably inferable that the decision whether to secure medical aid and the choice of the physician cannot await parental determination. The teacher should not substitute his opinion about the seriousness of the injury or the selection of a doctor for that of a parent."[87]

Many schools request the parents to fill out a card indicating the doctor to be called in case of an emergency. Only if the doctor indicated is not available, and the parent cannot be contacted should another doctor be summoned, and then only in an emergency. If no person with medical training is available, the teacher should make the child comfortable and send for the parent. If the parent is not readily available, the nearest doctor should be called. Under no circumstances should the teacher send a seriously ill or injured pupil home without proper escort or without first ascertaining that the parent is at home.[88]

For reasons which are largely inexplicable other than the fact that statutes often forbid any administration of medical treatment, there are few cases which concern circumstances under which instructors are held liable for attempting to provide medical attention to students. The

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[86] Ibid.

[87] Duda v. Gaines, 12 N. J. Super. 326 (1951).

[88] M. Chester Nolte and John Phillip Linn, op. cit., pp. 263-265.

cases often cited in the administration of medical treatment are so clearly examples of professional incompetence that they do little to help promote greater understanding.

In a Pennsylvania case, two teachers were held liable when, in the absence of an emergency, they undertook to treat a pupil's infected finger by holding it under boiling water. The teachers were required to pay for the resultant injuries. The court caustically pointed out that the teachers were not school nurses and neither of them had any medical training. There was no further evidence in the case that the teachers were acting in an emergency.[89]

A Louisiana case depicted the necessity of identifying an emergency situation. In early season football practices a young athlete fell to the ground exhausted after repeated windsprints. After being carried to the dressing room, his condition grew steadily worse. Upon testimony in court one discovers his condition at that time in these words, "His mouth was hanging slightly ajar, his lips, hands, and arms were bluish."[90]

The coaching personnel waited over two hours before recognizing the gravity of the situation. Another player's father earlier offered to call a doctor but was assured by the coaches that this was not necessary. Finally, a doctor was summoned when the player lapsed in unconsciousness. Efforts to revive the boy were to no avail, and he died of heat stroke. Based upon several professional opinions, the boy could

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[89]Guerrieri v. Tyson, 147 Pa. Super. 239 (1942).

[90]Professional Publication, P. O. Box 80097, Atlanta, Georgia 30341, Your School and the Law (May 1973), pp. 1-2.

have been saved if medical treatment had been started only thirty minutes earlier.

Suit was brought against the two coaches, the principal, superintendent, and the school board for negligence. Only the coaches were found negligent because they applied the wrong first aid procedures. They had wrapped him in a blanket instead of cooling him down. Intertwined in this situation was the blatant fact that the coaches waited too long before calling for expert assistance. The financial result was a $40,000 judgment for the parents.[91] A policy sequence to this tragic account is a need for all school districts to stringently impress upon their employees the obligation to call parents and doctor at the slightest question. A second consequence of all medical treatment cases appears obvious. The ability to remain dispassionately rational is unequivocally the educator's most significant asset when faced with a student's urgent medical problem.

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[91] Ibid.

Chapter 4

GENERALIZATIONS ON NEGLIGENCE LAW

While looking further into tort liability, it would be beneficial to summarize the progression of our argumentation. It was the initial attempt to predicate negligence in the fundamental body of public law. From a general position this writer has sought to identify the status of professional educators in the realm of public employees. Our focus crystallized into a narrower relationship between the negligence sources of practice, performance, and professional conduct.

First of all, negligence cannot exist unless someone sustains an injury resulting from an "unreasonable risk" taken by another person. Furthermore, to be categorized as negligent, the conduct must be weighed against circumstances of the occasion. It may be negligent for a driver to blow his horn unnecessarily when passing a herd of horses, but the same conduct may not be actionable if, added to this situation, was the presence of a child who fell in front of the car.[1]

As was previously inferred, adequate supervision is usually the elemental factor in judging a case of negligence. While this question has been before the courts on numerous occasions, no concrete assumption can be made as to what is adequate supervision. Each individual case rests upon its own merits. According to M. Chester Nolte, "Legally

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[1]William M. Kunstler, Law of Accidents (New York, N. Y.: Oceana Publications, 1954), pp. 18-19.

adequate supervision by the teacher is just what a jury of peers say it is, nothing more. Since standards of behavior differ from one part of the country to another, legally adequate supervision in one instance may not be adequate in another."[2]

The previous paragraph points to inconsistency between law and practice throughout the United States. Public school law in the area of tort liability appears to be no different than any other area of public law. The adherance to varying standards throughout the nation affects not only school laws but an entire host of cultural norms, folkways, and institutions.

The standard of care is contingent upon the measure of risk involved in the activity and the legal relationship between two parties. The teacher, while in the care of students, must act affirmatively and reasonably in his relation to the students. As a professional instructor, the teacher cannot be selective in his supervisory capacity as a layman or other public employee might be. The teacher may be liable for assigned as well as assumed duties.[3] In this same case, it was further postulated that supervisory duty begins when the child comes to school even if doors are not officially opened. A secondary source probes the court's reasoning even further:

> Children have a known proclivity to act impulsively without thought of the possibilities of danger. It is precisely this lack of mature judgment which makes supervision so vital.

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[2]M. Chester Nolte, Guide to School Law (West Nyack, N. Y.: Parker Publishing, Inc., 1969), p. 117.

[3]Titus v. Lindberg, 49 N. J. 66 (1967).

> The mere presence of the hand of authority and discipline normally is effective to curb this youthful exuberance and to protect the children against their own folly.[4]

Titus v. Lindberg included the following ideas in regard to the cause of negligence: The principal or teacher had not announced any rules with respect to the student congregation prior to classroom entry. Second, the principal had not assigned any teachers or other school personnel to assist him. Third, the actual physical supervision was not evident or sufficient.[5]

To generate a much broader perspective, one must continue to intellectually probe the total context of liability. If the actor's negligent conduct has resulted in any injury to another so as to create a right of action, he may also be liable for the following:

> a. For physical harm resulting from fright or shock or other similar and immediate emotional disturbances caused by the injury or the negligent conduct causing it.
> b. For additional bodily harm resulting from acts done by third persons in rendering aid irrespective of whether such acts are done in a proper or negligent manner.
> c. For any disease which is contracted because of lowered vitality resulting from the injury caused by the actor's negligent conduct.
> d. For harm sustained in a subsequent accident which would not have occurred had the person's bodily efficiency not been impaired by the actor's negligence.[6]

With the supervisory responsibility an important element of all teacher-student relationships, it appears obvious that the greater liability resides in the educator's role. Are there ever occasional instances when

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[4] E. E. Loveless and Frank R. Krajewski, The Teacher and School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1974), pp. 198-199.

[5] Ibid.

[6] Teacher Liability for Pupil Injuries (Washington, D. C.: National Education Association of the United States, 1940), pp. 13-14.

a student may encompass his own liability? Theoretically speaking, a student is responsible for his own torts and, therefore, may incur liability. Actually, only a microscopic number of cases are ever brought to our judicial system charging the child with negligence.

The subjective test of negligence in children is: "What is reasonable to expect of children of like age, intelligence, and experience."[7] Children under seven years of age have no capacity for negligence just like they have no capability to commit a crime. Children between the ages of seven and fourteen have a prime facie case for incapacity but it can be rebutted. Children in this age group are presumed not to be capable of negligence until proven otherwise.[8] For the professional instructor the chances of persuading the jury of a child's own negligence are almost nonexistent. However, it can be legally presumed that the chances would improve the older the student was.

Kern Alexander writes in a 1971 article of Nation's Schools affirming the concept that a child is held to a standard of care commensurate with his age, intelligence, and experience. He examines an interesting fact from the case, Ellis v. D'Angelo. In this specific piece of litigation it was judged that a child may have a legal capacity for battery and have no similar capacity for negligence.[9] This author states

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[7]Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials, 1973 Supplement (St. Paul, Minnesota, 1973), p. 86.

[8]Ibid., p. 87.

[9]Ellis v. D'Angelo, 116 Cal. App. 2d 310 (1971).

that the presumption is a standard of conduct more applicable for older children and those who commit intentional torts.[10]

Children have been held liable for such youthful indiscretions as pushing a baby sitter[11] and intentionally setting fire to a building.[12] In some instances, the plaintiff may collect damages from the parent as well as the child.

However, before the layman and the external observer conclude that the solution to these complexities will be solved in legal action against the student, let us revert back to the problems of negligence itself. Because of the inherent imbalance between the teacher-student relationship, the instructor as a public employee is usually put on the defensive. His concern in a majority of cases will not be to enact countercharges against the student but to defend his own actions. In other words he must have sufficient evidence to demonstrate that negligence was not committed on his part.

Let us sketch briefly, once again, the major defenses utilized in the processing attempt to exonerate the individual from his allegedly tortious conduct. According to Robert E. Phay, who is a professor on school law, and also president of the National Organization for Legal Problems in Education, an administrator, board member, or teacher can often avoid liability if he acted in "good faith." If the administrator or teacher can testify that he acted upon apparently valid orders of a superior authority, he can sometimes overcome personal liability. If a

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[10]Kern Alexander, "Trends and Trials," Nation's Schools, Vol. 87, No. 3 (March, 1971), pp. 55-58.

[11]Ellis v. D'Angelo, 116 Cal. App. 2d 310 (1971).

[12]Seaburg v. Williams, 16 Ill. App. 2d 295 (1971).

board member can show that his actions originated from required statutory or state regulations, he is usually immune from personal litigation. Nonetheless, Phay comments further, "The only consistent thread running through these cases is that school officials can't assume that they can escape liability on the grounds that they didn't act with malicious intent or purposeful desire to deprive plaintiffs of their constitutional rights."[13] The lack of malicious intentions is simply not sufficient to guarantee a legitimate defense against a suit for damages, although it might be utilized as a minor functional element of the entire defense.

The educator may also use one or a combination of the following defenses as they are categorically analyzed by Nolte and Linn.[14] First, the teacher acted without negligence and as the reasonably prudent person would have acted under the circumstances. A positive method in asserting this defense is to produce evidence showing instruction had been given to the students and proper precautions had been taken to protect the students' health and safety.

Second, the assumption of risk doctrine is often employed in a line of defense. This is commonly employed in school activities such as athletic events. The student is assumed to know the inherent and obvious risk involved. Madaline Remmlein in her publication on school law cites a case where the board of education applied this doctrine to their defense against the charges of negligence. In this example the theory was inadequate as a defense against another teacher for injuries sustained

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[13]Robert E. Phay, "Personal Liability Puts Schoolmen on the Spot," Nation's Schools, 93:39-41 (1974), p. 41.

