PRINCIPLES AND PHILOSOPHY OF TORT LIABILITY OF PUBLIC SCHOOL TEACHERS

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HESTER HILL TURNER

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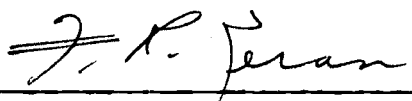
In Charge of Major



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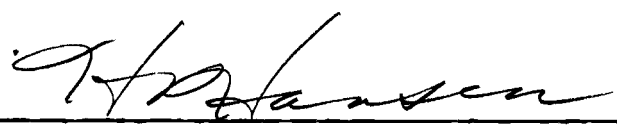

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CHAPTER I

INTRODUCTION

The Problem

The problem of this study is to determine, as far as possible, the principles and philosophy of tort liability of public school teachers as established by judicial decisions. The individual teacher as a member of an organized society is governed by the same laws and rules that operate for all individuals. However, in some respects the teacher's liability differs from that of the general public because of his position. A teacher is considered to a limited degree as a parent substitute and is expected to look after the well-being of the pupils in his care. Occasionally injuries occur in the classroom and on the school yard, and under certain circumstances the teacher may be legally responsible. Teachers are expected to maintain order, but at times have found this impossible without resorting to physical chastisement. Does the use of force entail liability for assault and battery? Who is liable if a pupil is injured while following the teacher's directives such as in a tumbling class or while participating in activities on a field trip? These are the areas of civil liability that are the concern of this study.

Purpose of the Study

The importance of the teacher was emphasized by a judge who said in an opinion,

> . . . free political institutions are possible only where the great body of the people are moral, intelligent, and habituated to self-control, and to obedience of lawful authority. The permanency of such institutions depends largely upon the efficient instruction and training of children in these virtues. It is to secure this permanency that the state provides schools and teachers. School teachers, therefore, have important duties and functions. Much depends upon their ability, skill and faithfulness. They must train, as well as instruct their pupils.[1]

To accomplish the above the teacher is placed to a limited degree in the position of substitute parent or, in legal terminology, "in loco parentis." This intrusts to the teacher the responsibility for the well-being, as well as the education, of the pupils. To quote a New Jersey judge,

> I incline to the opinion that education is no longer concerned merely with the acquisition of facts; the instilling of worthy habits, attitudes, appreciations, and skills is far more important than mere imparting of subject-matter. A primary objective of education today is the development of character and good citizenship. Education must impart to the child the way to live.[2]

The challenge to teachers is profound; equally so are

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[1]Patterson v. Nutter, 78 Me. 509, 7 A. 273 (1886).

[2]Stephens v. Bongart et. al., 15 N. J. Mis. Repts. 80, 189 A. 131 (1937).

the responsibilities. Shaw (85, p. 56) in discussing the legal doctrine *in loco parentis* warns, "It can be used in relation to the educator as a protecting umbrella on the one hand or as a sword of Damocles on the other." Wherever large groups of children are together, there is the possibility of injury, and when one is put in the position of parent-substitute for the individuals in the group, there devolves upon him the duty to use care to prevent bodily harm. Today's schools have enlarged and extended this responsibility by increasing enrollments; adding courses where the risk is higher, such as physical education, laboratory sciences, athletics, industrial arts; taking children on trips away from the school grounds; and by using machinery and apparatus in many classes and on the school yard. As one writer has stated it,

> School business has become big business. The activities of the modern high school carry it into areas of entertainment, transportation, food service, health service, and similar activities. . . . Many of the new activities of the secondary school involve questions of civil, personal, and property rights. (93, p. 1)

The same is true on the elementary level.

It would seem imperative that the teacher be aware of his legal rights, duties, and responsibilities.

> Educators should know the basic legal principles governing their profession. They should understand the constitutional provisions, statutory enactments, and significant court decisions which govern the organization, guidance, and maintenance of State systems of education. (53,p.2)

It is the purpose of this study to delineate the tort liability of the teacher so he may be in a better position to stay within the bounds of his legal rights. One writer expressed the thought that, "Ordinarily the teacher conforms to law not because of a recognition of its restrictions or protections but because she is conforming to an established pattern of behavior." (35, p. 40) In view of the recent tendencies of juries to award large sums for damages, knowledge that would prevent such a catastrophic mishap should be readily available. (45, p. 53)

Value of the Study

1. To the classroom teacher by giving him the security of understanding the substantive law that forms the legal basis of teacher-pupil relations. Knowledge of these principles has been compared in importance to the teacher with those of child development and educational psychology. (17, p. 21)

2. To administrators so they may more clearly realize the legal status of the school, the teacher and the pupil and in light of this knowledge formulate regulations where needed and provide safeguards where possible.

