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Teacher Malpractice

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TEACHER MALPRACTICE†

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Over the years, many classroom teachers in public schools have assumed that as employees of local school boards, they were not subject to tort liability for injuries suffered by their students. Only those teachers who have found themselves a party to litigation involving an injured student ever fully recognized just how legally vulnerable teachers are to such actions.

The contemporary public school teacher, however, is becoming increasingly aware of his legal liabilities for student injury. Many of today's teachers know that, in addition to their responsibility for the educational development of their students, they are legally responsible for the safety and welfare of all students assigned to their classroom, shop, laboratory, playground or gym.

I. WHY ARE TEACHERS SO VULNERABLE?

At first glance one might think that the increasing number of tort actions brought against teachers is a direct result of our living in an era wherein bringing lawsuits, even against teachers, has become a fashionable pastime. Despite the fact that such a thought is not totally erroneous, it is, however, not the primary reason. The working relationship between teacher and student is itself conducive to producing such litigation.

In a recent book,[1] E.C. Bolmeier has stated the basic reason for the precarious position occupied by the public school teacher relative to his liability for pupil injury. According to Dr. Bolmeier, an increasing number of damage suits are being brought against teachers

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1. E.C. BOLMEIER, TEACHERS' LEGAL RIGHTS, RESTRAINTS AND LIABILITIES (1972).

> [N]ot because the teachers are discriminated against in any way. It is obviously because teachers constitute the greatest proportionate number of the professional staff, and also because they are more directly in contact with the pupils. Moreover, they are usually in charge of the pupils when they perform activities in which accidents could occur.[2]

The primary reason why teachers are so vulnerable to actions for damages is that teachers are constantly involved with pupils in activities in which accidents could occur. Anyone who has ever worked with children knows that whenever children are placed together in the confines of a classroom, a shop, a gymnasium, a laboratory, or even when groups of children are playing in the open space of a playground, someone frequently gets injured no matter what precautions are taken.

What complicates the teacher's situation when accidents occur is that there is a responsibility on their part to help students avoid accidents, as well as a legal obligation to eliminate conditions which are inherently dangerous and hazardous. As one author has stated, "[t]eachers have an inherent responsibility for the care of children. . . ."[3] Thus, it can be said that the standard of care owed by teachers to their students is great. More specifically, "[t]eachers must foresee possible danger and take whatever steps are necessary to prevent injury. A teacher, however, is not liable for injuries which result from the sudden and unpredictable acts of school children. . . ."[4]

In the recent past, some courts have held that a teacher's "relationship to the pupils under his care and custody differs from that generally existing between a public employee and a member of the general public."[5] A prevailing view in some judicial circles is that a teacher must exercise a degree of care towards his students greater than that degree of care exercised by any other public employee. However, an analysis based upon case law reveals "that a teacher may be charged only with reasonable care such as any person of

2. *Id.* at 104.

3. Alexander, *Tort Liability Spreads to Students, Faculty*, 87 NAT. SCH. 55 (1971) (hereinafter cited as Alexander).

4. *Id.* at 57. *See, e.g.*, Fagan v. Summers, 498 P.2d 1227, 1228 (Wyo. 1972).

5. Eastman v. Williams, 124 Vt. 445, 207 A.2d 146, 148 (1965).

ordinary prudence would be expected to exercise under comparable circumstances."[6]

The standard of care that teachers owe their students was defined most succinctly some years ago by Reynolds Seitz, writing in *The Hastings Law Journal*:

> [T]eachers . . . must act toward pupils as would the reasonable, prudent person or parent under the circumstances. This standard does not make teachers the insurers of the safety of children. If school personnel have acted as the reasonable, prudent parent under the circumstances and nevertheless a child is injured, the teacher . . . cannot be held responsible. The teacher or administrator are not liable for pure accidents.[7]

The key phrase in Seitz's statement suggests that teachers are not liable for "pure accidents." There is a critical difference between those student injuries that result from a "pure accident" and injuries that are the direct result of a teacher's action or failure to act. When a pupil suffers an injury and the teacher is accused of causing that injury, "the teacher must be able to show that he was performing his duties reasonably and it was not his act or omission to act which was the legal cause of harm."[8]

II. Governmental Immunity

Any discussion of teacher liability must include a consideration of the liability of public school districts and their boards of education for injuries suffered by students as a result of the acts of their employees. Generally, it has been held that local public school boards, as governmental agencies, are protected from tort liability by the doctrine of governmental immunity.