[14]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963), pp. 252-253.

by young people.[15] The assumption of risk is based on the concept that the injured knew of the dangerous condition and nevertheless chose to accept the risk. According to Remmlein many courts proclaim that even when pupils know that a condition is dangerous they do not always know the extent of the danger. Therefore, the tenets of assumption of risk are often inapplicable.[16] An almost universal application of this doctrine to athletic participation has been the precedent in case history. While this type of specialized defense has achieved a large measure of success in the athletic realm, one must conclude from further evidence that its sole use outside of extra-curricular activities is of precarious value.

Third, another defense strategy is the legal principle of contributory negligence. Or to state it another way, the student contributed to his own injury. The defense of contributory negligence is based on the contention that even though the teacher was negligent, there was a lack of ordinary care on the part of the person injured. This lack of ordinary care contributed to the injury and constituted an element of negligence without which the injury would not have occurred. In Wilhelm v. Board of Education of the City of New York and The City of New York a thirteen year old was found guilty of contributory negligence when he was injured by mixing dangerous chemicals in a science laboratory. The individual was fully aware of the existence of these dangerous chemicals.

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[15] Dutcher v. City of Santa Rosa High School Dist., Rebe v. City of Santa Rosa High School District, 156 Cal. App. 2d 256 (1957).

[16] Madaline Kinter Remmlein, School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1962), pp. 277-288.

This prior knowledge was enough to abscond any liability on the part of the school, principal, or teacher.[17]

Age and maturity become prime factors for developing a contributory negligence defense. A school bus injury case in North Carolina held as a matter of law that a six-year-old girl is incapable of contributory negligence.[18] In another significant development, a Washington Court of Appeals concluded it was not proper to portray a habit of delinquent acts on the part of a pupil to defend themselves in a lawsuit over storeroom materials falling on the student.[19]

Contributory negligence is becoming a more commonly accepted defense in various circles of public law. Nevertheless, its validity and reliability in school law cases depends primarily on the age of the student and his emotional maturity. In addition, there tends to be a variance of acceptance in this model of defense depending upon the social and geographic community in which it was espoused.

A fourth alternative defense to a negligence charge is called comparative negligence. This is a relatively new concept in American law and is not widely used in any judicial realm. Consequently, legal counsels for public school employees have been reluctant to incorporate such a doctrine in their legal defense. A few states have adopted this doctrine of comparative negligence in which the teacher's and student's

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[17]E. E. Loveless, and Frank R. Krajewski, The Teacher and School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1974), p. 200.

[18]Crawford v. Wayne County Board of Education, 168 S. E. 2d 33 (1972).

[19]Osborn v. Lake Washington School District, 462 Wash. 2d 966 (1972).

negligence are ruled to be mutually contributory to the injury. The damages are then pro-rated on the basis of whether the negligence of each party was slight, ordinary, or gross. While the principle has been widely accepted in foreign countries, it has not been generally accepted in the United States.

Lawyers may project a fifth line of defense where the injury was the result of an avoidable accident. Therefore, nothing the defendant could have done would have prevented it.

In some states and foreign countries the attorney may claim it was an act of God, and was the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man, and without intervention.[20]

The utility of conduct defense is a legal consideration revealed in Butler v. District of Columbia. In this case a teacher was held to be not liable when a junior high pupil was struck in the eye by a piece of metal upon entering the print shop. The teacher was five to ten minutes late to class because she was on duty in the lunch room. The principal had tried to balance duty schedules for maximum safety and order. Certain specific rules were laid out by the teacher to be followed if ever he was absent at the start of class.[21] The cautious attention of the teacher to specific conduct rules in correlation to the conscientious application of his own supervisory duty were undoubtedly ultimate reasons for his exoneration.

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[20]M. Chester Nolte and John Phillip Linn, op. cit., pp. 252-253.

[21]Butler v. District of Columbia, 417 F. 2d D. C. 1150 (1969).

The doctrine of "last clear chance" is an attempt by common law courts to abrogate the strict rules of contributory negligence. It could possibly be employed by the public school teacher in rare and exceptional circumstances. The rule provides that where the injured party, although contributorily negligent, is helpless to avoid his injury and the actor is able to do so by diligent action, and yet injury results, the former can recover despite his contributory negligence. The real element of this doctrine is that the injured party's prior negligence placed him in a position of complete helplessness and the actor is cognizant of this helplessness in time to avoid injuring him.[22] Realistically speaking, this situation is usually a reversal of acknowledged roles and would more than likely be utilized by the student to counteract charges of contributory negligence. Nevertheless, there is no strict ruling against a public school teacher for utilizing this mode of defense.

In defense of the teacher, it should be emphasized that school employees cannot guarantee there will be no student or spectator injured as a result of their acts. The law does not require superhuman foresight or vigilance, it requires only reasonable and ordinary precautions on the part of the teacher.

In the final analysis, the best protection a teacher can have against tort liability is to exercise precautions in a consistent manner. Preventive measures in public school law are just as feasible as in health or medicine. The antidote for increased liability cases, in fact, might be to increase the legal knowledge and awareness of the public school

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[22]William M. Kunstler, Law of Accidents (New York, N. Y.: Oceana Publication, 1954), p. 43.

teacher. With the background information already presented throughout this study and in works cited on public school law, one might conjecture on possible guidelines, policies, and recommendations.

The School Law Bulletin published at the University of North Carolina in October, 1973, reflects a concise but propitious summary of ten tort liability guidelines. They include the succeeding statements:

> 1. Teachers must maintain a standard of care for control and protection of students which is commensurate with teachers' duties and responsibilities.
> 2. A teacher should not assume responsibilities which he cannot reasonably perform. Such assumption carries with it the same standard of reasonableness as duties which are required.
> 3. Children are liable for their torts in jurisdictions. Intentional as well as negligent acts on the part of students can render them liable to students or teachers.
> 4. Under certain conditions, a parent can be liable for the acts of his child. A teacher who is injured by a minor student can sue the parent, if the parent consents to the child's act and/or the parent negligently seeks to control the child.
> 5. Teachers are not liable for injuries to pupils which result from sudden and intervening acts of other pupils. Even where a teacher has acted negligently, the intervening and injurious act of another pupil may break the cause and effect claim, thereby absolving the teacher from liability. The courts will not, however, allow the luxury of claiming an intervening cause if the teacher's lack of control of the pupils can be established as the cause of injury.
> 6. Contributory negligence on the part of an injured student may be a defense for a teacher.
> 7. Teachers must provide reasonable supervision of children, but the courts do not require constant scrutiny.
> 8. Students volunteering to participate in athletics assume the normal dangers of the game.
> 9. Courts require adequate and proper instruction, taking into account such things as age, sex, knowledge, physical ability and condition of the child.
> 10. Teachers must make and enforce rules for the regulation of student activity in high risk areas of the curriculum.[23]

In a National Association of Secondary School Principals publication entitled A Legal Memorandum several pertinent recommendations are

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[23]Robert E. Phay, School Law Bulletin, Vol. IV, No. 4 (October, 1973), p. 57.

made to the teacher and principal alike. First of all, meetings should be held periodically to review all facets of school safety rules. This will be viewed by many courts as an integral segment of the supervisory capacity. Second, the age and ability of the student must be taken into account in all activities. Third, the school goal should be complete supervision. At no time during the school day should the student not be under supervision.[24]

From all available evidence and information one cannot over-emphasize the importance of safety rules. Teachers must not only have safety rules, but they must make reasonable efforts to make certain that students are aware of the regulations, the importance of the regulations, and why they are required. Safety rules before field trips, rules regarding chemicals and laboratory experiments in science classes, and playground conduct rules during recess should be explained to the students by the supervising teacher. Daniel J. Gatti and Richard D. Gatti in their book, The Teacher and the Law, affirm unanimous support for the premise, "If a rule is broken, steps must be taken to assure that the infraction will not occur a second time. If a teacher does not take further steps, he might be found liable on the grounds that rule did not really exist, except on paper."[25]

Much debate has evolved over the confiscating of a student's personal property. Let us survey this issue when the personal property seeks to disrupt the class or is naturally injurious to the health,

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[24]"Negligence--When is the Principal Liable?" A Legal Memorandum, (January, 1975), p. 5.

[25]Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law, (West Nyack, N. Y.: Parker Publishing Company, Inc., 1972), p. 54.

safety, and general welfare of the class. According to some legal authorities teachers have the right to take property away from students, but they do not have the right to keep the property for their own use, or keep the property away from their students for an unreasonable length of time.[26] Of course, it also depends on the type of property the student may have. If the property is inherently illegal contraband, the teacher has an obligation to take the property to the principal, and he should handle the situation from there. If the property, for instance, is a squirt-gun, it is owned by the pupil, and should be returned to him with instructions not to bring it back to school.

The final summary of this section reviews the liability factor when a teacher is absent from class. A 1973 publication on the legal interrelationship of state, school, and family formulates a general proposition based on teacher liability cases. It is this: "A teacher's absence from the classroom, or failure properly to supervise student's activities, is not likely to give rise to a cause of action for injury to a student, unless under all the circumstances the possibility of injury is reasonably foreseeable."[27]

In what specific illustrations is the possibility of injury foreseeable? Injury is generally foreseeable in situations where large crowds of students are gathered without supervision; in specialized activities in vocational education, physical education, and science classes; and in cases where you are absent from the room for an

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[26]Ibid., p. 44.

[27]Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Company, Inc., 1972), pp. 5-37.

unreasonable amount of time. Two specialists on school law, Lee O. Garber and Reynolds C. Seitz, strive for some clarification on foreseeability when they say, "After the event, hindsight makes every occurrence foreseeable, but whether the law imposes a duty does not depend on foreseeability alone. The likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant must also be taken into account."[28] In cases where the student is directed by the teacher to do something, and the student is injured, the courts have uniformly held that the child is not negligent no matter what his age.[29]

This research exercise will now proceed to discussion on tort liability in disciplinary cases. Although different in content, many of the same legal guidelines will be applicable for this next section of tort action.

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[28]Lee O. Garber and Reynolds C. Seitz, The Yearbook of School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1971), pp. 108-109.

[29]Daniel J. Gatti and Richard D. Gatti, op. cit., p. 62.

Chapter 5

TORT ACTION IN DISCIPLINARY CASES

No academic discussion on tort liability would be complete without an analysis of disciplinary action. Because disciplinary prerogatives are composed of conscious physical and mental directives, this area is often viewed as a distinct entity from unintentional torts such as negligence. However, since this is probably the one area which is debated the most in educational circles, there will be no lengthy discourse to justify or validate its inclusion in this study on tort liability. When the majority reaction of public school teachers to corporal punishment usually conjures up battling parents, defensive school boards, unsympathetic juries, sophisticated legal jargons, huge financial loss, and eternal strife, it becomes a grave necessity to investigate the rights and limitations in disciplinary punishment.

