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Teachers' Tort Liability

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THE RECENT NOTORIETY in the Cleveland area attendant upon several reports of alleged batteries committed by teachers has served to focus the attention of both the educator and the citizen on this aspect of liability. This attention may well result in some necessary judicial and legislative clarification in this area, but it may tend to obscure other equally important facets of the teacher's tort liability. It is with this thought in mind that this article is written. The article itself is intended as much for teachers as it is for attorneys. Where possible, it attempts to transcend the attorney's usual interest in event which have already occurred and seeks to present rules for guidance.

Before liability is discussed, reference must be made to a particularly vexing problem. In Ohio, actions for negligent torts must be commenced within two years, and actions for intentional torts must be commenced within one year of the tort. However, if the injured person is a minor, these periods do not begin to run until majority is reached.[1] The problem is obvious: the lawsuit may not be filed for five, ten, or even fifteen years. Time has a corrosive effect on the human memory, and a teacher will probably find that his recollection of the incident which is the subject of the lawsuit is, to say the least, vague. Then, too, the teacher's witnesses, usually students, will undoubtedly have completely forgotten the incident.

The solution to this problem of the Statute of Limitations is not an easy one. It would, of course, be possible for the Ohio General Assembly to do as certain other state legislatures have done and to remove this protection from minors. To press for such a solution would be a time-consuming alternative, and such legislation, unless limited, might well destroy minors' substantial rights in other areas of the law. The fact is that the minor's attorney faces a problem similar to that of the teacher, and one finds that the claims are nearly always brought to suit within the one or two year period.

The teacher can protect himself from the damaging effect of delay by immediately preserving all available evidence. If pos-

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[1] Ohio Rev. Code § 2305.16.

sible, some other school official should assist in the investigation; this would ensure the teacher of having at least one adult witness. The investigation should produce *detailed* statements from all witnesses and, if possible, from the injured child himself. Professional investigators prefer to use a stenographer in order to preserve the statement in the precise language of the interrogator and the witness, but if this is not feasible, a signed narrative statement will afford some protection. A lapse of several years may find a particular area or condition completely changed, and thus it may be desirable to take some photographs. Finally, the teacher should record his own recollections and observations as fully as possible. This investigative material should then be collected in one file and preserved for future use.

Turning now to the question of liability, it has been found convenient to discuss the subject of negligent torts separate from that of intentional torts. The word "teacher" will be used in its broad sense to include all certificated personnel.

Negligent Torts

The first point to note is that, under the present law of Ohio, the school itself is immune from liability.[2] This raises the interesting question whether a teacher, acting in his capacity as such, does not also share the school's immunity. The question has not been decided or discussed by the Ohio courts, but dictum in one Ohio case is to the effect that a teacher is not immune.[3] When the question of the individual liability of public officers other than teachers has come before the Ohio courts, it has been held in a number of instances that such officers are immune.[4]

Leaving aside the question of immunity, a person is liable for his own negligent torts and, in addition, may be held liable for the torts of others on the principle of *respondeat superior.* Thus, a teacher who sends a pupil on a personal errand, as opposed to an official errand,[5] could be held liable for the pupil's tort in, for example, striking someone with his bicycle.

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[2] 48 Ohio Jur. 2d, *Schools* § 238 *et seq.* With respect to private schools, see Matthews v. Wittenberg College, 113 Ohio App. 387, 178 N. E. 2d 526 (1960).

[3] 65 Ohio App. 163, 29 N. E. 2d 444 (1940).

[4] Thomas v. Wilton, 40 Ohio St. 516 (1884); Ramsey v. Riley, 13 Ohio 157; State ex Bolen Construction Co. v. Department of Highways, 15 Ohio L. Abs. 630 (Ct. App. 1933), aff'd 127 Ohio St. 587, 190 N. E. 246 (1934).

[5] A teacher who delegates school business to a child would appear to be acting as a superior servant, not as a principal.

The cases which discuss a teacher's liability for his own negligent acts may be arbitrarily subdivided into three general categories: (1) failure to supervise; (2) failure to use good judgment; and (3) failure to instruct. There have been surprisingly few Ohio decisions dealing with the liability of teachers, and so liberal use must be made of out-of-state authorities.

The only reported Ohio decision dealing with a teacher's liability for his conduct in the classroom, *Guyten v. Rhodes*,[6] fits within the first category, a failure to supervise. The case was decided on the teacher's demurrer, supposedly after the plaintiff's attorney had pleaded even those allegations about which he might be hard-pressed to present evidence. The petition alleged that the defendant, the teacher of a class of defective and incorrigible youths, left the class unattended in order to gossip with another teacher. While the teacher was absent, a seventeen year old boy threw a milk bottle which struck a twelve year old boy in the eye. It was alleged that the teacher knew the seventeen year old boy had previously assaulted the plaintiff. The Hamilton County Court of Appeals absolved the teacher from liability on the theory that his action was not a proximate cause of the plaintiff's injury.

