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THE TORT LIABILITY OF THE CLASSROOM TEACHER

STEPHEN R. RIPPS*

INTRODUCTION

THIS ARTICLE WILL DISCUSS the tort liabilities to which classroom teachers are exposed and predict future parameters of concern. The rules of law applicable to the tortious conduct of the classroom teachers equally affect elementary, secondary, and higher education instructors.

The classroom teacher is vulnerable to liability for both intentional and negligent torts. Previously, the intentional torts of assault and battery have been the subject of the majority of the litigation because of the various disciplinary actions taken by both administrators and teachers. However, the time may soon arrive when other intentional torts such as false imprisonment and defamation will provide a foundation for future lawsuits.

Negligent conduct in a classroom setting contains two broad areas that often cannot be separated and will be discussed as one in this article—the duty of instruction and the duty of supervision. These situations arise when the teacher does not explain basic procedures or fails to warn of risks inherent in certain activities, such as chemistry experiments, athletic performances or dangerous machinery.

Generally, the same principles and rules of law which are relied upon in cases of intentional torts and negligence, and which would apply if the teacher acted in a private capacity will apply to the teacher in the classroom.

SOVEREIGN IMMUNITY

The doctrine of sovereign immunity does not apply to the tortious conduct of the teacher, but explains why, especially in Ohio, there is very little case law on the subject. A prospective plaintiff looks toward a prospective defendant who would be able to satisfy a settlement or judgment after trial. Traditionally, the employer is responsible for the acts of his employee under the doctrine of *respondeat superior*, and usually is either the sole or major contributor in satisfying the judgment awarded to the plaintiff. This is not true in matters involving teachers. Because of sovereign immunity the school district or college is immune from liability. Even though this immunity does not extend to the teacher, in most instances it tends to discourage lawsuits and curtails any type of redress that could have been made available to the injured student.¹

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¹ See Henson, *Schools and Teachers—Tort Liability in Our Changing Society*, 8 KANSAS L. REV. 124 (1959).

The doctrine of sovereign immunity originated in England, where the courts accepted the belief that the "king could do no wrong" and summarily dismissed cases against the government. The concept was initially applied in the United States by a Massachusetts court in 1812, and was quickly extended to all governmental or quasi-governmental agencies in the various states.²

Sovereign immunity regarding public schools and institutions of higher education dictates that in the absence of express statutory authority, the public corporation cannot be sued.³ However, an exception was carved out in *Thomas v. Broadlands Community Consol. School Dist.*,⁴ based upon insurance law concepts. While recognizing that immunity is justified because of the need for the protection of public funds, the court held that when a quasi-municipal corporation purchases liability insurance to protect the public funds, even if the purchase is without authority, the reason for the rule of immunity vanishes to the extent of the available insurance.

A majority of states, joined in 1975 by Ohio,⁵ have generally waived their sovereign immunity. Nevertheless, only a few have statutes that provide for direct relief against a school district for damages suffered at the hands of their boards, officers, agents and employees.⁶

² Mancke, *Liability of School Districts for the Negligent Acts of Their Employees*, 1 J. LAW & ED. 109 (1972). The article discusses the history of sovereign immunity from the perspective of the case of *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788) in England, and its counterpart in the United States, *Mower v. The Inhabitants of Leicester*, 9 Mass. Rep. 247 (1812) and analyzes the reason courts adhere to the doctrine absent express statutory authority.

³ 15 AM. JUR. 2d Colleges and Universities § 34 (1964). See also *Weary v. State University*, 42 Iowa 335 (1876) (which held a public college or institution is a creature of the legislature and cannot be sued, rendering any judgment against it valueless); *Garrity v. State Bd. of Adm.*, 99 Kan. 695, 162 P. 1167 (1917); *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332 (1877) as reported in Note, 17 ORE. L. REV. 251 (1937); *Spencer v. School Dist. No. 1*, 121 Ore. 511, 254 P. 357 (1927); *Briscoe v. School Dist. No. 123*, 32 Wash. 2d 353, 201 P.2d 697 (1949) (which held that in absence of a statute, the school district is not subject to liability for injury to a pupil in connection with school attendance).

⁴ 348 Ill. App. 567, 109 N.E.2d 636 (1952).

⁵ See *Wolf v. Ohio State Univ. Hosp.*, 170 Ohio St. 49, 162 N.E.2d 475 (1959) (Board of Trustees could not be sued because they were agents of the State of Ohio pursuant to OHIO REV. CODE § 3335.03). On January 1, 1975, the Ohio legislature effectuated OHIO REV. CODE §§ 2743.01-2743.20 which waived the state's sovereign immunity from tort liability and permits suits to be brought in a new court of claims. Of special interest is § 2743.02 that involves agency relationships.