It has been generally acknowledged and verbally reiterated that teachers enjoy a measure of immunity from liability for reasonable punishment of pupils.[1] Many authorities on school law have detected trends away from this almost universal position. It seems evident that this may be a justifiable consequence of a public school performance which, on occasion, has been arbitrary and capricious. One would assume, in most instances, a causal connection between rules or regulation and

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[1]E. Edmund Reutter, Jr., Schools and the Law (New York, N. Y.: Oceana Publications, Inc., 1960), p. 63.

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the enforcement of various modes of punishment. This study will now view the nature of rules and regulations for the purpose of determining their connection to tort liability.

Most of the rules governing student conduct are organized on the local level as distinguished from the state level. Local rules including those of the classroom teacher, have to be consistent not only with the school board policies, but with the policies of the state board of education, with state statutes, with state constitution, and with the federal Constitution. Furthermore, rules should be designed to accomplish proper ends, and, of course, they must be reasonable in terms of those ends. The burden of proof in cases challenging the legitimacy of the punishment rests with the prosecution. According to E. Edmund Reutter, Jr., the legal assumption is that the rule is proper until proven otherwise.[2]

The area of pupil conduct in regard to rules is one in which there is a vast body of common law which has to be considered. General principles are often easy to formulate but indisputable answers are often elusive. Considering the millions of children in public schools in the thousands of school districts in the country, there are surprisingly small numbers of judicial decisions on pupil personnel matters by the highest state courts and the Supreme Court.[3] There has been a marked inclination in legal groups to allow local schools and, in a limited sense, lower courts to decide on the disciplinary authority of teachers and the validity of school rules.

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[2]Ibid.

[3]Ibid.

Robert L. Drury and Kenneth C. Ray in their book, The Essentials of School Law, confirm the low profile of courts on school rules. They state:

> A court will not substitute its judgment for that of a school board regarding the wisdom or logic of the rules. A court, however, will interfere if a board acts arbitrarily, violates the law, deprives the pupils of rights granted by law, alienates the pupil from proper parent control, or acts in a manner which is completely unrelated to the proper efficiency or conduct of the school system, or the control, training or discipline of the pupils.[4]

As a general principle, the school board which is designated with the operation and management of the public schools has the legal right to adopt reasonable rules for the discipline and management of such schools. The regulations of a school board are final in most areas, and the courts will not interfere unless the actions of the board are unreasonable or in violation of the law.

Numerous rules have been submitted to local court interpretations. In each case the question of reasonableness became the focal point of legal discussion. A rule barring the doors of schoolhouses against little children coming from a great distance in the winter and then for being a few minutes tardy was judged blatantly unreasonable and unlawful, and in its practical operation, a little less than wanton cruelty.[5] The rule which suspended students for absence six half-days without a valid excuse was unreasonable.[6]

In State v. White it was widely recognized that a student is required to submit to any proper rule necessary for the good government

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[4]Robert L. Drury and Kenneth C. Ray, Essentials of School Law (New York: Meredith Publishing Co., 1965), p. 40.

[5]Thompson v. Beaver, 63 Ill. 350 (1892).

[6]Churchill v. Fewkes, 13 Brad. R. Indiana 520 (1892).

of the institution.[7] To support this contention, where a pupil was suspended for being tardy, it was held that the rule was for the government of the school. Furthermore, the rule was proper, reasonable and within the power of the officers to enforce.[8]

A proponent for legal awareness among public educators enunciates the specific authority for school officials to establish rules governing student behavior. Conduct such as talking in class, leaving the classroom without permission, fighting, using profane language, disobeying instructions, and annoying other pupils can be prohibited. Every act which interferes with the orderly operation of the school cannot be anticipated by teachers. They are empowered with the administration to control, however, any undesirable behavior when it becomes evident.[9] Drury and Ray concur with the previous philosophical and legal position. In their viewpoint certain authority must be granted to teachers to establish rules for and to regulate the behavior of children. No set rules adopted by a governmental agency such as the school board can meet every emergency or requirement. Any reasonable rule adopted by the teacher is binding upon the student according to this source. A school employee, on the other hand, would have no authority to enforce any regulations which the school board cannot lawfully impose.[10]

Laurence Kallen who is a practicing attorney on school law cases recognizes the inherent right of teachers to punish pupil misconduct and

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[7] State v. White, 82 Ind. 286 (1892).

[8] Bendock v. Babcock, 31 Iowa 562 (1892).

[9] E. Edmund Reutter, Jr., Schools and the Law (New York, N. Y.: Oceana Publication, Inc., 1960), p. 63.

[10] Robert L. Drury and Kenneth C. Ray, Principles of School Law (New York: Meredith Publishing Company, 1969), p. 40.

describes some specific instances in which they have done so. Teachers may discipline students who are tardy or truant, smoke on school grounds, cheat on examinations, disrupt others, fail to hand in homework, or hand in someone else's work, come to class unprepared, fight in the halls, act insolently, use profanity, insult or strike the teacher, or engage in malicious destruction of property. Pupils may be required to stay out of the teacher's chair or personal papers, cease wearing destructive and noisy metal heel plates, wear proper attire at graduation exercises, and name others who are breaking the rules. Those who are not enrolled in a particular school may be barred from visiting it during school hours.[11]

The teacher's authority extends to all pupils attending the school. School regulations need not list every type of offense. Rules need only be sufficiently precise so that the standards are understood by the student body. Most lawyers concede that the rules need not be officially enforceable. If the board has remained silent on a particular question, the teacher may make reasonable rules on his own initiative.[12]

In numerous instances, it is not the rule per se that is subject to dispute but the manner in which the rules of conduct are enforced.

The Teacher and the Law outlines a proper procedure for enactment of reasonable rules. It includes the following:

1. Make it clear what behavior is unacceptable. Formal and elaborate rules are not necessary, however;
2. Standards of behavior should be in writing;

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[11]Laurence Kallen, Teacher's Rights and Liabilities Under the Law (New York: Arco Publishing Company, Inc., 1971), pp. 57-76.

[12]Ibid.

a. A rule that may deal with a constitutional issue such as freedom of speech should be written with precision and clarity.
b. Rules must apply equally to all students.

3. Behavior codes should be available to all students at the beginning of the year.
4. Update "old" behavior codes;
5. "Reasonableness" of rules depends in essence upon the mythical "conscience of the community." In preparing rules of conduct, idealistically, students, parents, faculty, and administration should be involved.

The author, furthermore, states that "behavior codes and procedures should be set up in such a way where the truth will be found, fairness will be afforded all parties, and the rule will be effective to maintain discipline and order. The scope of rules should only be sufficient to meet the needs and objectives of your school."[13]

EXTENT OF DISCIPLINARY CONTROL

Student behavior may be categorized as follows: Behavior which school officials have the authority to control; behavior which persons other than school officials have the authority to control; and behavior which students are free to engage in.[14]

Control of behavior may enter into the realm of two considerations. There are the constitutional aspects of student behavior and the institutional factors which, by necessity, must be controlled to accomplish certain educational requirements. If the pupil fails to obey school rules and regulations or fails to obey his teacher, he may be subject to

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[13]Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law (West Nyack, N. Y.: Parker Publishing Company, Inc., 1972), p. 181.

[14]E. T. Ladd, "Allegedly Disruptive Student Behavior and the Legal Authority of School Officials," Journal of Public Law, 19:209 (1970), p. 209.

detention, corporal punishment, suspension, or expulsion.[15] Infringement on any student's rights is allowable only where it can be demonstrated that his action "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school."[16]

While there is probably universal agreement on obvious disruptions like fighting with knives, behavior such as running in the halls, talking in the cafeteria, public criticism of the principal, unorthodox wearing apparel, and leaving school premises during the day are some practices once prohibited but now permitted in reputable schools of various types. One author believes that education should point the way to judicial theory and application rather than relying on traditional modes of judicial precedent which tend to support authoritarian institutions.[17] While this personal evaluation may be a somewhat generalized and simplistic form of commentary, it may indicate a more progressive change in public thinking. As in other realms of public law, there appears to be a gradual breach with conventional norms. Authority figures such as public educators are now confronted with their once assumed justification for disciplinary action. Authority positions are not always enough vindication for the legal control of pupils.

The debate over disruptive behavior continues. In a Journal of Public Law article the crux of this problem was stated best in the proceeding words: "So it is clear that except for behavior at one end of the scale, behavior which is clearly, directly, and immediately

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[15]Chester W. Harris, ed, Encyclopedia of Educational Research, (3rd ed.; New York: The MacMillan Co., 1960), p. 1190.

[16]Daniel J. Gatti and Richard D. Gatti, op. cit., p. 184.

[17]E. T. Ladd, "Allegedly Disruptive Student Behavior and the Legal Authority of School Officials, Journal of Public Law (1970), p. 221.

disruptive of the educational program proper or the school as an institution, there is great disagreement about what is or is not disruptive on the part of those who have recently ruled on the subject."[18]

Specifically, to what extent does the disciplinary control of school officials reach? In historical terms the principle is fundamentally established that the power of school officials over students does not cease absolutely when they leave the school premises. In reference to the volume, Law and Public Education, one discovers the following analysis of behavior outside school hours:

> Conduct away from school may effect the good order and welfare of school quite as much as improper conduct on the school premises. If the effects of acts done outside school hours and beyond the supervision of the school authorities in fact reaches within the school during school hours and are detrimental to the welfare of the school, the acts may be forbidden.[19]

The most common offenses invoked after school hours for which courts have upheld school punishment are immorality, use of profane language, showing disrespect for school authorities,[20] and abuse of smaller children even though the guilty boy had reached his home and the abuse occurred in the yard of his home.[21] In addition, any activity which "reflects disrepute on the school, interferes with schoolwork, or impairs discipline" may be legally controlled by the institution. Pupils could

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[18]Ibid., p. 218.

[19]Robert Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn, N. Y.: The Foundation Press, Inc., 1959), p. 519.

[20]Tanton v. McKenney, 226 Mich. 245 (1924).

[21]O'Rourke v. Walker, 102 Conn. 130 (1925).

conceivably be disciplined by the school for acts resulting while the student is going to and from school.[22]

Before one draws any conclusions concerning the extent of disciplinary control, it would be beneficial to review the judicial precedents of the teacher's disciplinary authority. In the Corpus Juris Secundum (79 C. J. S.) the teacher's legal position is given relative to student control:

> As a general rule a school teacher, to a limited extent at least, stands in loco parentis to pupils under his charge, and correction over them as may be reasonably necessary to enable him properly to perform duties as teacher, and accomplish the purposes of education, and is subject to such limitations and prohibitions as may be defined by legislative enactment.[23]

In State v. Burton the Wisconsin Supreme Court relied heavily on the in loco parentis doctrine to support its fundamental position. In addition, the court had some exhortative statements to make to the public instructor. The opinion of the court was stated:

> He (the teacher) stands for the time being in loco parentis to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent . . . The teacher is responsible for the discipline of this school, and for the progress, conduct and deportment of his pupils. It is his imperative duty to maintain good order, and to require of his pupils a faithful performance of their duties. If he fails to do so, he is unfit for his position. To enable him to discharge those duties effectively, he must necessarily have the power, in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adequate remedy. In general, no

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[22]Chester W. Harris, ed., Encyclopedia of Educational Research (3rd ed; New York: The MacMillian Company, 1960), p. 1190.