3. To schoolboard members to assist them in establishing policies that will insure an effective and well ordered school system.

4. To professional educators as a ready source of reference on legal problems as well as an analysis of an important aspect of the total legal framework which underlies public education in this country.

5. To parents as a guide in establishing and accepting the respective responsibilities of parents and teachers. By recognizing and respecting the divisions of authority, cooperation between parents and teachers should be facilitated.

Justice Garwood, in a concurring opinion said, "Teachers of the public schools being the important element of our population that they are, the sooner, and more completely they are advised of their rights or lack of them the better."[3]

The laws governing education and the relationships involved are professional tools and, "Knowledge of these laws is the responsibility of any person in public school service." (67, p. 4)

So many writers have expressed concern over the teacher's position (82, p. 6; 46, p. 4 and 6, p. 5) it appears that the teacher himself should be better informed.

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[3]Woods v. Reilly, 147 Tex. Sup. Ct. 586, 218 S. W. 2d 437 (1949).

Procedures Employed in the Study

The material used in this research has been gleaned primarily from a study of several hundred cases. Approximately 300 of which were most applicable have been included. Initial references were found in legal encyclopedias (3, 26 and 27), and the American Digest system (1), which summarizes all reported cases from 1658 to the present. By tracing cases through Shepard's Citator (86) it was possible to ascertain whether each was appealed, quoted or followed in another decision, or overruled, as well as to be directed to other actions on the same point.

The cases were all read in either state or national reporter systems and the relevant ones briefed. Often annotated reports (5) were available which contained a study of many decisions comparing conflicting opinions.

An attempt was made to restrict the selection to tort cases in which the teacher was the defendant. However, to make the picture complete it was necessary to include some in which suit was instituted against a Board of Education, city or school district, but where liability was predicated on the actions of the teacher. Also a few criminal cases have been used. The choices in both of these areas were made because the teacher would have been personally and/or civilly liable on the bases of the same fact situation had he been named defendant in a civil action for damages.

A few cases involving college personnel were used for specific illustrations that would apply equally to public school teachers.

The cases cited herein by no means represent the total on the subject. These are almost entirely all decisions of appellate courts, and according to one study (51, p. 153) a conservative estimate indicates that only one out of 150 cases which is tried in lower courts is appealed. There is no estimate of the number of suits which are threatened or instituted, then settled or dropped.

Periodicals both legal and lay were searched for pertinent and timely articles. Text books were utilized where necessary.

Common law, the great body of customary law (74, p. 1), and subsequent legislative codifications of it are the basis of the decisions. Statutes have been cited only where they alter, add to, or depart from the common law rules.

The cases in this study represent forty three states and cover the period from 1837 which is the earliest case on this subject in this country to date.

CHAPTER II

GENERAL THEORY OF TORT LIABILITY

> Human beings in their intercourse with one another, come into relationships which necessitate some sort of social control. Law, the controlling factor, is based on human relationships and the function of law is to protect human wants and desires - called interests. (49, p. 2)

Tort law is a branch of that framework for social control that "exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs." (76, p. 7) Prosser (76, p. 7) explains that, "The fundamental principle of this branch of law is 'alterum non laedere' - to hurt nobody by word or deed."

Tort is a civil wrong, excluding breach of contract, for which the injured person has a right to compensation in a suit for damages.

Harper (49, p. 10) contends that in medieval law liability was imposed for "all harms caused, irrespective of the character of the actor's conduct and regardless of his mental and moral attitude when the conduct which caused the harm was indulged."

The term tort is derived from the Latin "toquere" to twist, "tortus" twisted or wrested aside (27, vol. 86, p. 923). Although the earliest forms of legal liability were

similar to the present tort actions, ". . . the concept of tort and crime were at first confusedly intermingled and no clear distinction was made between private and public law." (5, vol. 160, p. 925). The first treatise under the heading of tort was not published until 1859 (11, p. 1).