⁶ *Supra* note 1. New York, California and Washington expressly provide for this type of suit. See *Miller v. Board of Education*, 291 N.Y. 25, 50 N.E.2d 529 (1943); *Herman v. Board of Educ.*, 234 N.Y. 196, 137 N.E. 24 (1922); N.Y. EDUC. LAWS §§ 2560, 3023 in which New York alone adheres to the British rule of liability to the extent of recognizing no immunity for acts of the school board, but extends such immunity to the acts of the board's agents and employees and it incorporates an indemnification against loss to its agents and employees, which includes teachers.

As for private colleges and universities, they are created at the expense of private parties in the corporate sense, and are deemed private corporations, which allows them to sue and to be sued.⁷ Most states have at one time or another legislated that these institutions be the subjects of immunity from liability under the doctrine of "charitable immunity," as a matter of public policy.⁸ Many states in conforming to the abrogation of sovereign immunity have dealt a similar blow to charitable immunity, but Ohio is one of the few states which has not.⁹

The doctrine of sovereign immunity may have outlived its usefulness in that the original purpose of protecting the state funds has been replaced by the availability of insurance policies for organizations such as schools and charitable institutions. It is crucial that the teacher or professor understand, however, that the doctrines and strictures of sovereign and charitable immunities are for the benefit of the school or university and are not applicable to the individual instructor.¹⁰ The teacher remains personally liable for his or her tortious actions even in a jurisdiction that retains any immunity protection.

INTENTIONAL TORTS

The primary scope of intentional torts affecting classroom teachers is the intentional interference with the person of the student. Assault and battery have evidenced the majority of the court actions, both in the civil and criminal courts, usually arising as a result of disciplinary action taken by the classroom teacher. Important is the authority given the teacher through rules and regulations promulgated by the school or college administrations *in loco parentis*. These regulations set forth the criteria that the teacher must heed in his or her role, and a determination later may be made by the court as to whether the teacher exceeded the scope of authority. Any teacher who

⁷ Succession of Hutchinson, 112 La. 656, 36 So. 639 (1904) (whether medical school facility was a private or public institution).

⁸ See *Matthews v. Wittenberg College*, 113 Ohio App. 387, 178 N.E.2d 526 (1960) (a non-profit religious institution is not liable for tortious conduct resulting in injuries to one of its students). The court, in quoting from a prior recent Ohio Supreme Court, stated that:

A charitable or eleemosynary institution, other than a hospital, as a matter of public policy is not liable for tortious injury except (1) when the injured party is not a beneficiary of the institution, and (2) when a beneficiary suffers harm as a result of failure of the institution to exercise due care in the selection or retention of an employee.

⁹ See *Williams v. First United Church of Christ*, 40 Ohio App. 2d 187, 318 N.E.2d 562 (1973), *aff'd*, 37 Ohio St. 2d 150, 309 N.E.2d 924 (1974).

¹⁰ *Rose v. Board of Education of Abilene*, 184 Kan. 486, 337 P.2d 652 (1959). "The cloak of immunity from liability for tort . . . does not extend to an employee of the board of education who, through negligence or other wrongful act, causes injury to another" (however, in *Rose* the employee was a custodian in this case). This was also true in Ohio, see, e.g., the leading case *Guyten v. Rhodes*, 65 Ohio App. 163, 29 N.E.2d 444 (1940). See also *Annot.*, 32 A.L.R.2d 1163 (1953).

attempts to enforce his or her own individual will upon a student without the authority of at least written rules and regulations is acting foolishly. A civil lawsuit, criminal prosecution, or both, may result, even if the action taken was in attempt to restore order to the classroom, and the teacher cannot rely on the institution for support.

There are two clear lines of authority relating to the acceptable parameters of the teacher's administration of corporal punishment.¹¹ The case of *State v. Pendergrass*,¹² laid down the older rule, which gives the teacher complete discretion as to the necessity of punishment and how it is to be administered. The newer or modern rule was stated in *Sheehan v. Sturges*,¹³ which denies the teacher the absolute discretion to determine the necessity of the punishment and leaves as questions of fact the reasonableness and type of punishment to be administered.

In Ohio, the *Pendergrass* criteria as to the duration of the injury and malice are followed, but Ohio is in the minority. In *State v. Lutz*,¹⁴ the Connecticut Supreme Court set some definite guidelines relating to assault and battery, specifically in criminal cases. The defendant school teacher appealed an assault and battery conviction for paddling a pupil. The

¹¹ See Proehl, *Tort Liability of Teachers*, for an extensive discussion. 12 VAND. L. REV. 723, 734 (1959) [hereinafter cited as Proehl].