[23]Madeline Kinter Remmlein, School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1962), pp. 267-268.

> doubt, the teacher should report a case of that kind to the proper board for its action in the first instance . . .[24]

In an Indiana Court, the opinion in a 1963 case continued to endorse the teacher's right to discipline in almost unequivocal terms. Because of the enormous significance of this discussion it is quoted here:

> A teacher and a parent have not only the right but the obligation to discipline a child, if necessary using corporal punishment, for the good of such child, as well as the protection of third parties injured by the actions of such child. The failure to exercise such disciplinary action where the occasion requires it, is condemned by the law as much as an excessive and cruel punishment beyond requirements.[25]

In the previously mentioned case the teacher was confronted with an arrogant and obstinate child who was interrupting a classroom exercise by using violent and abusive remarks towards the teacher. Special medical testimony asserted that this pupil had the mentality to know and comprehend her wrongdoing and to control it. The teacher had the concomitant duty of protecting the interests of the remaining members of the class from interruption and at the same time maintaining order and respect for authority among the children. A teacher has little option in an orderly society but to initiate physical force in apprehending and removing the recalcitrant child and inflicting corporal punishment, "not only to the offending child for its benefit, but as an example to the other pupils. Such matters may not be delayed until there is time to talk and 'reason' with the pupils. Consideration has to be given to the remaining pupils in the class where the incident occurred."[26]

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[24] State v. Burton, 45 Wis. 150 (1962).

[25] Indiana State Personnel Board v. Jackson, 244 Ind. 321 (1963).

[26] Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials (St. Paul, Minn: West Pub. Co., 1969), pp. 629-630.

A Vermont Court took an extreme and unusual position in upholding an unqualified right of the teacher to discipline a student. In Scott v. School District No. 2 the court went so far as to declare that a teacher has the right to demand expulsion of a certain pupil. When the school committee refused to expel the pupil in this instance, it became the right of the teacher to refuse to teach without losing her right to recovery under the contract. The specific words of the court went like this:

> The teacher could not perform the duties of her employment without maintaining proper and necessary discipline in the school, and when all her other means for doing so failed in respect to the boy, it was her right, and might be her duty to expel him, to save the rest of the school from being injured by his presence. It was not the duty of the teacher, under the contract, to teach the school without maintaining proper and necessary discipline in it; and if the committee insisted that she should have the boy there, when she could not have him there and have the discipline too, it was equivalent to insisting that she should teach the school without the discipline; which she was not bound to do.[27]

An integral aspect of the disciplinary scope includes the assistance of parents in modifying and eliminating deviant behavior. This was legally asserted in a Georgia courtroom where the right of a child to attend a public school was held to be dependent upon the good conduct of the parent as well as the child. In other words, both must submit to the reasonable rules and regulations of the school. The legal opinion in this case was developed to an even greater extent, when it was stated that "the parent must so conduct himself as not to destroy the influence and authority of the school management over the children whenever he comes into contact with the school authorities . . ."[28] The parent who

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[27] Scott v. School District No. 2, 305 N. Y. S. 2d 601 (1969).

[28] Board of Education v. Purse, 101 Ga. 422 (1897).

disagrees with the teacher does have the right to discuss the matter with the teacher. Among most school districts it would be a proper procedure to file a complaint with the school board provided the matter had been discussed with the instructor. The last alternative may be a redress of grievances in a court of law. The chances of success for the parent usually depends upon the constitutionality of the issue.[29] A simple protest against a method of disciplinary action will not usually be sufficient evidence to bring a public educator to court. Only when there is ample evidence to portray a severe deprivation of fundamental rights is there a chance of successful court action.

It is then ordinarily accepted that school boards and teachers may legally control student conduct. The question which emerges from this research is the extent to which they may exercise control. The fundamental distinction between control on school premises and during school hours and control outside the school and outside school hours has also been formulated. However, this differentiation remains a vague concept even to lawyers.

State v. Randall assumes the traditional prevalence of disciplinary authority when it says, "In the absence of a rule or rules prescribing the names and methods of punishment, the teacher is authorized to inflict such humane and reasonable punishment to enforce the rules of the board and good discipline and order, as he may deem conducive to these ends."[30]

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[29]Chester W. Harris, ed., Encyclopedia of Educational Research (3rd ed; New York; The MacMillan Company, 1960), p. 1190.

[30]State v. Randall, 79 Mo. App. 266 (1955).

While order may be a time-honored objective of educational institutions, a few authors and jurists are beginning to speculate on the anomaly of an autocratic rule in a democratic society. Bates v. Board of Education comes the closest to indicating this paradox of society when it designates the intended beneficiaries of public schools. In the Bates decision one reads, "The public schools were not created, nor are they supported, for the benefit of the teachers therein, as implied by the contention of the appellant, but for the benefit of the pupils and the resulting benefit to their parents and the community at large."[31]

Before the instructional hierarchy can be completely put on the defensive, one must survey the vibrant, yet caustic viewpoint of Michael W. La Morte in a School and Society publication. The result should be more than a cautionary warning but rather a complete reorientation to the exigencies and practices of school discipline. La Morte believes that Federal courts were often reluctant in the past to overrule public school authorities in cases dealing with student conduct. Many courts have rejected the "custodial" emphasis of traditional norms. The changing orientation has been to a humanist viewpoint in legal circles. The custodial concept, i.e. in loco parentis doctrine, tends to be "authoritarian, punitive, generally distrustful of students, highly impersonal, and overemphasizing order."[32] The humanist approach is depicted as one in which individual student differences are recognized and often accommodated.

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[31] Bates v. Board of Education, 139 Cal. 145 (1973).

[32] Michael W. La Morte, "The Courts and Governance of Student Conduct," School and Society, 100:89-93 (February, 1972), p. 89.

Students are treated with personal dignity and respect. Their relationship between rules of student conduct and educational objectives must be closer aligned and explicitly clarified.

MODES OF PUNISHMENT

The final phase of our liability inquiry will concentrate on the methods of punishment used by professional teachers. This segment will also include the citation of numerous cases which have evolved from various punishments. Discernment of the vital themes and applicable guidelines in these legal situations are intended for the beneficial use of the educational community.

E. Edmund Reutter, Jr., has developed several generalizations concerning student punishment. His suppositions include:

> 1. Punishment must "fit the crime." The seriousness of the penalty must equal the gravity of the offense. Any penalty must be dispensed for a legitimate purpose, such as maintaining discipline, generally promoting the welfare of the school, or helping the student in his own interest to correct a fault.
> 2. Reasonableness cannot be decided in the abstract. Some punishments might be reasonable in some situations and not in others. For instance, detention after school is a judicially approved method of punishment in almost all circumstances. Likewise, the withholding of privileges as a punishment is judicially condoned.
> 3. There always exists in legal circles the presumption that school authorities have acted correctly in administering any type of punishment. It is also believed that school officials have acted in good faith. The burden of proof to the contrary rests with the person bringing the suit against the school.[33]

A 1973 edition on school law intimates that altering views on corporal punishment may be on the educational horizon. This collection

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[33]E. Edmund Reutter, Jr., Schools and the Law (New York, N. Y.: Oceana Publications, Inc., 1960), pp. 66-67.

of case law studies views the employment of corporal punishment as a traditional mode of disciplinary action which "may have ceased to represent prevailing views today."[34]

The vast majority of courts and people have usually accepted the assumption that teachers must have this authority to maintain classroom decorum and discipline. Therefore, the primary issue before the courts today hinges upon the degree and reasonableness of the punishment. Primary arguments against corporal punishment include three broad categories:

> 1. The social and psychological arguments that society has progressed past the physical punishment stage.
> 2. The idea that legally, corporal punishment is "cruel and unusual punishment prohibited by the Eighth Amendment."
> 3. Corporal punishment should not be administered without first providing the student with due process of law.[35]

The first of these arguments is not strictly a legal one. The cruel and unusual punishment argument has been dealt with in two decisions and rejected.[36]

In Sims the court maintained that a corporal punishment rule did not provide for notice, hearing, or right of representation before punishment was administered and went on to basically state a more interference position.

> Procedural due process does not require a trial-type of hearing in every conceivable case of government impairment of private interest. The very nature of due process negates any concept of flexible procedures . . . This court cannot, under

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[34]Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Co., Inc., 1973), pp. 9-24.

[35]Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials, 1973 Supplement (St. Paul, Minn.: West Publishing Co., 1973), pp. 191-192.

[36]Ware v. Estes, 328 F. Supp. 657 (1971) and Sims v. Board of Education, 329 F. Supp. 678 (1971).

> the applicable law, and would not if applicable law permitted the exercise of such discretion, substitute its judgment of the defendants in the case at hand on what regulations are appropriate to maintain order and insure respect of pupils for school discipline and property. This Court will not act as a super school board to second guess the defendants . . . If our educational institutions are not allowed to rule themselves, within reasonable bounds, as here, experience has demonstrated that others will rule them to their destruction.[37]

The past behavior of a student is an important element in determining what is reasonable punishment. In a New York case a pupil was punished by the school principal and the principal was indicted for criminal assault. The boy had dropped a book from a balcony to the seats of an auditorium. While the lower court ruled for the pupil, the appellate court reversed the decision saying that reports of the pupil's prior misconduct should have been considered in deciding the reasonableness of the punishment.[38]

In an early Texas case, which represents the more traditional position, a teacher whipped a pupil with a switch for fighting after school; the court held to the fact that the fighting which occurred after school did not deprive the teacher of his legal right to punish the student.[39]

Another New York case lends further support to a teacher's professional discretion. A teacher was accused of being malicious in the punishment of a boy. Pupils who were not taking part in a class-day assembly were supposed to leave the school premises. One boy refused to leave even after the teacher insisted. This specific student had a

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[37] Sims v. Board of Education, 329 F. Supp. 678 (1971).

[38] People v. Mummert, 50 N. Y. S. 2d 699 (1944).

[39] Hutton v. State, 23 Tex. App. 386 (1887).

record of bad behavior and he had been drinking. The boy continued to defy the authority of the teacher even to the point of using profane language. The teacher put his hands on the throat of the boy and either pushed or threw him over the hedge. The boy accused the teacher of assault and battery. The court ruled for the teacher and said:

> . . . People will differ as to what force is reasonable in manner and moderate in degree. Taking into consideration the prior conduct of the complainant, the lack of malice on the part of the defendant, the nature of the offense of the pupil, his motive, the effect of his conduct on other pupils, and his size and strength, I find and decide that the guilt of the defendant has not been proved beyond a reasonable doubt.[40]

This discussion will now center on the threatening theater of corporal punishment. Corporal punishment has run the entire gamut of intellectual, social, and judicial debate. For our purposes, the presentation will dwell on all three aspects but with special emphasis on the judicial factor.