In order to have a cause of action at common law, the claim had to meet rigidly prescribed rules. However, in modern law "new and nameless torts are being recognized constantly, and the progress of the law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action where none had been recognized before." (76, p. 5)

Justice Holmes (59, p. 65) explained, "The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."

Today most tort actions are set forth by statutes, but new torts may develop either through legislative enactments or court decisions. (76, p. 643)

Tort liability is always based on one of the following:

1. Intentional interference with another's interest
2. Negligence
3. Strict liability

To be a tort, the actions, whether intentional or negligent, must "involve a violation of a legal duty, imposed by

statute, contract, or otherwise, owed by the defendant to the person injured." (76, p. 633)

Tort differs from criminal law in that "a crime is the breach of a duty imposed by law on every citizen for the benefit of the community at large; a tort is a breach of a particular duty owed to an individual." (74, p. 40)

The extensiveness of the field of tort prohibits a thorough study of the entire area. However, in those aspects in which a teacher's liability differs from that of the general public, either because of the duty that is imposed or a conferred right that is violated, a detailed explanation will be offered.

Intentional Interference with the Person

The term "intention" signifies that a person performs an act designed to accomplish a particular result or with the knowledge that such a result would most likely follow.

Trespass for personal injuries. This is the older form of action which sought compensation for injuries that were directly inflicted.

> Ex. A principal hit a student on the back of the neck with a violent blow. Suit was brought against him for trespass for personal injuries.[4]

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[4]Harris v. Galilley, 125 Pa. Super. 505, 189 A. 779 (1937).

> A teacher searched a child to ascertain if she had stolen money in her possession, and was named defendant in an action of trespass.[5]

Trespass on the case. This is another older form and is to be distinguished from the above in that, in this action there was no direct application of force.

> Ex. A boy was expelled for studying other matter during the reading of the Bible. There was no direct force so the action was "case."[6]
>
> A student who was suspended for unexcused absences, instituted suit for trespass on the case for infringement of his right to attend school.[7]

Assault. This is the threat of violence or unlawful touching that causes an apprehension of immediate bodily injury or contact. There may be an assault without a battery but in every battery assault is included. The two terms are usually used together.

Battery. This is any unlawful touching or striking a person without consent. Prosser (76, p. 43) adds that, "The Plaintiff is assumed to consent to ordinary contacts allowed by social usage." The use of corporal punishment by a parent or teacher, if reasonable, is privileged touch-

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[5]Phillips v. Johns et al., 12 Tenn. App. 354, 43 ALR2d 473 (1931).

[6]McCormick v. Burt et al., 95 Ill. 263, 35 Am. Rep. 163 (1880).

[7]Churchill v. Fewkes, 13 Ill. App. 520 (1883).

ing and therefore lawful. (Infra Chapter V)

Ex. A superintendent was liable in assault and battery for striking a pupil since the court held he did not have the same right to administer punishment as a classroom teacher.[8]

Damages were granted to a student whom the teacher had punished by hitting him with such force that the coccyx bone was broken.[9]

Examples of privilege:

Hitting a student on the hand with a stick for abusing girls on the way home from school was not assault and battery on the part of the principal.[10]

There was no assault and battery when a teacher administered a spanking with a ping pong paddle for an infraction of school rules.[11]

False imprisonment. This is the illegal restraint of a person or confinement within a specific area determined by the defendant.

Ex. False imprisonment was charged when a teacher refused to allow a student to retire from the classroom while being kept after school. The court held, "However mistaken a teacher may be as to the justice or propriety of imposing such a penalty at any particular time, it has none of the elements of false imprisonment about it, unless imposed from wanton, willful, or malicious motives.[12]

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[8]Prendergast v. Masterson, 196 S.W. 246, Ct. Civ. App. , Texas (1917).

[9]Serres v. South Santa Anita School Board et al., 10 Cal. App. 2d 152, 51 P2d 893 (1935).

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

[11]Suits v. Glover, 260 Ala. 449, 71 So.2d 49 (1954).

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

Defamation

This is a legal wrong that causes injury to a person's good name, character or reputation by malicious statements. (7, p. 538) It includes both libel-written defamatory remarks, and slander-spoken words. Prosser (76, p. 793) says the modern trend is to distinguish the two on the basis of permanency of form.