¹² 19 N.C. 365, 31 Am. Dec. 416 (1837) (there was an indictment for assault and battery, the offense being the whipping with a switch which left marks that disappeared within a few days. The defendant schoolteacher was found guilty by the jury and the conviction was overturned on appeal. The court applied the concept that the teacher is *in loco parentis* and may exercise personal judgment as to the gravity of the offense and the punishment it merits. The limitations to his power are that no punishment may be inflicted that is of a nature which might cause lasting injury to body or health, and that punishment may not be inflicted maliciously. The other view not adopted by the court requires that in inflicting corporal punishment a teacher should exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment, by a consideration of the nature of the offense, the age, size, etc., of the offender. Both views set limits that the teacher cannot overstep, but differ in that the rule adopted by the North Carolina court allows the limit to be set by the teacher, whereas the other requires different degrees of punishment to be graduated to different offenses).

¹³ 53 Conn. 481, 2A. 841 (1885) (this case spelled out the modern rule. Pupil violated school rules and disobeyed teacher who whipped him. The trial court's finding that the "whipping was not unreasonable or excessive and was fully justified by the plaintiff's misconduct at the time" was affirmed by the appeals court, 53 Conn. at 482, 2A, at 841. That court held that the reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact. In inflicting such punishment, the teacher must exercise sound discretion and judgment, and adapt it to the nature of the offense and the character of the offending pupil). See, e.g., how the rule has been applied in the case of *People v. Curtiss*, 116 Cal. App. 771, 300 P. 801 (1931) (criminal case against teacher who violated statute by unjustifiably punishing pupil. Court held that in absence of a statute, teacher may inflict reasonable or moderate corporal punishment upon a child. It was for court to determine whether punishment inflicted by teacher was unjustifiable, the teacher is not the sole arbiter).

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

punishment revolved around the pupil's lying about throwing a stone at an 11-year-old schoolmate on the way to school, knocking off her glasses. The pupil was spanked from six to 15 times causing tenderness and discoloration to the buttocks for five days. The appeals court held that a teacher is not criminally liable for mere, excessive or immoderate punishment, but that malice, express or implied, and production or threatened production of lasting or permanent injuries must be shown.¹⁵ The supreme court noted there was no evidence that indicated the teacher acted with malice or any serious injury occurred or any punishment occurred in excess of that which the law authorized one standing *in loco parentis* to inflict. In fact, there was ample evidence to indicate the teacher acted in good faith with proper motives. Given this standard, it is fair to speculate that a plaintiff in a civil action, even with the lesser burden of proof—a preponderance of the evidence rather than beyond a reasonable doubt—would have an equally difficult time and a low probability of success.

No matter in which jurisdiction the act occurs, the teacher will be in a precarious position if he or she acts before thinking. Reliance upon prior case decisions which generally support the actions of the teacher should not be blindly adhered to because there is an underlying message developing in these cases. That message is now clear—arbitrary, capricious or malicious conduct of the instructor will not be affirmed by the courts.

An action for false imprisonment by a student against an instructor may appear improbable at this time and, indeed, there is only one reported case in the United States.¹⁶ Generally defined, false imprisonment is the restraint of the person, which he or she is aware of, and which is against that person's will. Think about the student who is properly in the classroom and is denied permission to leave the room, no matter what the reason. Is false imprisonment a viable cause of action? Would an action in false imprisonment lie if the student was warned by the teacher that if he or she left the room the student would be expelled from school or fail the course? The student's age, maturity and the type of school or college are just a few variables which must be considered. There may also be an intentional breach of duty by releasing the person from confinement where that person was properly confined.¹⁷ These

¹⁵ See *Martin v. State*, 11 Ohio N.P. (n.s.) 183 (C.P. 1910) (which was relied upon as precedent for the *Lutz* case).

¹⁶ *Fertich v. Michener*, 111 Ind. 472, 11 N.E. 605 (1887) (any reasonable rule adopted by a teacher not inconsistent with a rule or statute of a higher authority, is binding upon the pupil. A rule requiring tardy pupils to remain in the hall is reasonable, and in enforcing it due regard must be had to the health, comfort, age, mental and physical conditions of the pupil and circumstances of each case. A mistake of judgment is not actionable; without wanton, willful or malicious conduct of the teacher, false imprisonment will not lie).

¹⁷ W. PROSSER, *LAW OF TORTS* 42 (4th ed. 1971).

examples may be far fetched but are set forth to stimulate thinking and emphasize that the teacher is legally responsible for his or her own individual actions.