It may be that the decisive action by the court in the *Guyten* case has discouraged the filing of similar cases. The rule enunciated by the court seems to be a sound one, and one which is fairly easy of application. However, it should be noted that the petition in that case did not specify how long the teacher was absent from the room. The court may have felt that, since the same incident could have occurred if the teacher had merely turned his back momentarily, a short absence could not possibly have contributed to cause the unfortunate accident. The question remains as to what action the court would have taken if the petition had alleged that the teacher was absent for, as an example, one-half hour. Such a prolonged absence might dictate a different result.

Other teachers charged with a failure to supervise have not fared as well as did the teacher in the *Guyten* case. In what seems to be a harsh application of the rule, the New York Court of Appeals has held that a teacher who attempted to supervise the noon recess activities from the building might be held liable to a child who was injured in a portion of the playground which

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[6] *Supra*, n. 3.

was not observable from the teacher's window.[7] Liability seems clearer in another New York case in which a principal failed to place anyone in charge of young children while they waited for the school bus following dismissal; one of the children, in scuffling, was pushed into the path of a bicycle, whereby he sustained certain injuries.[8]

A teacher who wishes to safeguard himself from this type of suit would do well to emulate the foresight of the school principal in the case of *Thompson v. Board of Education.*[9] The plaintiff in that case was injured when another pupil pushed her on the stairs. In dismissing the complaint, the New York Court of Appeals referred to eighteen different means the principal had taken to fulfill his supervisory duties.

There are no reported Ohio cases in the second subdivision, failure to use good judgment. What might be considered the typical example of this type of conduct was at issue in the North Carolina case of *Drum v. Miller.*[10] In order to attract a pupil's attention, the teacher threw a pencil at him; the pupil turned at the wrong moment, and the pencil struck him in the eye. The court held that a jury question was presented as to whether the teacher had acted as a reasonably prudent person. Liability has also been imposed upon a teacher for sending a young girl to tend a fire[11] and for approving the use of electric current as part of an initiation.[12] Into the same category fall the cases involving teachers who fail to render emergency medical treatment when it is necessary or who, when no real emergency exists, take it upon themselves to act as doctor and nurse.[13]

Scant sympathy can be mustered for the teacher who throws a pencil to attract attention or who approves of the use of electric current during an initiation. However, the teacher who must decide whether a pupil is really too sick to participate in the day's gym class or who must establish the policy insofar as fifth graders serving on the safety patrol is faced with a dilemma.

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7 Miller v. Board of Education, 291 N. Y. 25, 50 N. E. 2d 529 (1943).

8 Selleck v. Board of Education, 276 App. Div. 263, 94 N. Y. S. 2d 318 (1949).

9 280 N. Y. 92, 19 N. E. 2d 796 (1939).

10 135 N. C. 204, 47 S. E. 421 (1904).

11 Smith v. Martin, 2 K. B. 775 (1911).

12 DeGooyer v. Harkness, 70 S. D. 26, 13 N. W. 2d 815 (1944).

13 For example, in Guerrieri v. Tyson, 147 Pa. Super. 239, 24 A. 2d 468 (1942), a teacher attempted to treat a pupil's infected finger by holding it in boiling water for ten minutes.

There are some alternatives which are obviously proper, such as using an average seventh grade boy on the safety patrol, and some which are obviously improper.[14] But the numberless "in-between" areas present questions for the resolution of a jury, and a teacher can only hope that, after mature consideration, he has adopted the right course. When time permits, consultation with fellow teachers prior to arriving at a decision is a sign of mature consideration.

There are no reported Ohio decisions in the final category, failure to instruct, but the citation of certain out-of-state authorities will serve to point up the problem. In a New York case a physical education instructor placed two untrained boys in a boxing ring and let them "slug it out;" the court held that he failed in his duty as a teacher because he should have warned and instructed the boys in the art of boxing prior to allowing them to enter the ring alone.[15]

A good example of an instructor who had adequately fulfilled his duty is furnished by the manual training instructor in the case of *Meyer v. Board of Education*.[16] In that case a sixteen year old boy was injured when a classmate turned on a power saw which the plaintiff was cleaning. In holding for the teacher as a matter of law, the court noted that he had established and promulgated rules whereby no one was to turn on a machine until he was satisfied that it was clear, no one was to turn on a machine when anyone else was in the immediate area, and only one boy was to work on any machine at a time.