Libel.

Ex. For a newspaper to print an article stating that two teachers were guilty of horrible crimes and importing that the plaintiff teacher had aided another in taking indecent liberties was actionable per se.[13]

Slander.

Ex. The United States Supreme Court has classified actionable slander as follows:
(A) Words falsely spoken of a person, which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.
(B) Words spoken falsely of a person, which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or
(C) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, of the want of integrity in the discharge of such an office or employment.
(D) Defamatory words falsely spoken of a person, which prejudice such party in his or her profession or trade.

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[13]Thibault v. Sessions et al., 101 Mich. 279, 59 N.W. 624 (1894).

(E) Defamatory words falsely spoken of a person, which though not in themselves actionable, occasion the party to social damage.

First four classes are actionable per se and no damages need be proved if words are falsely spoken or written. In last category, damages must be proved.[14]

It was slander when the principal was called "unfit" at a Parent-Teachers Association meeting since it discredited him in his profession. Falsity of the statements inferred malice, overcoming a qualified privilege.[15]

Truth or consent are defenses to a charge of defamation. Qualified or absolute, privilege also protects certain people because of their position, or relationship, as long as they are not actuated by malice. (Infra Chapter VI)

Ex. A county superintendent was not liable in slander for telling the school board why he was revoking a teacher's certificate.[16]

The superintendent's report concerning a teacher contained libelous statements, but there was no liability since he honestly believed it was true and he was fulfilling his duty in so reporting.[17]

Negligence

Negligence is conduct that falls below the standard

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[14]Pollard v. Lyon, 91 U.S. 225, 23 L.Ed. 308 (1875).

[15]Thompson v. Bridges et al., 209 KY. 710, 273 S.W. 529 (1925).

[16]Raush v. Anderson, 75 Ill. App. 526 (1897).

[17]Barry v. McCollum, 81 Conn. 293, 70 A. 1035 (1908).

that is expected of a reasonably prudent person under the circumstances. The elements that must be present before a cause of action can be based on negligence are:

1. Legal duty owed to the plaintiff by the defendant. The teacher owes an affirmative duty to his pupils in addition to the general obligation of using care so his acts will not harm others. This is vital to the teacher-pupil relations. (Infra Chapter III)

Ex. The court said it was the teacher's duty to preserve order and look after the welfare of his pupils.[18]

This case was concerned with the law applicable to the duties of a teacher in the care and custody of the pupils.[19]

2. Failure to conform to the standard. The standard of care that is expected of a teacher will vary with the facts of each case. The only gauge is the theoretical "reasonably prudent person." The law does not impose liability even though a person is negligent, if he has met the standard of care expected. (3, vol. 38, p. 461)

Ex. A teacher did not use sufficient care when an explosion occurred while he was demonstrating an experiment during chemistry class.[20]

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[18]Beaty v. Randall et al., 79 Mo. App. 226, 50 LRANS 269 (1899).

[19]Gaincott v. Davis, 218 Mich. 515, 275 N.W. 229 (1937).

[20]Damgaard v. Oakland High School District of Alameda County, 212 Cal. 316, 298 Pac. 983 (1931).

> A teacher on duty as playground supervisor did not exercise the degree of care required when a boy was injured by another student on the school ground.[21]

3. Reasonably close causal connection between the failure to conform to the required standard and the injury. The defendant's actions must have been the proximate cause of the injury. The bare fact of an injury is not sufficient to impose liability for it may have resulted from an unavoidable accident, an Act of God, or a remote unexpectable cause. (27, vol. 65, p. 311) It is not necessary that the exact consequences should be foreseen as long as the harm falls within the general area of danger which should have been anticipated.

> Ex. A student was injured while playing on a large tank that had been removed from the school building and left on the grounds. The court held that the injury was the reasonable and probable outcome of the negligence of permitting the tank to remain on the school yard, and even though the boy was pushed off of the tank by other pupils, the intervention would not preclude recovery since the injury was the natural and probable result of the original wrong.[22]
>
> The court defined proximate cause of an injury as "....the immediate cause; it is the natural and continuing sequence, unbroken by any intervening cause, preceding the

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[21]Charonnat v. San Francisco Unified School District, 56 Cal. App.2d 840, 133 P2d 643 (1943).