Likewise, defamation is not in the forefront of litigation involving the teacher. While there are reported cases, they are few in number and hinge on narrow issues.¹⁸ But think of the various classroom situations which might be the basis for this type of action. For example, a teacher remarking to a particular student in a classroom filled with his or her colleagues that "you are so dumb you'll never pass this course let alone graduate college." Suppose the direct language is not used, but by innuendo or other overt actions it can be implied by the class that the teacher indicates that the student is not overburdened with gray matter. Is that actionable? The court will look into the actions of the teacher and will arrive at the intent of the teacher evidenced by that individual's actions. This tort may even cause instructors to reconsider serving on evaluation or admission committees for fear of suit even though there is a qualified privilege which would arise in that situation. A privilege confers upon a person a special benefit or legal sanction to do something, or negatively it may grant immunity from suit. A special or qualified privilege is bestowed upon certain classification of persons, such as teachers and professors and requires that the person conveying information or doing an act within his or her authority, do so for reasons which protect the interest of the public, third parties or the person who is the beneficiary of the privilege.¹⁹

Thus, although assault and battery still dominate the domain of intentional torts relating to classroom teachers, with a society that is changing rapidly and with more people than ever before using the courts, assault and battery may soon be joined by other intentional interferences with the person such as false imprisonment and defamation. Administrators have the responsibility to make decisions, inform teachers as to possible classroom legal problems and attempt to resolve problems that arise in the school or on the campus and try to prevent these problems from reaching the courts. This can be done by instructing teachers as to the legally sanctioned parameters of classroom discipline and making proper and sometimes unpopular decisions. History shows that this record

¹⁸ See, e.g., *Kenney v. Gurley*, 208 Ala. 623, 95 So. 34 (1923) (action of libel against college dean and college doctor reversed in their favor with court holding that their letters to parents as to why daughters could not be permitted to return to the college [plaintiff minor had venereal disease] as a student were conditionally privileged communications).

¹⁹ An example of the application of the special or qualified privilege that may arise under the Civil Rights Acts, 42 U.S.C. § 1983 (1963) is found in *Wood v. Strickland*, 43 U.S.L.W. 4293 (1975). The Supreme Court, in that case, held that liability for all actions which violate a student's constitutional rights would impose an undue burden upon the school in exercising their official decision making powers. Rather, school officials will be granted immunity so long as the action taken is a good faith fulfillment of responsibility and within the borders of reason. Liability will follow only if the action is taken in bad faith or with malicious intent.

is poor and prophecy mandates an expectation of expanded litigation. The individual teacher should be especially aware as each is ultimately responsible for his or her own tortious conduct especially in the realm of intentional torts.

NEGLIGENCE

The immediate concern of classroom teachers when the subject of tort liability is mentioned is that of negligence. Most teachers may be of the erroneous opinion that as employees of local school districts or institutions of higher learning, they are not subject to tort liabilities for injuries suffered by their students. As previously indicated, teachers are legally responsible for their negligent acts. Simply defined, negligence is conduct that falls below a standard of care established by law to protect others against an unreasonable risk of harm.

Teachers are legally responsible for the safety and welfare of students assigned to their classroom, shop, laboratory, playground or gym class.²⁰ The teacher's liability for damages resulting from his negligence in or about the school rests upon the same principles and defenses as does the liability of a private person, away from the school. The same standard of care applies, that of a reasonable and prudent person acting under like circumstances.²¹ An individual teacher must take precautions to avoid acts or omissions which he can reasonably foresee would be likely to injure his students.²² Thus, the accepted standard of care imposes a duty on the teacher owed to the student or students. If the breach of the duty causes damage or injury, liability will rest with the teacher. The duties of a teacher are the duty of supervision and the duty of instruction.

DUTIES OF SUPERVISION AND INSTRUCTION

The majority of the litigation involving adequate supervision falls into the realm of the teacher who is absent from the classroom when a student is injured. There is no uniform standard as to what proper supervision is except to state that it varies from jurisdiction to jurisdiction. The duty of supervision is an affirmative one and the standard of care is "ordinary care" or "ordinary prudence."²³ While schools cannot offer constant supervision there must be

²⁰ Vacca, *Teacher Malpractice*, 84 UNIV. RICH. L. REV. 447 (1974).

²¹ Proehl, *supra* note 11, at 752.

²² Seitz, *Tort Liability of Teachers and Administrators for Negligent Conduct Toward Pupils*, 20 CLEV. ST. L. REV. (3) 551 (1971).

²³ See *Brooks v. Jacobs*, 139 Me. 371, 31 A.2d 414 (1943) (student fell from staging during course in vocational training); *Segerman v. Jones*, 256 Md. 109, 259 A.2d 794 (Ct. App. 1969) (pupil kicked another pupil during teacher's absence, absence was not proximate cause); *Gaincott v. Davis*, 281 Mich. 515, 275 N.W. 229 (1937) (teacher directed student to water plant in classroom and the glass vessel shattered. The test was one in which the ordinary prudent person would be able to foresee the accident); *Ohman v. Board of Education*, 300 N.Y. 306, 90 N.E.2d 474 (1949) (pencil thrown when teacher out of room cannot be foreseen by teacher); *Drum v. Miller*, 135 N.C. 204, 47

evidence that a thought-out plan of supervision existed at the time of the accident.²⁴ It is not only the instructor who leaves the classroom unattended, or in the hands of a young pupil who risks suit, but also the instructor who is present and improperly oversees or supervises the students. These situations can occur in the regular classroom, but are more pronounced in the laboratory or gym.