The most frequently litigated punishment is corporal punishment. It should be noted that corporal punishment, in a legal sense, would be any touching of the body with an intent to correct a child's behavior. Through the years courts have upheld the infliction of corporal punishment which is reasonable in manner and moderate degree.[41]

There are basically three types of legal consequences growing out of the use of corporal punishment. First, criminal action for assault and battery could be brought by the state against the teacher. Second, the court action might be a civil case for assault and battery. The

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[40] People ex. rel. Hogan v. Newton, 56 N. Y. S.2d 779 (1945).

[41] E. Edmund Reutter, Jr., Schools and the Law (New York, N. Y.: Oceana Publication, Inc., 1960), pp. 68-69.

object of the parents' suit is to obtain damages (financial redress) from the teacher. Third, a proceeding may be initiated against the teacher by the school board charging that the particular instance of corporal punishment constitutes incompetency and, therefore, grounds for dismissal.[42] With these three negative outcomes for employing corporal punishment, it appears fundamental that the teacher should apply corporal punishment only as an effective ultimatum or last resort.

While the circumstances surrounding each case are controlling, the courts will often hesitate to interfere with the teacher's right to administer corporal punishment if it is:

1. Not prohibited by statute.
2. For the good of the child, and administered in good faith and without malice.
3. Not cruel and excessive, nor performed with an instrument which leaves a permanent mark or injury.
4. Performed under the in loco parentis relationship.
5. Suited to the age, sex, size, and physical strength of the child.
6. Conducive to the general welfare of the school.
7. In proportion to the gravity of the offense.
8. Not performed to enforce an unreasonable rule.[43]

It may serve to further accentuate the authoritative power of the public educator, if we delve into the historical themes and precedents involved in corporal punishment. The fact that school teachers have authority to physically punish students to maintain discipline is well documented. For hundreds of years courts have supported corporal punishment and continue to do so today. Common law doctrine before the adoption of the United States Constitution, and throughout the nineteenth

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[42] Ibid.

[43] M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963), p. 219.

century, permitted the teacher the right to administer corporal punishment to his pupils within certain limits as to the manner and means employed.[44] The legal authority to punish children derives from the common law prescript of in loco parentis.

"Under the doctrine of in loco parentis the teacher is considered immune from any liability arising out of the reasonable use of corporal punishment."[45] In Suits v. Glover additional legitimacy was applied to the substitute parent concept. Their distinct words were, "A schoolmaster is regarded as standing in loco parentis and has the authority to administer moderate correction to pupils under his care. To be guilty of an assault and battery, the teacher must not only inflict on the child immoderate chastisement, but he must do so with legal malice or wicked motives or he must inflict some permanent injury."[46] Suits v. Glover reaffirms the concept that when punishment is reasonable in degree and administered by a teacher to a pupil as means of discipline, it is privileged in that the administration of such punishment will not give rise to a cause of action for damages against the teacher. It appears that within the role of public teacher the privilege to use corporal punishment is valid when the individual stands in the responsible position of maintaining order and discipline over the pupils.[47]

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[44]Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Mathew Bender and Company, Inc., 1973), Ch. 9, pp. 16, 24.

[45]Melon v. McLaughlin, 107 Vt. 111 (1935).

[46]Suits v. Glover, 260 Ala. 449 (1954).

[47]Lawrence J. Nelson, "Right of a Teacher to Administer Corporal Punishment to a Student," Washburn Law Journal, Vol. 5, No. 1, (Winter, 1965), p. 78.

Chief Judge Wyzanski of the United States District Court of Massachusetts cites two statutory laws which may be invoked to rule on the procedural aspects of corporal punishment While they may be restrictive in application to the state of Massachusetts, their provisions could serve as useful guidelines in narrowing the gaps between public laws, expectations, and actual performance. Listed below are the following judicial codes:

> Massachusetts Code 2115--Corporal punishment may be administered for disciplinary reasons by any teacher or principal. Corporal punishment was restricted to boys on the hand with a rattan, presence of competent witnesses, shall not be inflicted in the sight of other students, should not be inflicted when it could aggravate an exciting physical injury, shall be resorted to in only extreme cases, offense must be fully explained to the offending pupil. Violent shaking or other gross indignities are expressly forbidden.
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> Massachusetts Code 211.6--Cases of corporal punishment shall be reported by each teacher on the dates of their occurrences, in writing to the principal. Reports shall state name of the pupil, names of witnesses, amount of punishment and reason therefore. Reports will be kept on file for two years, after which they shall be destroyed.[48]

By continuing the comparative nature of state laws it will afford the individual educator an opportunity to measure his behavior modifying approaches to the legal sanctions of public statutes. Excerpts from the Revised Statutes of the State of Nevada (392, 465 Corp. Pun. of Pupils) summarize the legal limitations of Corporal punishment:

1. The legislature declares:
   a. That the use of corporal punishment is to be discouraged in the public school, and only to be used after all other methods of discipline have proven ineffective.
   b. That judgment and discretion are to be used in all punishments . . . and maximum use should be made of available school counseling and psychological services.

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[48] Michael S. Sorgen, op. cit., Ch. 9, pp. 16, 24.

2. Board of trustees of every school district shall adopt rules and regulations in the administering of reasonable corporal punishment.
3. Parents and guardians shall be notified before, or as soon as possible after, corporal punishment is administered.
4. No corporal punishment shall be administered on or about the head or face of any pupil.
5. Nothing contained in this section shall be construed or interpreted to indicate that the teachers, principals and other certified personnel have not heretofore had the authority and the right to administer reasonable corporal punishment.[49]

Once again the body of case law dealing with corporal punishment contains examples of obvious inconsistencies. Furthermore, there are several illustrations which, at least on the surface, contain authoritative abuses of power but which, for varying reasons, are not upheld in court. When the type of punishment is selected, the influence on other pupils may be considered along with the pupil's past conduct. Where a teacher struck a child on the ear causing permanent injury, the teacher was held liable.[50] In New York, on the other hand, a teacher was legally permitted to slap a boy on the cheek with his hand, since such punishment was administered moderately in degree and manner.[51] The latter example, however, does not take into account several statutory limitations in numerous states restricting any type of physical punishment around the head. Nor does it take into account the original legal premise that any type of physical touching could be judged as corporal punishment if administered with such intent. Therefore, while such punishment may be allowable in New York, uniformity does not exist in our federal system of justice.

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[49] E. E. Loveless and Frank R. Krajewski, The Teacher and School Law (Danville, Illinois: The MacMillan Co., 1960), p. 241.

[50] Rupp v. Zinter, 29 Pa. Dist. and Co. 625 (1937).

[51] People v. Baldini, 159 N. Y. S. 2d 802 (1957).

In another New York case, People v. Petrie, it was held that corporal punishment by use of a half-inch rubber syphon hose on a fifteen-year-old boy did not constitute unreasonable or excessive punishment.[52] In another instance, when a boy denied knowledge of stealing a dime from a window sill, two teachers searched his pockets but failed to find the dime. Because he had resisted, one teacher administered slight punishment in the course of the search. This particular court refused to hold the teachers liable for assault and battery.[53]

A court ruled in one case that relatively severe punishment may be inflicted without legal penalty. According to this opinion, punishment is not excessive if it does not produce a lasting permanent injury, or if plaintiff fails to prove that the punishment was administered with spite, hatred, or revenge. A boy had been paddled six to fifteen times with a medium sized paddle. As a result, the child's buttocks were vividly discolored black and blue for about five days.[54] The instructor should be aware, nevertheless, that in a different state court or under varying circumstances the outcome might have been different. As was previously stated in Rupp v. Zinter, a permanent injury to the ear of a child administered by the teacher was found to be excessive. On the other hand, a North Carolina case held that any act done by the teacher in a valid exercise of his authority and not prompted by malice, is not actionable, although it may cause permanent injury.[55] In view of this

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[52] People v. Petrie, 198 N. Y. S. 81 (1923).

[53] Marlar v. Bill, 181 Tenn. 100 (1944).

[54] State v. Lutz, 113 Ohio 2d 757 (1953).

[55] Drum v. Miller, 135 N. C. 204 (1904).

apparent conflict of legality, LeRoy J. Peterson, Richard A. Rossmiller, and Marlin M. Volz speculate on another degree of liability. Their observation, in light of Rupp v. Zinter, claims that even where moderate punishment causes a permanent injury a teacher will be held liable.[56] As early as 1853, the right to chastise a student moderately was recognized in an Indiana Court. However, this court denied justification for beating and cutting the face and head of a pupil with any weapon which may be devised.[57]

Attempting to place the array of corporal punishment cases in proper perspective becomes an enormous undertaking. There is a lack of consistency in public school law on what constitutes liability even when there is agreement on the level and degree of physical punishment. According to the assortment of cases just presented, it has been held that severe punishment may be meted out if it is not excessive. It is not excessive, on this opinion, if it does not induce permanent injury. Another position views the use of moderate punishment as feasible only if it does not produce permanent injury. However, a countervailing opinion emanated from the North Carolina case where any teacher was immune from liability if the punishment was done in his authoritative capacity even if it produced a permanent injury.[58] Needless to say, at this juncture the average reader discovers a real frustration in sorting out predictable, logical, and usable guidelines.

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[56]LeRoy J. Peterson, Richard A. Rossmiller, and Marlin M. Volz, The Law and Public School Operation (New York: Harper and Row, Publishers, Inc., 1968), p. 406.

[57]Cooper v. McJunkin, 4 Ind. 290 (1853).

[58]Drum v. Miller, 135 N. C. 204 (1904).

For the most part, authorities tend to verify the idea that courts usually favor the public teacher in administering corporal punishment. In the past, this assumption has included a variance of extreme cases supporting the teacher. To balance the scope of this endeavor one must recognize the thread of public dissent demanding greater justification from the teacher for physical punishment.

In an obvious example of unreasonable punishment, the head schoolmaster encountered a student who resisted entrance into his office. The teacher dropped this third grade boy to the floor, knelt, and sat upon the boy to subdue him. The schoolmaster weighed 190 pounds, while the student weighed 89 pounds. The court ruled that the head teacher had exercised unreasonable force in disciplining the boy, and held him liable for injuries.[59]

Fists and a piece of flooring were considered improper instruments for disciplining a fifteen-year-old pupil. Their use constituted a proper ground for discharge of an Arkansas teacher. The teacher employed these devices twice in whipping a student for telling a riddle and throwing a paper wad at the teacher. The teacher was justified in inflicting reasonable punishment for the second act, but he was not justified in imposing excessive or cruel punishment.[60] In 1935 a Vermont teacher was fined $450 for striking an eleven-year-old girl with a book. As a result of the punishment, the child's kidney was injured. The court ruled that the teacher had the right to punish when it was not excessive or improper.[61]

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[59] Calway v. Williams, 130 Conn. 575 (1944).