[22]Stovall v. Toppenish School District No. 49, 110 Wash. 97, 188 Pac. 12 (1920).

injury and without which it could not have happened. Proximate cause means probable cause."[23]

A student who was directed to clean sawdust from the jigsaw, was injured when another student turned on the switch. The independent act of the other pupil was the intervening cause that destroyed the causal connection between any negligence on the part of the teacher and the injury.[24]

4. Actual loss. In an action based on negligence, there must be proof of actual damage. This is to be contrasted with battery in which it is not necessary to prove actual injury; it is sufficient that the striking or touching be unpermitted. (76, p. 175)

Ex. Although there was contradictory evidence as to the extent of the injuries resulting from a tumbling stunt, there was sufficient grounds to support the jury's finding and an award of damages. The girl complained of headaches, dizziness and vomiting as a result of her head injury, but the doctor could find few objective symptoms. A witness testified that the plaintiff ran before taking a physical examination and the girl admitted walking over a mile before going to the doctor's office so her heart rate would be faster.[25]

The defendant's attorney contended that the bone injury which was the basis for damages, resulted from the student's stepping on a

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

[24]Meyer v. Board of Education, 9 N.J. 46, 86 A2d 761 (1952).

[25]Bellman v. San Francisco High School District, 11 Cal.2d 576, 81 P2d 894 (1938).

> nail, rather than an outcome of a blanket-toss game at school during which her foot plunged through the torn blanket and struck the ground forcibly. Medical evidence overwhelmingly supported the plaintiff's claim.[26]

Even when the four factors discussed above are present, liability will not attach if the one injured had assumed the risk, or was contributarily negligent himself. (75, p. 9)

5. Assumption of the risk. If a person voluntarily engages in an activity, fully cognizant of the attending danger, it is said he has assumed the risk and there is no duty to protect him. (48, p. 27 and 19, p. 39).

> Ex. A 14 year old student, well trained in tumbling, broke his arm while jumping over a gym horse. The court recognized that the student had the intelligence and experience to appraise the danger which he elected to assume. The court added that even though the teachers were negligent, the pupil had no right of recovery since knowledge of the danger compelled the assumption of the risk.[27]
>
> A 16 year old student brought suit after he was injured while playing football. The court found no liability since the boy was intelligent and old enough to realize the roughness of the game and the possibility of injury. His participation was voluntary.[28]

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[26]Rook v. State, 254 App. Div. 67, 4 N.Y.S.2d 116 (1938).

[27]Sayers v. Ranger, 16 N.J.Super. 22, 83 A2d 775 (1951).

[28]Hale v. Davies, 86 Ga. App. 126, 70 S.E.2d 923 (1952).

6. Contributory negligence is the lack of care on the part of the person injured, concurring or combining with the negligence of the one causing the injury. (7, p. 1231)

Ex. Students scuffled in a supply room although they knew a bottle of acid was on the shelf. The court said of the boy who was burned when the acid fell, that his negligence was at least as great, if not greater than the teachers.[29]

A student was injured while using a buffer in an industrial arts shop. He knew he was supposed to wear goggles and was aware of the reason they were required. His failure to wear goggles was evidence on which the jury could find he was contributorily negligent.[30]

Nuisance

A public nuisance is the offense of creating or maintaining a condition that is offensive to the general public either because it is dangerous, unhealthful, or indecent to the senses.

Ex. The court explained that a nuisance could have its origin in negligence but there must be more than an act or omission, the danger created must be a continuing one to give rise to a nuisance. Placing a balance beam on a newly oiled floor created a continuing condition of danger to all children using it, hence it was a nuisance.[31]

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[29]Grosso v. Witteman, 266 Wis. 17, 62 N.W.2d 386 (1954).

[30]Ross v. San Francisco Unified School District, 120 Cal. App.2d 185, 260 P2d 663 (1953).

[31]Bush v. City of Norwalk, 122 Conn. 426, 189 A. 608 (1937).

A wire protruding from trash which had been on the school ground long enough to establish constructive notice, created a nuisance.[32]

Action for Wrongful Death

Contrary to common law where a cause of action did not survive either the person injured or the wrongdoer (no action could be brought if injuries resulted in death), "wrongful death statutes" are in force in every state.