Numerous reasons exist why courts have held that local school

6. *See* K. Alexander, R. Corns & W. McCann, Public School Law 87-88 (1973 Supp.). In Ferreira v. Sanchez, 79 N.M. 768, 449 P.2d 784, 787 (1969), the Supreme Court of New Mexico held that it was an "impossibility of a teacher supervising every minute detail of every activity. . . ."

7. Seitz, *Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Toward Pupils,* 15 Hastings L.J. 495, 496-97 (1964) (hereinafter cited as Seitz).

8. Alexander, *supra* note 3, at 57-58.

boards are protected by the immunity doctrine. Basically, the main reason is because legally they are state agencies, created by state law, to perform a governmental function (public education). As such, courts have held, throughout the years, that local school boards are not liable for the tortious acts of their employees.

In Virginia "the doctrine of a state's absolute immunity from suit in tort has become case-hardened." The Virginia Supreme Court, over the years, has "extended immunity in tort to the state itself and to its agencies, including those modern state authorities created with the statutory power to sue and be sued. . . ."[10]

Despite the fact that teachers can claim in their defense in a tort action that they were only performing their required duties as employees of the school board, the doctrine of *respondeat superior* is inapplicable to hold the school board liable when the teacher was negligent.

However, the teacher cannot assume that *he* occupies a status of immunity:

> The immunity of a school board from liability to an injured student does not extend to a teacher, even though it is true that at the time the student was injured through the alleged negligence of the teacher, the latter was employed and performing his duties as an instructor at the school.[11]

In *Crabbe v. County School Board,*[12] the Virginia Supreme Court held in reversing a lower court ruling that had released a teacher from liability for injuries suffered by a student during instruction on how to use a power saw, that the fact that the teacher "was performing a governmental function for his employer, the School

9. Eichner, *A Century of Tort Immunities in Virginia,* 4 U. RICH. L. REV. 238, 247 (1970) (hereinafter cited as Eichner). Virginia statutes do allow for a waiving of school board immunity for liability "in connection with the operation of school buses. . . ." 16 M.J., *Schools,* § 11.1, at 80 (1972 Cum. Supp.). *See also* VA. CODE ANN. §§ 22-289-290, (1973).

10. Eichner, *supra* note 9, at 239. This immunity protection only extends to the performance of governmental functions and not to proprietary functions. *See, e.g.,* Kellam v. School Bd., 202 Va. 252, 117 S.E.2d 96 (1960).

11. 16 M.J., *Schools,* § 11.1, at 80 (1972 Cum. Supp.). In Gonzales v. State, 29 Cal. App. 3d 585, 105 Cal. Rptr. 804 (1972), the court held that the state itself is not responsible for torts of school district employees.

12. 209 Va. 356, 164 S.E.2d 639 (1968).

Board, does not mean that he was exempt from liability for his own negligence in the performance of such duties."[13] One year before *Crabbe,* in *Elder v. Holland,*[14] an appeal involving a state police officer, the Virginia Supreme Court cited an earlier decision of that court, *Sayers v. Bullar.*[15] In *Sayers* it was held that "as long as those agents [the State's] act legally and within the scope of their employment, they act for the State, but if they act wrongfully their conduct is chargeable to them alone."[16]

The ruling in *Elder* emphasized the necessity to establish positive proof that the state employee overstepped the bounds of his legal duty. According to the court, proof must be shown that an act was "performed so negligently that it can be said that its negligent performance takes him who did it outside the protection of his employment."[17] The inference can therefore be drawn that negligence on the part of a governmental employee will lead to legal liability from which no immunity may be claimed.