[60] Berry v. Arnold School Dist., 199 Ark. 1118 (1940).

[61] Melon v. McLaughlin, 176 A. Vt. 297 (1935).

The only political divisions which have ruled directly against the utilization of corporal punishment include the District of Columbia and New Jersey. According to the evidence collected, numerous school districts have also ruled against corporal punishment by school board regulation.[62] However, according to a leading education association, in states where state law authorizes reasonable corporal punishment, local school boards have no right to forbid such correction. "When a board adopts a rule against all physical punishment inconsistent with state law, the rule would not be upheld in court."[63]

Observing the situation in Kansas, one discovers no statutes directly in point with the administration of corporal punishment by a teacher to a pupil in Kansas. Furthermore, there are no cases dealing with the right of a teacher to administer corporal punishment to a pupil.[64] In Morris v. School District a teacher was discharged for cruelty to and unreasonable punishment of his students. The court did not discuss reasonableness of punishment or the right to administer it.[65] In an earlier instance, a Kansas court affirmed the right of a district board "in conjunction with the county superintendent (may) dismiss (a school teacher) for incompetence, cruelty, negligence, or immorality."[66]

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[62]Madaline Kinter Remmlein, School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1962), p. 267.

[63]Teacher Liability for Pupil Injuries (Washington, D. C.: National Education Association of the United States, 1940), p. 9.

[64]Lawrence J. Nelson, "Right of a Teacher to Administer Corporal Punishment to a Student," Washburn Law Journal, Vol. 5, No. 1 (Winter, 1965), pp. 85-86.

[65]Morris v. School Dist., 139 Kans. 268 (1934).

[66]School Dist. v. McCoy, 30 Kans. 268, 273 (1883).

The only other potentially pertinent statutes related to physical punishment are listed in the General Statutes of Kansas Annotated. It reads, (K. S. A. 21-405) "Homicide shall be deemed excusable when committed by accident or misfortune in either of the following cases in lawfully correcting a child, apprentice, servant, or in doing any other lawful act by lawful means, with the usual and ordinary caution, and without unlawful intent . . ."[67] "Secondly, the vague concept of the county superintendent of public instruction's jurisdiction in educational matters might be interpreted in disciplinary cases. This statute states that the county superintendent should "advise school officials and teachers on matters relating to the organization or administration of the school, the discipline and methods of instruction, and the welfare of the people."[68] Whether this generalization would retain the same validity in contemporary arrangements of district superintendents could only be subject to court discretion. At any rate the indecisiveness of legislation in Kansas has not helped to alleviate the fears and frustrations of public educators. Attempts to provide specific statutes for corporal punishment have been few. The latest attempt was by a representative, Mr. Teter, in 1965. House Bill 678 did not even pass out of the committee.[69] In the event that a ruling becomes a necessity, Kansas, like most states, would be guided by common law principles. These principles include conditional immunity of the teacher until excessive and unreasonableness punishment can be determined.

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[67] School Dist. v. McCoy, 30 Kans. 268, 273 (1883).

[68] Lawrence J. Nelson, "Right of a Teacher to Administer Corporal Punishment to a Student," Washburn Law Journal, Vol. 5, No. 1 (K. S. A. 72-229, 1965), p. 85.

[69] Ibid.

Before closing the discussion on corporal punishment, one must endeavor to balance the extreme points of view. With this procedure goes the corroborating task of detecting future judicial trends. There have been dissenting voices in the wilderness of unequivocal acceptance of corporal punishment.

A Louisiana Court commented on Civil Code 220 pertaining to teacher authority. The legal essence of this decision was espoused in Johnson v. Horace Mann Mutual Insurance Company. In this court's opinion, the law in Louisiana:

> . . . does not say that fathers and mothers do delegate the power of restraint and correction to teachers, but that fathers and mothers may delegate such power. It might have been said, in days when schooling was a voluntary matter, that there was an implied delegation of such authority from the parent to the school and teacher selected by the parent. Parents no longer have the power to choose either the public school or the teacher in the public school. Without such power to choose, it can hardly be said that parents intend to delegate the authority to administer corporal punishment by the mere act of sending their child to school.[70]

In a specific instance, another Louisiana Court ruled against the physical education teacher. This legal judgment determined the action excessive when the educator protected himself by lifting, shaking, and dropping the student. Their reasoning was as follows:

> We expressly refrain from making any judicial pronouncement as whether it is actionable per se for a teacher in a public school to place his or her hands upon a student. Common sense would dictate, however, that the individual facts and environmental characteristics emanating from each case would disclose both the right and the reason for a teacher to do so, and the degree of force, if any, which may be used under particular or peculiar circumstances. A general rule in the negative relative to this problem may encourage students to flaunt the authority of their teachers. On the other hand, a general rule permitting physical contact between teacher and student in any instance

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[70] Johnson v. Horace Mann Mutual Insurance Company, 241 So. 2d 588 (1970).

> without qualification would obviously encourage the one who occupies a position of superiority to take advantage of those who are in a less favorable position since they are subject to their authority.[71]

Our discussion has scanned the fluctuating responses of diverse courtroom practices. It has been the objective of this section on corporal punishment to present a variety of judicial citations. Ware v. Estes probably presents the most universal stance of contemporary judicial thought. In the review of this case, one should observe the tone of legal caution and moderation. At the same time, one must be careful to note that the majoritarian view of an issue in a changing democratic state is subject to the whims of public opinion. The court's opinion in this case began as follows:

> From the evidence presented, the court has no doubt that the practice of corporal punishment has been abused by some of the seven thousand odd teachers in the Dallas Independent School District. This does not, however, show that the policy itself is unconstitutional.[72]

It was this District's policy that corporal punishment be used sparingly and only as a last resort. For this specific reason, it had to be recommended by a committee and approved by the parent before a teacher can use it. The prerequisites are only for the teacher and not imposed upon the principal or assistant principal because he has more resources available at his convenience to find out about the behavior and problems of the child.[73]

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[71] Frank v. Orleans Parish School Board, 195 So. 2d 451 (1967).

[72] Ware v. Estes, 328 F. Supp. 657 (1971).

[73] Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Co., Inc., 1973), Ch. 9, pp. 24, 27.

The following statements represent not only the summarization of this case but prevailing viewpoint of legality in regards to corporal punishment. In maintaining the quasi-official position of the judicial structure, the court declared that it was not their innate function to pass judgment upon the wisdom of corporal punishment as an educational instrument. The only question before the court was whether the method was utilized in an "arbitrary, capricious, or unreasonable" manner. Neither did the court find that corporal punishment constituted cruel and unusual punishment. If corporal punishment becomes unreasonable or excessive, it is no longer lawful and the perpetrator of it may be criminally and civilly liable. Corporal punishment remains an area of potential consequences where the teacher as a public employee must be ever alert to the changing positions of legality and public opinion.

SUSPENSION AND EXPULSION

Another one of the controversial areas of school discipline relates to the suspension or expulsion of a student. Inasmuch as the teacher is usually involved only in an indirect role, the authority mechanism rests heavily on the school administration. The objective of this segment of the study is to acquaint the teacher with the procedures leading to ultimate suspension or expulsion so his recommendations and opinions may be presented with an abundance of discretion. For the most part, courts have been reluctant to invade the institutional domain of public schools in the realm of suspension and expulsion.

The inherent power to make reasonable rules and regulations for the conduct of the schools resides in boards of education by express statutory authority, or may be legally implied. Pupils may be suspended

or expelled for violation of reasonable rules.[74] The fundamental difficulties lie in determining what rules are reasonable. In some cases the reasonableness of rules is obvious, but in the majority of situations there is no key as to how to predict what the courts will decide in particular cases. Boards of Education are vested with wide discretionary power in the making and enforcement of rules for the management of the schools. The validity of rules is almost always attacked on the point that they are unreasonable.

It has been held that such diverse rules as excluding a married woman from school, requiring students to remain home and study at a given time, requiring pupils to wear mandatory uniforms at home, and demanding a pupil pay for property accidentally destroyed as a condition for admission to school were unreasonable. Hamilton and Mort in their publication, The Law and Public Education, ascribe a large measure of authority to school officials. They said, "If pupil conduct is such as to satisfy the school authorities that the presence of the pupil is detrimental to the best interests of the school, he may be expelled or suspended even though there is no express rule against the particular conduct complained of."[75]

In an early case Douglas v. Campbell the legal principle of suspension or expulsion was defined even further. The court stated the following premise: "Any conduct of a pupil that tends to demoralize or interfere with the proper and successful management of the school, that is, impair the discipline which the teacher and board shall consider necessary for the best interest of the school, even though such conduct

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[74]Robert Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn, N. Y.: The Foundation Press, Inc., 1959), p. 513.

[75]Ibid., p. 514.

occurs off the school premises, is grounds for the punishment of the offending pupil, such as his suspension or expulsion."[76]

Limitations on the power of suspension or expulsion are often delineated in state laws. Besides the due process requirements, some statutes provide that a pupil may not be expelled until all other reasonable means of reforming him have been exhausted. If a statute expressly states the evidence or procedure for expulsion, the statute must be adhered to strictly.[77]

Because of the necessity of maintaining an orderly educational process, it has been held that "a teacher may suspend a student temporarily when the welfare of the school seems reasonably to demand it."[78] The California Education Code affirms the right of teachers to suspend a pupil "for not exceeding one schoolday, plus the remainder of the schooldays during which the suspension is ordered."[79] The final determination concerning whether the student suspension shall remain in effect, be modified, or the pupil expelled, resides in the board.[80]

There has been much discussion in intellectual and judicial circles relating to the concept of due process in student suspension and expulsion. Several court cases have referred to this time-honored

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[76] Douglas v. Campbell, 89 Ark. 254 (1909).

[77] Robert Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn, N. Y.: The Foundation Press, Inc., 1959), pp. 514-515.

[78] State v. Burton, 45 Wis. 150 (1878).

[79] Michael S. Sorgen, Patrick S. Duffy, William A. Kaplin, and Ephraim Margolin, State, School, and Family: Cases and Materials on Law and Education (San Francisco: Matthew Bender and Company, Inc., 1973), Ch. 9, pp. 5, 36.

[80] Madera v. Board of Education of City of New York, 386 N. Y. S. 2d 778 (1967).

tradition of American law. A number of courts have criticized the application of due process to student expulsion as a distortion of criminal law procedure.