Before leaving the subject of negligent torts, reference should be made to one interesting Ohio decision, *Casper v. Higgins*.[17] The plaintiff in that case, a student at Miami University, was injured while returning from a debate in which he had participated as part of a course in public speaking. At the time of the accident, the plaintiff was in an automobile driven by the defendant instructor, whose duties included directing the public speaking course. The guest statute was raised as a defense. The student sought to avoid the effect of the statute by arguing

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[14] One of the Cleveland high schools reportedly sends a girl student on public transportation to pick up the weekly student passes for the entire school. While the girl carries no money, she does carry several hundred dollars of very salable merchandise. This exposure of the girl seems improper.

[15] LaValley v. Stanford, 272 App. Div. 183, 70 N. Y. S. 2d 460 (1947).

[16] 9 N. J. 46, 86 A. 2d 761 (1952).

[17] 54 Ohio App. 21, 6 N. E. 2d 3 (1935).

that, since his tuition had been partly used to compensate the instructor, he was a paying passenger. The Butler County Court of Appeals rejected this argument and held that the payment of tuition was too indirect to constitute payment for the trip.

Several recent Ohio cases have held that indirect benefits will suffice to take a case out of the ambit of the guest statute,[18] and it may be questioned whether the *Casper* case represents the present law of Ohio. Liability has been imposed upon school bus drivers without regard to the guest statute,[19] and an argument could be made that the two situations are analogous. A teacher who finds it necessary to drive students to and from school events might be able to protect himself from liability by an antecedent release, but the only real security is in having liability insurance. It was probably in recognition of this that the Ohio General Assembly recently enacted legislation which permits school boards to procure liability insurance insuring employees for liability occasioned by the operation of a motor vehicle owned or operated by the school district.[20]

Intentional Torts

When one thinks of an intentional tort in connection with a teacher, he thinks of assault and battery. But there are two other torts which may likewise be connected with a teacher's work—false imprisonment and illegal search and seizure.

The Cleveland newspapers have recently reported on a number of lawsuits and threatened lawsuits arising out of alleged batteries by teachers. Yet there are no reported Ohio civil cases enunciating the applicable rule of law. The court in the *Guyten* case,[21] as dictum, obscurely referred to the right of a teacher, within certain undefined limits, to discipline pupils; however, the court then stated that a teacher could be held civilly liable for an assault or unreasonable corporal punishment.

The Ohio rule insofar as criminal responsibility for an assault and battery has been established. As stated by the court in the case of *State v. Lutz*,[22] it is that a verdict should be directed for the defendant unless (1) the punishment was severe or exces-

[18] Burrow v. Porterfield, 171 Ohio St. 28 (1960); Lisner v. Faust, 168 Ohio St. 346, 155 N. E. 2d 59 (1958).

[19] Dickerhoof v. Bair, 54 Ohio App. 320, 6 N. E. 2d 990 (1936).

[20] Ohio Rev. Code § 3313.201, eff. August 19, 1959.

[21] *Supra*, n. 3.

[22] 65 Ohio L. Abs. 402, 113 N. E. 2d 757 (C. P. 1953).

sive, and (2) there either was malice on the part of the teacher[23] or was the production or threat of permanent injury.[24] The pupil in that case had been paddled six to fifteen times (the pupil's version being that it was fifteen times) and had bruises which disappeared after five days; the court directed a verdict for the defendant.

In a recent unreported civil case, Judge Brennan of the Cleveland Municipal Court applied the rule of the criminal cases and directed a verdict for the teacher.[25] The fourteen year old plaintiff had been warned on two occasions to stop talking. Finally, the teacher instructed the boy to do exercises, in lieu of being paddled. The plaintiff did a few exercises and then stopped. True to his word, the teacher struck him once with a ruler; this caused a welt which remained for a few days.

Such a decision, fitting as it does within Ohio's criminal rule, seems to be a sensible approach to the problem of school discipline. A teacher who did not dare to touch a pupil to punish him or to stop a disturbance would exist in a jungle. In states which do not adopt a rule like that of the *Lutz* case, it is necessary to examine several factors in arriving at a decision: (1) the nature of the offense; (2) the motive of the pupil; (3) the influence of his example; (4) the age, sex, mental and physical condition of the pupil.[26] The resolution of these circumstances is typically a jury function, which, unfortunately, can oftentimes result in the imposition of liability on a well-meaning teacher.