Ex. The football coach was liable for damages for the wrongful death of a student at a letterman's club initiation.[33]

The parent of a student who was electrocuted while on a field trip with his class, sued the host company for wrongful death.[34]

Person Entitled to Sue

In the event of injury to a minor, the parent or guardian has a claim for cost of care and treatment, loss of child's services or earning capacity, which the father is entitled to receive until the child reaches his majority (71, p. 31), or a reduction in that earning capacity (66, p. 327). This does not deprive the child of the claim for

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[32]Popow v. Central School District et al., 277 N.Y. 538, 13 N.E.2d 463 (1937).

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

[34]Myers v. Gulf Public Service Corporation, 15 La. App. 589, 132 So. 416 (1931).

damages which accrue to him personally. The parent must have a pecuniary loss to support a cause of action, but the child need not. However, since a minor is not allowed to sue in his own name, the suit is usually brought by the parent as "next of friend" of the minor ward. (71, p. 31)

Damages

Nominal damages may be assessed where there has been an invasion of a right but no pecuniary loss. If actual harm has been caused, an award may be made for disfigurement, pain and suffering beyond the cost of treatment, and loss or impairment of earning capacity after majority. (66, p. 327) If the wrongdoer is found to have acted in wilfull or wanton disregard of others rights, exemplary or punitive damages may be awarded.

Ex. The jury found the teacher struck a pupil in anger, and awarded exemplary damages.[35]

A jury awarded a student $31,000 for the loss of an eye due to negligence, but the appeal court reduced the amount to $16,000.[36]

A severe injury to a bone in a student's foot which was the result of negligence was the basis of a $15,000 judgment for the student

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[35] Melen v. McLaughlin, 107 Vt. 111, 176 A.297 (1935).

[36] Maede v. Oakland High School District of Alameda County 212 Cal. 214, 298 Pac. 987 (1931).

and $2,500 to her father to reimburse him for medical costs.[37]

A jury awarded a student $7,500 for a torn cruciate ligament when a strenuous test was not properly supervised.[38]

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[37]Rook v. State, 254 App. Div. 67, 4 N.Y.S.2d 116 (1938).

[38]Brittan v. State, 200 N.Y. Misc. Repts. 743, 103 N.Y.S.2d 485 (1951).

CHAPTER III

GENERAL THEORY OF TORT LIABILITY OF PUBLIC SCHOOL TEACHERS AS ESTABLISHED BY CASES

In order to establish a basis for tort liability of teachers, different from the general liability which applies to all people, it will be necessary to discuss to whom the term teacher applies, teacher-pupil relationship, and school district liability.

Who is the Teacher

In its broad sense, the term teacher has been interpreted "to include teacher, principal, superintendent, or any other educational worker in whose charge the school organization places the pupil." (18, p. 22) However, in order to clarify tort liability of the public school teacher, it is necessary to define the term in the language of the court.

"A teacher is one who teaches", said the court in a Texas decision,[39] which would seem to narrow the meaning to the person actually in charge of the classroom. This was an action for damages for assault and battery brought

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[39]Prendergast v. Masterson, 196 S.W. 246, Ct. Civ.App. (Tex. 1917).

against a superintendent of schools who chastised a pupil for being disobedient while the superintendent was visiting the classroom. The court upheld the contentions of the student in this manner:

> By the rules, the duty to maintain order and discipline in the schools was devolved upon the teachers, not on him, and the power to inflict corporal punishment on pupils was conferred upon the teachers, not on him. The teacher the law has in mind, we think, is one who for the time being is in loco parentis to the pupil; who, by reason of his frequent and close association with the pupil, has an opportunity to know about the traits which distinguish him from other pupils; and who, therefore, can reasonably be expected to more justly measure the punishment he deserves, if any.

A different position was accorded the supervisor in New Mexico,[40] where the court found that a

> . . . rural school supervisor is a person employed for instructional purposes and is a teacher who is entrusted with special duties of supervising public instruction in the schools, which embraces counsel and instruction of other teachers in the matter of classroom instruction, as well as personal professional contact with and instruction of pupils, and hence has a teacher's status. . .

The latter ruling appears to represent the better view. As between principal and teacher, the majority make no distinction as to the authority to discipline.[41] (89,

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[40] Ortega et al. v. Ortero, 48 N.M. 588, 154 P2d 252 (1944).