A case in point is one in which two students were implementing a potentially dangerous experiment in the chemistry laboratory when the instructor was called away. An explosion occurred and in attempting to quash a fire that ensued, one student was injured. The Washington court held there was sufficient evidence to find inadequate supervision.²⁵ In another case involving a chemistry experiment that caused an explosion, the instructor was found liable even though he was present during the experiment. In *Damgaard v. Oakland High School Dist.*,²⁶ the California Supreme Court held that the essence of negligence is failure to exercise due care and take proper precaution. The instrument that exploded was under the exclusive management of the instructor. In the ordinary course of events an explosion does not occur with proper use, and in the absence of any explanation of the defendant teacher as to what occurred, the instructor was liable in negligence under the doctrine of *res ipsa loquitur* ("the thing speaks for itself"). It is the duty of the teacher to prevent injury and supervise properly.²⁷ Similar fates have befallen gym teachers who leave their classes, many times on school business. The courts have usually held that had the teachers been present they could have foreseen

S.E. 421 (1904) (teacher threw pencil at pupil causing serious eye injury and was held to have anticipated the consequences of his act); *Guyten v. Rhodes*, 65 Ohio App. 163, 29 N.E.2d 444 (1940) (teacher left classroom and pupil known to be a troublemaker threw milk bottle at classmate injuring classmate whom he had previously assaulted. Teacher not liable because absence was not the proximate cause of the injury adopting the philosophy of *Ohman*).

²⁴ *Butler v. District of Columbia*, 417 F.2d 1150 (D.C. Cir. 1969). (Student struck in eye with sharp object by pranksters when entering printing classroom and was warned by classmate of the impending prank. Teacher was on cafeteria duty pursuant to a school plan thought to be best to promote safety and found not liable). See the dissenting opinion which argues teacher and school were on notice that boys roughhouse and throw type and would be prima facie case.

²⁵ *Jay v. Walla Walla College*, 53 Wash. 2d 590, 335 P.2d 458 (1949).

²⁶ 212 Cal. 316, 298 P. 983 (1931).

²⁷ See *Govel v. Bd. of Education*, 48 N.Y.S.2d 299 (1944) (gym teacher held liable for assigning students exercises not within their ability to perform). Of note is the law of teacher indemnification discussed in this case. The teacher, even if negligent, is indemnified through insurance policy purchased by school pursuant to state law. See authorities cited in note 5 *supra*.

the consequences of the acts that injured the students and their absences were found to be the proximate cause of the accidents.²⁸

The duty of supervision is not confined to absence from the classroom but can be extended to include the disciplining of the student and rendering aid or assistance to the student. The conduct of the teacher is expected to be reasonable. In the often cited case of *Guerrieri v. Tyson*,²⁹ an extreme administering of first aid occurred when a teacher treated a student's infected finger by forcing it into scalding water for ten minutes which caused the student to be hospitalized for 28 days. The Pennsylvania Supreme Court held that the doctrine of *in loco parentis*³⁰ did not extend to sanctioning negligent conduct and unreasonable discipline.

It is interesting that the only reported Ohio decision dealing with a teacher's liability for his conduct in the classroom is *Guyten v. Rhodes*.³¹ In that case the teacher was not found liable for leaving the classroom unattended, even though during the absence one student assaulted another, and the teacher had knowledge that several students had in the past assaulted classmates. Given this situation, outside of the classroom and school, the absent supervisor probably would have been found liable because the absence was the proximate cause of the injury. The theory has been advanced that the decision in the case absolving the absent teacher from liability may have discouraged the filing of similar cases.³² It is suggested, however, that the doctrine of sovereign immunity may have been a more important factor discouraging litigation. Now that this immunity has been abrogated by statute,³³ it is predicted that the prospective litigant, with the financial resources of the previously protected institution available to satisfy settlements and judgments, will be more willing to initiate an action.

The primary reason for the teacher's presence in the classroom is to teach students. However, few teachers pay attention to tort liability affecting the gravamen of their position. This is especially important to instructors whose students use dangerous chemicals or equipment. Not only are instruction and supervision critical concerns, but also to be considered are the maintenance of the equipment and its availability.