A New York City case spoke to the responsibility of classroom order. The remarks were as follows:

> Law and order in the classroom should be the responsibility of our respective educational systems. The courts should not usurp this function and turn disciplinary problems, involving suspensions, into criminal adversary proceedings--which they definitely are not.[81]

A prognostication on the results of judicial control in school disciplinary actions comes from a college case in Missouri. This court stated, "By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent."[82]

The legal opinion which seems to represent the most dramatic use of the concept of due process for school suspensions and expulsions is repeated in the publication of state, school, and family law by Sorgen, Duffy, Kaplin and Margolin. The contention of these authors was that due process must include the following:

1. Student must be given written notice of the charges and the right to a hearing.
2. He must know the school's evidence.
3. A hearing must be held.
4. Student has the right to counsel.
5. The result must be made by an impartial decision-maker.
6. He must be able to present evidence.
7. He should have the right to confront and cross-examine witnesses.

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[81] Robert Hamilton and Paul R. Mort, op. cit., pp. 514-515.

[82] Esteban v. Central Missouri College, 290 F. Supp. 622, 629 (1973).

8. There must be a written finding of facts based upon substantial evidence.
9. He should have the right to record the hearing at his own expense.[83]

This format was soundly rejected in Goldberg v. Regents of the University of California. The court's succinct response interposed the idea that "what is due process depends on circumstances." Any analogy of student discipline to adult or criminal proceedings is not sound and is both impractical and detrimental to the educational atmosphere.[84]

In the previously mentioned San Francisco case the court did not completely abandon the due process concept. On the contrary, the court offered several procedural guidelines as follows:

1. There should be a notice by mail, telephone, or other appropriate method, to parents or guardian within a reasonable time after the suspension, advising of the fact of such suspension, its duration, and reasons therefore, with the opportunity for a prompt meeting with school officials.
2. If requested, a meeting or hearing within a reasonable time, at which the suspended student may also be present, and where the student shall be afforded an opportunity to present informal proof of his side of the case.[85]

A book entitled The Law and Public School Operation offers some general statements on the topic of suspension and expulsion. Suspension procedures are often set by state statutes. If this is the case, they must be followed to the letter. Suspension is usually not applicable to students attending summer school. Expulsion may not extend beyond

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[83]Michael S. Sorgen, op. cit., pp. 9-36.

[84]Goldberg v. Regents of the University of California, Supra., 248 Cal. App. 2d 881 (1967).

[85]Charles S. v. Board of Education, San Francisco, 20 Cal. App. 3d 83 (1971).

the current school year. A student may be expelled for continuous absence without excuse. A student, however, may not be expelled because of low academic ability or because he is difficult to teach. Expulsion does not extend to students transferring from another school after being excluded in the previous school for mischief.[86] School authorities acting without malice or intention to wrong a pupil are not liable for errors of judgment when expelling a student. The basis of a claim for wrongful expulsion is bad faith rather than malice.[87]

DETENTION

Another aspect of teacher authority entails the utilization of after-school detention as a means of punishment. While there is a minimum amount of case-study information to rely upon, the entire subject has been the focus of close scrutiny by administrators and teachers alike. In many educational institutions, this has been a traditional mode of negative reinforcement.

According to two authors, Robert L. Drury and Kenneth C. Ray, a teacher is generally permitted to disarm a child, to detain him after school hours, to remove him from the room, and to inflict such reasonable punishment as deemed necessary for the enforcement of school rules. He may even enforce discipline where no formal policies have been enacted.[88]

One method for enforcing this discipline is often referred to as detention. Drury and Ray contend that this disciplinary practice will be

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[86] LeRoy Peterson, Richard A. Rissmiller, and Marlin M. Volz, The Law and Public School Operation (New York: Harper and Row, Pub., Inc., 1968), pp. 410-411.

[87] Robert L. Drury and Kenneth C. Ray, Principles of School Law (New York: Meredith Publishing Co., 1967), p. 43.

[88] Ibid.

upheld by a majority of courts if such penalty is administered in good faith without wanton or malicious motives. It does not constitute forced imprisonment even though a teacher may be mistaken in his judgment as to the justice or propriety of detaining a pupil.[89]

In the viewpoint of Peterson, Rossmiller, and Volz the imposition of pupil detention must be for a reasonable period and for an offense clearly punishable. When these conditions are met, there is no legal question of authority. The authority to detain pupils on the school grounds after school has been repeatedly upheld in our court system.[90]

PUNISHMENT AND DISCIPLINE IN REVIEW

Let us now summarize the closing assumptions of punishment and discipline. One cannot emphasize enough the acknowledged legal rights of schools to mete out reasonable discipline. In Johnson v. Taft School District the court claimed that an important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline.[91]

Another California court declared that even in the absence of an expressed statutory provision or school rule, every pupil in a public school is presumed to know, and is subject to disciplinary treatment for failure to comply with the obligation to obey lawful commands.[92] In the same case, it was held that a board of education also has inherent power

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[89]Robert L. Drury and Kenneth C. Ray, op. cit., p. 43.

[90]Fertich v. Michner, 11 Ind. 605 (1887).

[91]Johnson v. Taft School District, 19 Cal. App. 2d 405 (1961).

[92]Wooster v. Sunderland, 27 Cal. App. 51 (1915).

to summon a student for the purpose of investigating and passing on his alleged misconduct.[93] Furthermore, if a school board or professional educator acting as a public employee has the power to make regulations, then the power to enforce it by expulsion is implied.[94]

There are several restrictions upon the individual teacher's prerogative for punishment. A notable division of legal debate includes academic punishment. Prime examples of this type of punishment include lowering a course grade or withholding a child's diploma for reasons other than lack of proficiency in the subject. The general precedence is clearly to the effect that academic punishments are not to be measured out for disciplinary infractions unless these infractions are such as to render the student clearly unworthy of the academic benefits or unless such a punishment is sanctioned by statutory law.[95]

Other significant examples of instances where teachers are restricted in punishment are given in the following commentary. A teacher cannot punish a pupil for refusing to do that which a parent has asked the pupil to be excused from doing. The teacher may refuse to permit a pupil to attend if the pupil does not conform to the rules.[96] A rule requiring payment for school property wantonly or carelessly destroyed, should not be enforced by corporal punishment.[97]

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[93] Ibid.

[94] Burkitt v. School District No. 1, Multnemak Co., 246 P. 2d 566 (1961).

[95] E. Edmund Reutter, Jr., Schools and the Law (New York, N. Y.: Oceana Publications, Inc., 1960), p. 69.

[96] State v. Mizner, 50 Iowa 145 (1876).

[97] State v. Vanderbilt, 116 Ind. 11 (1888).

The following quotation from a North Carolina case summarizes the legal theory while illustrating the procedural dilemma facing the public school teacher:

> The law has not undertaken to prescribe state punishments for the particular offenses, but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments, within the limits of this grant, to the discretion of the teacher. The line which separates moderate correction from immoderate punishment can only be ascertained by references to general principles. The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limb, or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized; but any corrections, however, severe, which produce temporary pain only, and no permanent ill, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare . . .[98]

In the 1962 publication of School Law by Madaline Remmlein one discovers the following generality: "A teacher who chastises a pupil may be subject to dismissal for violation of a school law or school board regulation in some districts; is subject to fine or imprisonment and to civil action by the parent of the pupil, if the punishment is unreasonable, malicious, or otherwise unlawful."[99] Furthermore, a teacher is not relieved from liability by acting in good faith and without malice, honestly thinking the punishment necessary, when it was clearly excessive and unnecessary.[100]

When a teacher expresses anger towards a child, he may display a variety of individual behavior. However, he does not have the legal right to express anger by physical blows. Punishment should not be

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[98] State v. Pendergrass, 2 Dev. and Batt. N. C. 365 (1892).

[99] Madaline Kinter Remmlein, School Law (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1962), p. 268.

[100] Lander v. Seaver, 32 Vt. 114 (1859).

motivated by anger or malice.[101] Nevertheless, it may be assumed that a teacher is generally permitted to disarm a child, to detain him after school hours, to remove him from the room, to inflict such reasonable punishment as deemed necessary for the enforcement of school rules. He may even enforce discipline where no formal policies have been enacted.[102]

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[101]Madaline Kinter Remmlein, op. cit., p. 271

[102]Robert L. Drury and Kenneth C. Ray, Essentials of School Law (New York: Meredith Publishing Company, 1967), p. 43.

Chapter 6

MALPRACTICE LIABILITY

Legal responsibility remains the key concept in teacher liability. This study has attempted to categorize the various avenues of potential liability. With the continued acknowledgement of public teachers as a growing profession developing attitudes and skills of professionalism, it is not inconceivable to assume that there will be an increase in malpractice liability of public educators. The major obstacle in such a prognostication resides in the legal premise which recognizes the public teacher as a public employee. Even though the public presumes a certain degree of teacher professionalism and rightly so, there will always be the opinion of legal standards which tends to acknowledge the public employee concept at the expense of professional standards. In other words the public, through state government agencies, sets the employee standards and not the profession itself. Herein lies the crux of the entire issue.

The margin between professionalism and unionism is a dubious one. The legal complexities of educational liability might be clarified more easily if the courts, public, and educators themselves would grasp the criteria for teacher professionalism. While this may seem utopian in nature, a better understanding of the teacher's role in society by all groups would be beneficial. Until this is accomplished, society will be confronted with the vociferous demands and grievances of many educational groups.

While there may be numerous suits against teachers charging negligence, there are few if any charging malpractice. As of the present time, "malpractice suits against teachers are as hard to find on court dockets as are kangaroos in your backyard."[1] A careful differentiation must always be drawn between legal tort liability resulting from negligence "and the liability that results from failure to exercise the special skill, knowledge, and care that can be reasonably expected from one who presents himself to the community as a professional educator."[2]

Recognizing that emotional duress can be a legal liability, the teacher has an almost limitless opportunity to cause mental and emotional damage to students. No concrete professional standards have ever been developed by state statutes, school board regulations, or the "profession" itself to judge the professional competency of the educator. Many attempts are now being made, however, to measure and evaluate the instructor with varying procedures and degrees of efficiency. This lack of uniformity defies the acceptance of absolute professional standards.

A type of malpractice immunity has shrouded the teaching profession so as to often deny any distinguishing factor between the educator and the average nonprofessional.[3] What, then, are the limits and boundaries of the teacher's privileged status in relation to the emotional growth and maturity of his students? While a degree of privilege must be inherent in the educator's role, the profession itself must come to

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[1]Richard K. Sparks and Herming Strauss, "Can Professional Teachers Be Sued for Malpractice?" American School Board Journal, 159:19-21 (1972), p. 30.

[2]Ibid.

[3]Ibid., p. 32.

grips with this basic question of professional competency before malpractice suits begin in greater proportions.