[41] Green v. Peck, 9 Week. Dig. 3 (N. Y. 1879).

Harris et al. v. Galilley, 125 Pa. Super. 505, 189 Atl. 779 (1937).

p. 479) When a principal was sued for whipping a boy who dropped or threw a book from the balcony of the auditorium to the seats below, the court said of the principal: "He stands exactly in the same position in that respect as would the parent of the child had such parent been called upon to correct the child for some misbehavior at home."[42]

This right has been extended to one who was engaged to teach but had not as yet been certified. A teacher who had not fully complied with requirements for certification evicted a student who repeatedly refused to prepare his assignment and a suit was instituted for assault and battery. The court upheld the teacher's position in these words, "Although not a public teacher by legal appointment, he was a teacher in fact, his authority to govern the school could not be contested by those who sought to avail themselves of its advantages."[43]

The liability for negligence of teachers, principals, superintendents and other school administrators varies according to the duties imposed upon them. (80, p. 44) The kind of care required of the principal was found to differ from that expected of the teacher in New York.[44]

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[42]People v. Mummert, 183 Misc. 243, 50 N.Y.S.2d 699 (1944).

[43]Kidder v. Chellis, 59 N. H. 473, 35 Cyc. 1134 (1879).

[44]Thompson v. Board of Education, 280 N. Y. 92, 19 N.E. 2d 796 (1939).

In that case a student was injured while leaving the building at the close of school day by being shoved down three or four stairs by a boy who was running. The teacher who was assigned to supervise the exit had returned to the classroom to look for a missing student. The lower court dismissed the case against the board of education and the teacher, but held that the principal was negligent in not promulgating safety measures. Evidence was shown that the principal had published safety rules, called several meetings with the teachers in which they were warned of the dangers, and had inspected the stairs. The appellate court reversed the lower courts decision on the ground that the principal had exercised sufficient supervision, and that he was not required to attend personally to each class' exit.

This responsibility for the well-being of the students is such that a district is not fulfilling its obligation when a person of lesser qualification is placed in charge of the students. In a school in New York the students were required to remain in the gymnasium during the noon intermission. The only supervisor provided, the school janitor, joined in their game of "shoot the cow". In this activity, one person lies on his back on the floor, doubles up his legs, and another sits on his feet. By quickly extending the legs, the one on the floor propels the other through the air. When the janitor became the propelling force a

fourteen year old student was thrown five feet into the air and injured when he landed several feet past the mat. The appellate court remarked,

> We may not accept the theory or apply the principle that young boys in the grades of a public school may be restrained in a gymnasium equipped for play, and left there to their own devices, subject only to the control of one without training, skill or experience, of one who makes no pretense to the qualification necessary to the duties assigned. It is our view that this was palpable failure to meet the requirements of the common law rule, as well as an evident neglect of the duty imposed by statute.[45]

It would appear that a teacher could not delegate her duty to supervise to a non-teaching member of the staff. (22, p. 39) However, in a Michigan case[46] where a bath attendant accompanied a physical education class and supervised the running of races on the sidewalk, and a woman pedestrian was injured, the question of negligence in sending a person not qualified to teach to accompany the students was not raised.

The result of cases instituted because of an injury to a student while under the control of a student-teacher indicates that the supervising-teacher should be constantly alert and present at all times in the classroom. A seventh grade pupil was injured while attempting to stand on her

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[45]Garber et al. v. Central School District No. 1 of Town of Sharon, 251 App. Div. 214, 295 N.Y.S. 850 (1937).

[46]McDonell v. Brozo, 285 Mich. 38, 280 N.W. 100 (1938).

head during a tumbling class. The class was being conducted by a practice teacher who was in her third year of studies at the normal school. The court, in allowing the plaintiff's claim, found that failure to instruct the infant claimant pursuant to the customary method was the proximate cause of her injuries, that she had not been given proper preliminary and strengthening exercises, and that competent supervision was not provided. It was negligence for the physical education class to be conducted by one who could not meet the State adopted certification requirements in the absence of the regular teacher.[47] It must be noted that there was a strong dissent on the basis that the student-teacher was not incompetent, the prescribed course of study was being followed, and the accident would have happened no matter how competent the teacher was.