²⁸ *Schnell v. Travelers Insurance Company*, 264 So. 2d 346 (La. App. 1972) (teacher found liable in leaving sixth grader to "mind" first graders without supervision and accident occurred to the child that was "minding"); *Cirillo v. City of Milwaukee*, 34 Wis. 2d 705, 150 N.W.2d 460 (1967) (Supreme Court reversed trial court which held teacher liable as matter of law leaving gym class unattended).

²⁹ 147 Pa. Super. 239, 24 A.2d 468 (1942).

³⁰ See Proehl, *supra* note 11 for an in-depth history, discussion and analysis of *in loco parentis*. He describes abuse of discipline as an intentional tort.

³¹ 65 Ohio App. 163, N.E.2d 444 (1940).

³² Dugan, *Teachers' Tort Liability*, 11 CLEV.-MAR. L. REV. (3) 512, 514 (1962).

³³ OHIO REV. CODE ANN. § 2743.01-20 (1975).

There are two basic duties related to instruction.³⁴ The first is that instruction result in the student's mastery of certain processes and basic skills. The second duty is that students should not participate in any activity without adequate and proper instruction from the teacher regarding the performance of the specific function.

Litigation has been sparse in challenging the instruction of students in the traditional sense. One case is of a special nature. *In the Matter of Peter H.*,³⁵ the mother of a physically handicapped child petitioned the court for an order directing payment of her child's full tuition by the State of New York for attendance at a non-public special education facility. She alleged that the child had made practically no educational progress during the three and one-half years he was attending public school, but during one year at the non-public facility had made remarkable progress. The family court found that in light of this evidence the City and State of New York must pay the expenses at the non-public institution.

There is also one case filed in California,³⁶ which has not been decided, where a breach of duty of instruction is the basis for the lawsuit. The plaintiffs there have alleged that their son was never actually taught to read and as a direct result of that inability, the young man had been damaged in that he was unable to secure employment.

The lack of cases relating to the teaching of basic skills and communicating knowledge belies what may come. There is a new wave of consumerism in education. This new frontier has expanded to the doorsteps of several universities.³⁷ Students are attending schools and universities to learn and are not going to be satisfied by "vacuum" courses. The duty of instruction should be rethought and taken seriously.

It is important for the teacher to know that prior to any classroom related activities which demand student performance, proper instruction, explanation and probably demonstration relating to the specific endeavor, should be completed. Most of the litigation relating to the duty of instruction relates to dangerous situations, usually involving physical education instructors, shop teachers or science teachers, and the professional judgments which they exercised or failed to exercise.

³⁴ Vacca, *supra* note 20, at 452, 453.

³⁵ 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (Family Court, Westchester City, 1971). See also N.Y. EDUCATION LAW § 4403, 4407.

³⁶ Vacca, *supra* note 20, at 452, where the author discusses the unreported case of *Doe v. San Francisco Unified School District*, No. 653-312 (Super. Ct. Cal., filed Oct. 31, 1973). "An Educational Revolution." A student at the University of Bridgeport filed suit claiming she paid \$150.00 tuition for a course entitled "Methods and Materials in Teaching Basic Business Subjects" that did not teach her anything.

³⁷ See *The Wall Street Journal*, March 16, 1975, at 16. The subtitle of the editorial is

In those situations, instruction as to basic procedure is mandated. Consideration should be given to the difficulty of the activity with suggestions as to the conduct expected during the performance of the activity, and the identification of risks involved. The age level of maturity and past experience of the student also enter into the extent of the instruction required.³⁸

Detailed care in explaining to the student how the activity should be performed and clarifying inherent danger, especially when working with chemicals was described effectively in *Mastrangelo v. West Side Union High School Dist.*,³⁹ where the instructor was present during an experiment with gunpowder. The student mingled a substance not called for by the written text passed out by the instructor, causing an explosion and injury. The California Supreme Court stated:

[I]t was not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students regarding the selection, mingling and use of ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a text-book with general instructions to follow the text.⁴⁰

The specificity of instruction is acute to the shop teacher whose class uses machinery, be it simple or complex. Any demonstration that is used to complement the instruction also must be precise. In *Ridge v. Boulder C. Union Junior-Senior High School Dist.*,⁴¹ the court of appeals found the instructor liable for injury to the student. The instructor had demonstrated the use of a power saw without the safety guard attached to the machine although it was available. The student subsequently used the saw without the guard and was injured.

The instructor must have complete knowledge of the equipment that he or she expects the student to use, which includes knowledge of the risk of harm. If there is any chance of danger in performing activities there must be instruction, warning and information communicated to the student. This is best

³⁸ *Vacca, supra* note 20, at 453; *Kiser v. Snyder*, 21 N.C. App. 708, 205 S.E.2d 619 (1974) (duty to warn).