III. The Negligent Teacher

In school-related and teacher-related cases the charge of negligence is most often claimed by the plaintiff. As M.C. Nolte has said, "no person or school district can be held to account in damages where negligence is lacking."[18]

A teacher is negligent either if he fails to carry out a duty owed a student, or if he unreasonably carries out a duty owed a student, and that specific omission or unreasonable act is established as the proximate cause of an injury suffered by that student.[19] In actions

13. *Id.* at 359, 164 S.E.2d at 641. The Virginia Supreme Court also sustained the sovereign immunity of the School Board. The court found merit in the plaintiff's allegation that the defendant teacher:

> was negligent in the performance of duties, in that he permitted the plaintiff to use the tool which this defendant knew, or should have known, was defective and improperly equipped, and failed properly to instruct the plaintiff in the use of the tool, and that as a direct and proximate result of such negligence the plaintiff was injured. *Id.* at 360, 164 S.E.2d at 642.

14. 208 Va. 15, 155 S.E.2d 369 (1967).

15. 180 Va. 222, 22 S.E.2d 9 (1942).

16. *Id.* at 227-28, 22 S.E.2d at 11.

17. Elder v. Holland, 208 Va. 15, 19, 155 S.E.2d 369, 372 (1967).

18. M.C. Nolte, School Law in Action 167 (1971).

19. *See* R. Alexander & K. Alexander, Teachers and Torts (1970). A critical factor in the sequence of establishing liability is the notion of proximate cause. The defendant will be

brought against teachers, the first factor that must be established in proving that the teacher was negligent involves the identification and establishment by the plaintiff student of the legal duty or duties owed him by the defendant teacher.

Over the years, primarily through litigation, the duties of a teacher have been summarized in the following three categories: (1) proper instruction, (2) proper supervision, and (3) proper maintenance and upkeep of all equipment and supplies used by students.[20] All three duties have been and still are fertile grounds for negligence suits against teachers.

The first and most vital of the teacher duties is the duty of instruction. There are two basic meanings for the term instruction. First, teachers owe students proper instruction that will result in the student's mastery of certain processes and basic skills. In recent years, there have been suits against public school systems and public school teachers claiming that they have breached this duty of instruction, with damaging results to the students. For example, in *Doe v. San Francisco Unified School District*[21] the plaintiffs claimed that their son was never actually taught to read, and as a direct result of that inability the young man cannot obtain a job. A recent New York suit brought by parents whose son made little progress in a public school special education program due to lack of proper instruction offers another example of such litigation.[22]

There is a second meaning, however, that has been given to the duty of instruction. Students should not be subjected to an activity in school without first receiving complete instructions from the teacher on how to perform that activity. Included in the instructions given by the teacher should be an explanation of the basic procedures involved, some suggestions on conduct while performing the assignment, and the identification and clarification of any risks that might be involved. Shop teachers, gym teachers, and science teach-

relieved of liability if, for example, there is an intervening cause after the defendant's negligent act which breaks the causal link. It must also be kept in mind that "the concept of whether a duty is owed is a question of law for a court to determine." *See* Seitz, *supra* note 7, at 496.

20. ALEXANDER, CORNS, & MCCANN, *supra* note 6, at 363-64.

21. No. 653-312 (Super. Ct. Cal., filed Oct. 31, 1973).

22. *In re* H, 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (1971).

ers seem to be more aware of this "need for instruction" than are regular classroom teachers; yet, all teachers are exposed to the same liabilities.

In cases like *Damgaard v. Oakland,*[23] *Brigham Young University v. Lillywhite,*[24] *Keesee v. Board of Education,*[25] and *Crabbe v. County School Board,*[26] the courts have consistently maintained that students should not be allowed to attempt an activity in school without first receiving proper instructions from the teacher, especially when the activity is potentially harmful and dangerous.

In deciding these cases the courts have offered several important behavioral guidelines for teachers, guidelines that, if followed, should help prevent teachers from being found negligent. Certain of these guidelines are as follows: before allowing students to attempt tasks (1) consider the degree of difficulty involved in the activity, (2) consider the age, level of maturity, and past experience of the student, and (3) be certain to give careful instructions on how to perform the activity and identify and clarify any inherent dangers associated with the activity.