Malpractice suits center around an instructor's professional and moral responsibility to his students. A legal scholar, Philip E. Davis comments on the moral element in legal situations when he states:

> There are some persons, of course, who hold the view that neither legal issues nor legal decisions are ever specifically moral in character. Legality is one thing, they say, and morality is another. Undoubtedly there are many legal cases in which the moral content is minimal, consisting perhaps only in the observance of the principle of impartiality, or the principle of equal treatment before the law . . . Certainly there are many cases in which a well-recognized moral obligation is not even suggested as a factor for consideration . . .[4]

There are instances in which moral or conscience factors, either statutorily or implied conscientiously, influence the legal decision. Of even greater significance is the situation to the teacher where a moral obligation to his students is not synonymous to a legal responsibility. No legal guideline has been set for the conscientious teacher who perceives a moral duty in face of a lack of legal sanction.

In what ways can the public instructor's responsibility be controlled and developed? Or, in other words, how can a teacher's professionalism best be enhanced? Daniel J. and Richard D. Gatti provide an interesting commentary on professional responsibility. Because professional responsibility is so vital to counteract malpractice liability, here is their specific quotation:

> Teachers are assigned to a classroom with a job to do. They are given a great deal of professional responsibility, they are called professionals, and yet they are not given much professional authority. This could be remedied through a better understanding between the groups involved. Teachers should talk with

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[4]Philip E. Davis, ed., Moral Duty and Legal Responsibility (New York: Appleton-Century Crafts, Meredith Corporation, 1966), p. 4.

> their boards and develop a situation whereby a teacher representative is allowed to perform as a quasi-member at all board meetings. If this were done, problems and issues of concern could be better defined and handled. Furthermore, board members should be invited to teacher meetings. The board member would be able to vote his opinion on topics discussed and communicate those matters which are of concern to the board. Through teacher involvement in school board meetings, the board would be able to utilize the knowledge and professional expertise of the people who really are aware of the needs and desires of students.[5]

As in any public position, there are potentially many aspects of malpractice liability. It is probably safe to assume that if this trend in society continues, malpractice suits will not escape the teaching profession either. Many of these suits would ordinarily hinge on the professional competence of the instructor as perceived through the public's cultural norms, values, and opinions.

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[5]Daniel J. Gatti and Richard D. Gatti, The Teacher and the Law (West Nyack, N. Y.: Parker Publishing Co., Inc., 1972), p. 159.

Chapter 7

FINAL SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

The scope of this research has centered around the legalities of tort liability as it applies to public school teachers. The educator's role as a public teacher and employee has gravitated into various avenues of tort law. This study has attempted to investigate the massive body of public law which affects the teacher's daily instruction and supervision of the classroom. This study has not been undertaken just to produce another textbook in the field of school law. Nor has this academic endeavor been conducted to produce an amalgam of court cases from various state levels.

This specific phase of school law has been treated to present some obvious as well as inconspicuous observations. Tort liability is an area of school law which often defies the understanding of legal experts no less than the professional educator. The teacher as a public employee must encounter the complexities of tort law everyday whether he realizes it or not. His conflicts with administrators, parents, students, and personal colleagues often lead to indecision, disgruntlement, and intense frustration. There is probably no topic discussed more in educational circles than the potential extent of individual liability. However, in no area is there a greater lack of preparation, knowledge, and awareness than in tort law.

Once the investigation begins, the inconsistencies of legal application become patently obvious. Therefore, the thesis itself is based upon a typology of reference in which the individual teacher can attempt to become aware of his professional options and obligations in matters of tort liability.

In a March, 1971 article of Nation's Schools recognition was made of the traditionally few numbers of tort cases involving school injuries.[1] Today, however, with the breaking down of governmental immunity there has been a dynamic increase of cases involving tort liability. Because of this factor and the increase in litigation at all levels of society, trends can be discerned by one authority. These include the following:

> 1. There will be a greater volume of tort cases as a result of the decline in reliance on "sovereign immunity."
> 2. Students' increasing awareness of their own legal rights will result in a greater volume of legal actions brought by students against teachers.
> 3. The decline in acceptance of in loco parentis as a legal doctrine will continue to create an adversary relationship between the teacher and pupil. Therefore, teachers may pursue legal action against pupils and/or parents for intentional as well as negligence torts.
> 4. Teachers will undoubtedly seek statutory protection against personal liability for injuries incurred in high risk areas of the school program.
> 5. There may be a rise in claims by students against other students.[2]

All these previous remarks tend to leave the teacher in an emotional quandary. He is left facing various confrontations of legal consequences which are far from desirable, but somewhat inevitable. As a result of this, there may be a paralysis of professional progress and

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[1]Kern Alexander, "Trends and Trials," Nation's Schools, Vol. 87, No. 3 (March, 1971), p. 55.

[2]Ibid.

advancement. Is it not possible to assume that at least a minimum of professional educators will be limited in their activities, experiences and creative energies with the ominous cloud of personal liability resting upon their conscientious efforts? How disheartening this would be since this is the exact opposite effect the law is intended to have. Our legal system is designed not only to protect rights but to release those creative talents which may benefit all sectors of educational life.

Professor George M. Johnson addresses himself to the cost of liability in terms other than financial burdens. It is suggested, in his viewpoint, that:

> Proper research may reveal that the present rules for determining liability for injuries arising out of activities occurring in the education enterprise are inequitable and unsuited to the conditions of modern education and that the losses from such injuries should be regarded as part of the cost of modern education, to be borne by the education enterprise rather than by students and/or teachers.[3]

Johnson recognizes clearly that the essentials of tort law which are applicable in determining the liability of public educators and school personnel are often the reason for considerable uncertainty on the part of educational officials. Such uncertainty results in deficient teaching and educational administration. "It may be that the time has come to consider uniform state laws that will treat the education enterprise in a manner similar to the treatment accorded to the industrial enterprise when workmen's compensation legislation was initiated."[4]

Harry A. Rosenfield, a practicing attorney in Washington, D. C., makes several recommendations on tort liability. He recommends complete

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[3]George M. Johnson, Educational Law (East Lansing, Michigan: Michigan State University Press, 1969), p. 278.

[4]Ibid.

abolition of the rule of governmental immunity for torts as it applies to public schools. In his judgment, "Such action is necessary not only in order to protect innocent injured persons, but also to encourage schools to avoid preventable accidents."[5] Rosenfield's three point program would include the following details:

> 1. Abolition of the doctrine of governmental immunity for school accidents, by legislation if necessary.
> 2. Authorization to school boards to purchase necessary and appropriate insurance to cover such liability.
> 3. Establishment or continuation of a first-rate safety and accident prevention program in every school of this nation, in order to eliminate and substantially curtail accidents and the consequent results of school district liability.[6]

The emphasis on preventive liability continues to be the subject of numerous recommendations. In a 1963 publication related to school-shop liability, several recommendations were suggested. These proposals encompass the guidelines listed below:

> 1. Seek passage of mandatory save harmless legislation. This would leave any school employee harmless from potential liability litigation, although the school district may have to carry the cost.
> 2. Clearly define within the school laws of the state the current policy with regard to liability.
> 3. Clearly define the position of the individual teacher with regard to possible liability.
> 4. Incorporate a section relating to liability into teacher handbooks.
> 5. Seek legal counsel whenever legal problems are evident.
> 6. Establish full-time professional physicians on the staff of the larger school districts.
> 7. Install complete first aid kits in school shops, physical educational areas, and other potentially dangerous areas.
> 8. Instigate an in-service training program on safety and liability for teachers already employed.
> 9. Develop standardized procedures in the event of a pupil injury.

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[5]Lee O. Garber, ed., Current Legal Concepts in Education, (Philadelphia University of Pennsylvania Press, 1966), p. 278.

[6]Ibid., p. 279.

10. Require mandatory accident reports of all injuries.
11. Restrict the activities of accident prone students and students with disabilities.
12. Inform parents of potential and actual activities in the classroom.
13. Encourage familiarity with the history and reasons behind school laws.
14. Encourage alertness to the changing concepts of school law in regard to liability.
15. Investigate the possibility of liability insurance.[7]

Author Denis J. Kigin also proposes a pupil compensation plan based on a type of workman's compensation arrangement which is streamlined and modified to meet the especially unique situation of classroom students. His underlying thesis concludes:

> The solution to the problem of liability does not lie entirely in providing more legislative protection for teachers and school districts but in apportioning more responsibility to them. If they can be held more accountable for accidents, greater care and concern on their part will be the result. They are more likely to get to the source of the problem which has, as its basic premise, the prevention of injury-causing accidents. The initiative for this action must come from the teachers themselves and the school district.[8]

As sophisticated as he might be, the teacher of today is little prepared in the knowledge of the law, which is of growing importance to him and his profession. He seems particularly unaware of tort liability which pertains to so much of a teacher's professional activity.

According to Nolte and Linn, knowledge of the law should be emphasized for four basic reasons. They include:

1. Ours is a nation founded upon a government under law. Public schools must transmit this vital segment of our history. Our schools, in effect, should act as laboratories of democracy.
2. Teachers need to know the law because our national system of schools is based on an intricate partnership plan among local, county, state, and national governments. Legal

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[7]Denis J. Kigin, Teacher Liability in School Shop Accidents (Ann Arbor, Michigan: Prakken Publication, Inc., 1963), pp. 99-102.

[8]Ibid., p. 103.

concepts are quite different from psychological concepts. Most teachers are well-educated in psychological concepts related to individual development, but the legal concept also views the public schools as existing for the good of society. A superior teacher needs a well-balanced outlook on his teaching situation.

3. Knowledge of the law will advance the professional growth of teachers. Teachers as a class are provided for in constitutions and state statutes, "but the rights and responsibilities of teachers as individuals are constantly being hammered out in legislative chambers and courtrooms. As teaching changes, the rights and responsibilities of the individual teacher change, both legislatively and judicially."[9]

4. The teacher will be better able to avoid involvement in needless litigation if they possess a thorough knowledge of the law.[10]

Unless teachers as public employees develop a professional attitude of legal awareness through learning experiences, the intense problems of educational management and control will become critical. The impetus for rejuvenation must originate within the teaching profession itself if the results are to be of any significance. Although the body of public school law and its application to both educators and students is constantly changing, the individual teacher must alert himself conscientiously and intellectually to the exigencies at hand. His role in society, to a large measure, will be determined by his response.

Without statistical information and further research, the need for more knowledge concerning public school law is necessary to draw additional conclusions. Based upon the evidence of this research study, however, there appears to be no universal controlling cases that are applicable to all teachers. Various court interpretations and differing state laws have led to a confusing picture of tort liability. While many

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[9]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1963), p. 7.

[10]Ibid., pp. 5-8.

authors seek to outline general legal guidelines for teachers, the evidence points to no consistent rationale and/or content to liability for teachers.

While the instructor who understands the nature of law, the legal bases of society, constitutional politics, and legal principles may be only slightly better off than the teacher who does not, it is not inconceivable that he could protect himself in certain instances. However, the most valid conclusion that one can develop from this information is that tort liability laws for public educators lack consistency and uniformity.

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