An interesting question is raised when the battery is committed in punishing the student for an act which occurred away from the school premises. In the *Lutz* case,[27] the pupil had thrown a stone at another pupil who was on her way to school; the court held that the teacher's responsibility attaches from the time the child leaves home and continues until the child returns home. This rule can, of course, be carried to unreason-

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[23] The court states that the malice may be express or implied. Implied malice is defined by it as a wrongful act, done wantonly, without just cause or excuse.

[24] An earlier decision, Martin v. State, 11 Ohio N. P. (n.s.) 183 (1910), aff'd, 87 Ohio St. 459, 102 N. E. 1132 (1912), states that there must be both malice *and* production or threat of permanent injury.

[25] Poole v. Young, Cleveland Municipal Court No. A613952 (unreported, 1962).

[26] Restatement, Torts § 150. See also, Quinn v. Nolan, 7 Ohio Dec. Rep. 585 (1879).

[27] *Supra*, n. 22.

able extremes, as in one case in which the pupil had gone home and then, while standing on his mother's property, abused two girls who were en route home from school.[28] While such a holding could be justified if the incident took place on a school bus or at a school outing, it seems unnecessary and extreme to say that a teacher can punish for misconduct occurring anywhere. The better rule seems to require a direct and immediate relationship between the act and the maintenance of school order and discipline.[29]

The Restatement of Torts takes a novel position insofar as punishment of pupils whose parents have expressly forbidden the teacher to punish the child.[30] It is stated therein that, under those circumstances, the teacher's right to punish flows from the state and, thus, can only be exercised by public school authorties. Such a distinction seems ill-founded because the need for discipline is as great in both the public and private system. Artificial distinctions can frustrate, rather than aid, the private school in the accomplishment of its public purpose—education.

Research has discovered only one reported decision involving a claim of false imprisonment.[31] The reason for this scarcity of authority may be that teachers "discipline" pupils, rather than "imprison" them. The Restatement of Torts takes the position that a teacher is privileged to impose such confinement as is reasonably necessary to secure the observance of the necessary discipline.[32]

A *caveat* should be sounded with respect to requests by police to interrogate pupils at school. The teacher may wish to assist the police by making the pupil available, and this probably would not expose him to liability. However, discretion would dictate that the teacher not take part in any detention, either verbally or by his actions.

There is also a scarcity of authority on the question of illegal search and seizure. Certain petty thefts or "losses" are bound to occur during school hours, and it would seem logical to conclude that a teacher can make a reasonable investigation.

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[28] O'Rourke v. Walker, 102 Conn. 130, 128 Atl. 25 (1925).

[29] In Pennsylvania, the teacher, by express statutory provision, has authority over pupils while they are going to and from their homes. Purdon's Pa. Stat. Ann., Tit. 24 § 13-1317.

[30] Restatement, Torts § 153.

[31] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605 (1887).

[32] Restatement, Torts § 154.

Whether such an investigation can include the search of a pupil's person and property is a question about which no easy answer can be given. The two reported decisions in this area, both from Tennessee, reach opposite results, because, as stated by the court, the teacher in the second case told the pupil that he was searching him only for the purpose of clearing him of suspicion of theft.[33]

A different question is presented by a teacher's need to search lockers and desks for sanitation purposes or to discover "contraband." So long as the desk, lock, and locker are owned by the school, it would seem that even a routine search would be proper, probable cause not being a prerequisite. As an additional safeguard, the school authorities might, at the beginning of each semester, inform the students that the school expressly reserves the right to enter the desks and lockers.

Conclusion

A teacher, like every other member of society, should be held accountable for his negligent torts in failing to supervise, failing to use good judgment and failing to instruct. The teacher's protection lies in an individual policy of insurance or in the enactment of legislation requiring the school board to hold him harmless for torts committed within the scope of his employment.[34]

But a teacher should not be so hamstrung by the law of intentional torts, especially with respect to alleged assaults and batteries, that it interferes with his function—to teach. One whose most recent experience with education has been at the university level tends to forget that serious discipline problems exist at the lower levels. A teacher who cannot control his class cannot teach—corporal punishment may be needed in certain instances to enforce such control.

The sensible, immediate solution to the problem of an alleged assault and battery is to adopt the rule which has been enunciated by the courts in the criminal cases: there is a battery only when there is severe or excessive punishment plus either malice on the part of the teacher or the production or threat of permanent injury. Any other rule would unhappily expose the teacher to the uncertainties of a jury verdict.

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[33] Marlar v. Bill, 181 Tenn. 100, 178 S. W. 2d 634 (1944); Phillips v. Johns, 12 Tenn. App. 354 (1930).

[34] For example, see N. Y. Education Law § 3023.