Numerous negligence actions have also been instituted against teachers claiming violation of a second teacher duty, the duty of supervision. In such suits the teacher's absence from the classroom when a student was injured is often claimed as the proximate cause of the resulting student injury. Another allegation frequently made by injured students is that while the teacher was present in the room, he failed to supervise the children closely enough while they were engaged in a potentially dangerous exercise, experiment, or procedure, and that the teacher's failure to provide close supervision was the proximate cause of the student's injury.

There is no uniform standard provided in case law to measure adequate, necessary, or proper supervision of students. What is adequate, necessary, or proper supervision is situational—it depends on a number of factors. Such factors as the age of the student, his experience, his judgment, his physical condition, and the difficulty of the task or activity must each be considered separately in determining the adequacy of teacher supervision. Thus, it becomes the

23. 212 Cal. 316, 298 P. 983 (1931).
24. 118 F.2d 836 (10th Cir. 1941), *cert. denied,* 314 U.S. 638 (1941).
25. 37 Misc. 2d 414, 235 N.Y.S.2d 300 (1962).
26. 209 Va. 356, 164 S.E.2d 639 (1968).

individual teacher's responsibility to first weigh all factors, and, based on that evaluation, provide a degree of supervision reasonably calculated to minimize accident and injury. It has been pointed out that "[c]onstant scrutiny by the teacher is not required."[27] However, "the teacher must be able to show that he was performing his duties reasonably and it was not his act or omission to act which was the legal cause of harm."[28]

Jay v. Walla Walla College[29] offers an example of a college instructor being found negligent as a result of his being absent from a chemistry laboratory when two students were working on a potentially dangerous experiment. The court was convinced that had the teacher been present in the lab while the two students conducted their experiment, which called for the use of flammable gases, the accident would not have occurred.

In *Cirillo v. City of Milwaukee*[30] and *Schnell v. Travelers Insurance Company*[31] the question of teacher supervision was also a critical factor in the court's final decision. *Cirillo* involved a suit by parents claiming their son was injured because his gym teacher left a class of forty-eight students unsupervised for twenty-five minutes, and the students became rowdy. *Schnell* involved a suit against a teacher who left a portion of her first grade class in the hands of an eleven year old pupil while she left the room. While the teacher was absent one of the children put his hand through a plate glass door pane. In both cases, the teacher's absence was found to be the proximate cause of the accident. Each court held that had the teacher been present he could have foreseen the consequences of the students' actions which, if not curtailed, would lead to injury.

A third duty owed by teachers concerns the upkeep and safety of all supplies and equipment that students use in playground exercises, class experiments, and demonstrations. For example, suits have been brought against school boards and teachers where a stu-

27. Alexander, *supra* note 3, at 57-58. *See also* McDonald v. Terrebonne Parish School Bd., 253 So. 2d 558 (La. App. 1971); Sheehan v. St. Peter's Catholic School, 291 Minn. 1, 188 N.W.2d 868 (1971); Fagan v. Summers, 498 P.2d 1227 (Wyo. 1972).

28. Alexander, *supra* note 3, at 57-58.

29. 53 Wash. 2d 590, 335 P.2d 458 (1959).

30. 34 Wis. 2d 705, 150 N.W.2d 460 (1967). *See also* Armlin v. Board of Educ., 36 App. Div. 2d 877, 320 N.Y.S.2d 402 (1971).

31. 264 So. 2d 346 (La. App. 1972).

dent fell on unlighted school stairways,[32] where students were injured rolling a piano on coasters from an auditorium,[33] where a piano in a classroom toppled over on a child,[34] and where plywood stored in a school shop storeroom tumbled over onto a student and killed him.[35] Other suits have charged that teachers knowingly allowed students to use swings and merry-go-rounds on the playground that were in poor repair and about to break thereby increasing the possibility of injury and damages to their students.[36] Still other suits by parents have claimed school board and teacher negligence for allowing students to use improperly paned glass doors,[37] faulty machinery,[38] faulty gymnasium equipment,[39] and dangerous auditorium conditions.[40]

In a recent Maryland case, *Duncan v. Koustenis*,[41] a high school student lost parts of two fingers in an industrial arts class because of the negligence of his teacher who had improperly secured a guard on an automatic planer. The court held that the teacher was not protected by the doctrine of governmental immunity, and because of the teacher's involvement in the student's injury, they remanded the case back for further proceedings against the teacher.