³⁹ 2 Cal. 2d 540, 42 P.2d 634 (1935). See *Brigham Young University v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941); *Damgaard v. Oakland High School Dist.*, 212 Cal. 316, 298 P. 983 (1931) (the doctrine of *res ipsa loquitur* applied).

⁴⁰ *Mastrangelo v. West Side Union High School Dist.*, 2 Cal. 2d at 542, 42 P.2d at 636 (1935).

⁴¹ 60 Cal. App. 2d 453, 140 P.2d 990 (1943). See also *Clark v. Board of Education of City of New York*, 304 N.Y. 488, 109 N.E.2d 73 (1952) (inadequate instruction by gym teacher as to students doing somersaults); *Armlin v. Board of Education of Middleburgh Central School District*, 36 App. Div. 2d 877, 320 N.Y.S.2d 402 (1971) (teacher never demonstrated any stunts and spotters not instructed how to perform as to the gym apparatus [rings] and teacher did not follow State Education Syllabus that was in effect); *Severson v. City of Beloit*, 42 Wis. 2d 559, 167 N.W.2d 258 (1969) (instructor failed to advise student of hazards of operating grinder-machine without a guard).

illustrated by the case of *La Valley v. Stanford*,⁴² where a physical education instructor allowed two students to box while he sat in the bleachers. The New York court held that it was the duty of the teacher to exercise reasonable care to prevent injury. In not warning or instructing the students as to the hazards and dangers of boxing, he failed in his duty and was held to be negligent.

The duty of instruction assumes that the equipment needed to perform the activity safely had been provided and was available. If the equipment was not available, the question of proximate cause is involved. In *Meyer v. Board of Education*,⁴³ the New York Court of Claims held that the absence of the safeguard on the saw was not the proximate cause of the injury. The cause of the injury was a fellow student who turned on a switch in violation of known safety instructions and broke the chain of causation that may have been attributed to the Board of Education and the instructor who was present.

The unavailability of the equipment can be the proximate cause of the injury, exposing the instructor as well as the institution to liability if the institution can be sued. Therefore, the instructor should not proceed with the activity if all safety conditions are not met, especially if it violates a safety statute.

In *Weber v. State*⁴⁴ the claimant was a student in the New York State Agricultural and Technical Institute. While attending a carpentry class with the instructor present, he fell from a scaffolding that the class was constructing. The safety laws required a safety rail which was not present. The court held that the state and instructor had breached their duty to comply with the statute. The instructor was not a named defendant since the claim was filed in the New York Court of Claims solely against the State of New York.

Available equipment will not relieve liability per se. The equipment must not be defective.⁴⁵ The teacher could be found negligent in the performance of his duties in allowing students to use equipment or tools, which even if the teacher did not know was defective and improperly equipped, he should have known.⁴⁶

⁴² 272 App. Div. 183, 70 N.Y.S.2d 460 (1947).

⁴³ 9 N.J. 46, 86 A.2d 761 (1952). See also *Lehmann v. Los Angeles City Board of Education*, 154 Cal. App. 2d 256, 316 P.2d 35 (1950) (school board should have provided safeguard for a press); *Kirchner v. Yale University*, 150 Conn. 623, 192 A.2d 641 (1963) (push block not available); *Duncan v. Koustenis*, 260 Md. 98, 278 A.2d 547 (1970) (teacher improperly secured guard on automatic planer and student lost parts of two fingers).

⁴⁴ 53 N.Y.S.2d 598 (Ct. of Claims 1945).

⁴⁵ See *Thomas v. City of New York*, 285 N.Y. 496, 35 N.E.2d 617 (1941); *Banks v. Seattle School Dist. No. 1*, 80 P.2d 835 (Wash. 1938) (machine may not have been set up properly to allow clearance).

⁴⁶ *Crabbe v. County School Bd. of Northumberland Co.*, 209 Va. 356, 164 S.E.2d 639 (1968) (teacher allowed student to use defective power saw. If teacher did not know of defect, he should have known about the defect).

There are no reported cases in Ohio regarding the failure to instruct, but there are problems that can be incurred as evidenced by the cases cited. It is important for the teacher to remember that the usual acts of negligence in the classroom are not the only ones which must be considered. The duty of instruction must additionally be dealt with especially since the public is becoming more consumer oriented. The duty of instruction runs the gamut of teaching basic skills to precise instruction and judgment in specific areas involving dangerous situations. It should be noted that generally the defenses of contributory negligence and assumption of the risks that are available in negligence actions can be asserted in the illustrations discussed, excepting violations of safety statutes. These defenses do take into account the age, experience and comprehension of the student; thus causing problems with pupils of an early age. So even the defenses should caution the instructor to exercise special care relating to usual activities in the classroom which have not been thoroughly explored in litigation.

FUTURE CONCERN

The courts have indicated a growing willingness to involve themselves in school and college problems. This is a change of judicial philosophy from the prior "hands-off" attitude; schools are now aware of the potential answerability to the court system and must adjust institutional conduct accordingly.⁴⁷

In light of judicial review and decisions regarding due process, a future concern of educational administrators and teachers relates to the constitutional rights, privileges and guarantees of the students. Search and seizure, for example, is a coming issue of substantial importance. The search of lockers and dormitories and the seizing of the fruits of these searches are in the forefront of protracted legal battles. Search and seizure goes to the essence of a protected constitutional right⁴⁸ and must be recognized by instructors, especially in jurisdictions like Ohio where *in loco parentis* in the older sense still prevails.

While courts have maintained the right of search by a high school principal,⁴⁹ questions as to the search of college dormitories⁵⁰ are not settled, and the volume and diversity of school and college cases is beginning to

⁴⁷ An example of the diminishing of the courts' previous restraint in school board suits can be found in *Goss v. Lopez*, 95 S. Ct. 729 (1975), in which the United States Supreme Court struck down an Ohio statute which permitted a 10-day suspension of a student without prior notice and hearing as a violation of and interference with student property rights under the due process clause of the fourteenth amendment.

⁴⁸ U.S. CONST. amend. IV.

⁴⁹ See, e.g., *State v. Stein*, 203 Kan. 638, 456 P.2d 1 (1969) (search of high-school locker inherent right of principal).

⁵⁰ See, e.g., *People v. Kelly*, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (1961) (college dormitory).

mount.⁵¹ It is an area that teachers should consider in everyday situations, beginning with the search of the young child who may have a squirt gun, which when found after a search, is used in evidence to expel him. Should this type of problem be avoided by teachers and handled solely by school or university administrators and the civil authorities? In a theoretical sense, yes. While the teacher is liable for one's tortious acts, counsel may be provided by insurance policies or administrations. The answer becomes subjective and hinges upon the extent to which the teacher wishes to become involved or exposed.

Federal legislation may also be a source for future litigation with specific attention directed toward the civil rights of the students under 42 U.S.C. Section 1983 and the Buckley Amendment legislation relating to students' privacy,⁵² with impact on posting grades. More and more the law is intruding into domains and sanctuaries taken for granted by professors, even to the point of classroom materials being scrutinized by parents.

There may be an increased need for a malpractice type of insurance protecting against a suit by a disgruntled student. After all, should not an instructor's teaching be held to the same standards as a physician's healing? A teacher may very well be required to teach as competently as a teacher in like circumstances and be held accountable for failing to do so. A teacher may be liable for a student who after graduation performs in a negligent or incompetent manner based on the teacher's past instruction, the allegation being that the teacher's duty of instruction was breached and was the proximate cause of injury to the third party.

The respect and awe of schools and institutions of higher learning has eroded. The notion that institutions are hostile and need to be fought is rapidly replacing the notion of reverence. Add to this loss of esteem a growing consumer sophistication complemented by the general waiver of sovereign immunity, and the future concern of increased litigation arising from the classroom appears near.

CONCLUSION

This article has discussed the tort liability of the teacher and the impact of the doctrine of sovereign immunity on the tort liability of teachers, be they in schools or colleges. Sovereign immunity has had the effect of protecting the instructor. It can be noted that states such as New York, which have waived their immunity, do evidence more litigation, especially in the negligence field, than states which maintain immunity.

Teachers must recognize that there are legal duties that they owe to

⁵¹ See generally Annot., 49 A.L.R.3d 978 (1973).

⁵² General Education Provisions Act (Federal) §§ 513.(a)(C), 438.(a)(1), 514.(a)(C), 439.

their students and the breach of a duty can bring on a lawsuit. With a more sophisticated society that is consumer oriented, the likelihood that litigation will be entered into is greater now than before.

In Ohio, where the doctrine of sovereign immunity has recently been abrogated, it is predicted that more lawsuits will be brought against both teachers and their institutions. The issues raised and discussed here will be resolved and expanded upon in Ohio's new Court of Claims.⁵³

Education and the law will be narrowing a gap that secondary and higher education have always enjoyed, *i.e.*, autonomy. Recent history indicates that the courts will have more influence on the conduct of the teachers and the administrator than the educators ever dreamed of.⁵⁴

⁵³ OHIO REV. CODE ANN. §§ 2743.01-.20 (1975).

⁵⁴ Barton, *Where Does It Hurt Professor?* CHRONICLE OF HIGHER EDUCATION, May 5, 1975, at 32. "The doctor takes responsibilities that professors have consciously avoided, while we deal with students who never sue. Can you imagine how high the premiums would be for malteaching insurance? We would clog the courts."