In *Cappel v. Board of Education*,[42] a school district was sued by parents of a child who was injured on a school playground. In their complaint the parents charged that the board negligently maintained an unsafe playground. The defendant school board was found negligent by the court. The defendant owed a duty to keep the land in a reasonably safe condition.

In Virginia, the supreme court in *Crabbe v. County School Board*[43] cited as its main reason for remanding the case to the lower court for further proceedings against the teacher involved the fact

32. Hovey v. State, 261 App. Div. 759, 262 App. Div. 791, 27 N.Y.S.2d 195 (1941).
33. Freund v. Board of Educ., 28 Cal. App. 2d 246, 82 P.2d 197 (1938).
34. Kidwell v. School Dist., 53 Wash. 2d 672, 335 P.2d 805 (1959).
35. Swartley v. Seattle School Dist., 70 Wash. 2d 17, 421 P.2d 1009 (1966).
36. Roman Catholic Church v. Keenan, 74 Ariz. 20, 243 P.2d 455 (1952).
37. Eberle v. Benedictine Sisters of Mt. Angel, 235 Ore. 496, 385 P.2d 765 (1963).
38. Kirchner v. Yale Univ., 150 Conn. 623, 192 A.2d 641 (1963).
39. Kelly v. Board of Educ., 191 App. Div. 251, 180 N.Y.S. 796 (1920).
40. Abruzzo v. Board of Educ., 12 App. Div. 2d 797, 210 N.Y.S.2d 21 (1961).
41. 260 Md. 98, 271 A.2d 547 (1970).
42. 40 App. Div. 2d 848, 337 N.Y.S.2d 836 (1972).
43. 209 Va. 356, 164 S.E.2d 639 (1968).

that the teacher allowed the student to use a defective power saw. The court noted that the teacher "was negligent in the performance of duties, in that he permitted the plaintiff to use a tool which defendant knew, or should have known, was defective and improperly equipped. . . ."[44]

With regard to proper maintenance of equipment and supplies, as with the duties of instruction and supervision, if it can be shown that the teacher breached his duty and that the breach was the proximate cause of a student's injury, the teacher will be found negligent. In judging situations involving each of the three teacher duties, courts will apply the same basic test—foreseeability.

IV. Conclusion

The purpose of this article is twofold. The first purpose is to discuss teacher liability generally in an effort to clarify certain misconceptions relative to the governmental immunity doctrine as it applies to public school personnel. The second purpose is to focus attention upon the negligent teacher in an effort to establish the actual source of judgments against teachers in all jurisdictions.

Whatever the defense claimed by the teachers, there is no place for negligence in schools and colleges. Teachers at all levels owe a legal, ethical, and moral obligation to their colleagues, to parents, to students, and to themselves to maintain a safe, hazard free environment in which learning can take place. No one in school or on the playground should be subjected to unnecessary and unreasonable risks, because someone else was negligent.

To conclude, the following guidelines are proposed for teachers in an effort to minimize their possible involvement in future litigation:

1. Teachers must recognize the legal duties owed their students.

2. As employees of local boards of education, teachers (which term includes principals, supervisors and counselors) are not protected from tort actions by the doctrine of governmental immunity when their acts overstep their legal authority and when they have been negligent.

3. Teachers are expected to protect the health, welfare, and safety of their students.

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44. *Id.* at 360, 164 S.E.2d at 642.

4. Negligence has no place in school work. Teachers must recognize that they are expected to foresee the consequences of their actions and their inactions.

5. Teachers must carefully instruct their classes. They must work to become effective teachers of their subject matter, and they must give careful directions before allowing students to attempt independent projects.

6. All activities must be carefully planned.

7. When working with older students, students who might be more responsible for their own safety, teachers must be certain that they relate any "risks" that might be inherent in a particular activity prior to student engagement in that activity.

8. Teachers should not tolerate "horse play." Make and enforce "rules of the road" in classrooms.

9. Teachers must provide proper supervision under the circumstances of the type of instruction being offered and the nature of the student involved.

10. Teachers should report all hazardous conditions to supervising personnel and insist that those conditions be corrected immediately.

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