In another New York case in 1951,[48] a prospective student's knee was injured as she took a leg strength test as part of an entrance requirement. A senior student administered the test. The court, in affirming an award for the plaintiff, held that the tests were dangerous if not conducted properly and the use of a student who was not qualified according to law as a teacher constituted negligence.

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[47]Gardner v. State of N. Y., 281 N.Y. 212, 10 N.Y.S. 2d 274 (1939).

[48]Brittan v. State, 103 N.Y.S.2d 485 (1951).

When student-teachers held a play day at their normal school and all of their students were required to attend, an injury resulting from being tossed in a torn blanket was the basis of a claim for damages. The court recognized that the injury was the result of negligence, particularly since the principal of the normal school and four of his faculty members were acting as judges and were aware of the game.[49]

From the foregoing, one could justifiably conclude that the term teacher generally applies to the principal and superintendent as well; that all are charged with the duty to care for students, but their individual responsibilities vary. One not qualified to teach does not fulfill the role, but a de facto teacher has the same authority to control the students as a de jure one. Either principal or teacher can administer discipline, but there is a question as to the supervisor's right to do so.

Teacher-Pupil Relationship

The relationship between the teacher and the pupil from which rises the specific duties and powers of the former for the control and well-being of the latter, has devolved from the common law duty of the parent to provide,

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[49]Rook v. State, 254 App. Div. 67, 4 N.Y.S.2d 116 (1938).

care for and educate his child. Kent, in his Commentaries on American Law (54, pp. 189-190) stated it this way:

> The education of children in a manner suitable to their station and calling, is another branch of parental duty, of imperfect obligation generally in the eye of the municipal law, but of very great importance to the welfare of the state. Without some preparation made in youth for the sequel of life, children of all conditions would probably become idle and vicious when they grow up, either from the want of good instruction and habits, and the means of subsistence, or from want of rational and useful occupations. A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance.

He continues in more direct language,

> The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. (54, p. 211)

In an early case in North Carolina[50] in ruling on the question of the teacher's right to discipline a student, the judge explained the teacher's role in this manner:

> One of the most sacred duties of parents is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer

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[50]State v. Pendergrass, 19 N.C. 365, 31 Am.Dec. 416 (1837).

> moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.

Another jurist in commenting upon the subject noted that,

> The right of the parent to keep the child in order and obedience, is secured by common law . . . and he may delegate such portion to tutor or schoolmaster viz: that of restraint or correction as may be necessary to answer the purpose for which he is employed.[51]

This was a reiteration of the comments of Blackstone (8, p. 453) who wrote his commentaries in 1765.

In present day schools even though the parent no longer contracts for personal instruction for his child, in fact, where education is compulsory, the legalism of parent substitute still prevails. Edward Spencer in his Treatise on the Law of Domestic Relations (89, p. 483) explains,

> While it may be doubted whether a teacher in the public schools, particularly where compulsory education laws exist, is the mere agent of the parent in any proper sense, his powers in this respect are certainly analogous to those of the parent and are subject to similar limitations.

A judge in a 1949 case in Washington[52] further explained, ". . . when a pupil attends a public school, he or she is

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[51]Stevens v. Fassett, 27 Me. 266 (1847); and see, Vanvactor v. State, 113 Ind. 276, 15 N.E. 341, 3 Am. St. Rep. 645 (1887).

[52]Briscoe v. School District No. 123, 201 P2d 697 (Wash. 1949).

subject to the rules and discipline of the school, and the protective custody of the teacher is substituted for that of the parent."

The term in loco parentis has been used by courts to describe this relationship, and is found from the earliest cases through to the present.[53] In a 1954 case[54] which was an action for damages brought against a teacher for using corporal punishment, the judge reaffirmed the right of the teacher to discipline as a substitute-parent exercising delegated authority.

Since the parent releases control of the child for a specific purpose, the authority over that child must be confined to that ". . . particular phase of child's life which is entrusted to them." (64, p. 136) In a case in which the teacher had exceeded her authority, the court established these limits: "The status of a parent, with some of the parent's privileges, is given a school teacher by law in aid of education and training of the child and ordinarily does not extend beyond matters of conduct and discipline."[55]

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[53]See Boyd v. State, 88 Ala. 169, 7 So. 268 (1890); Marlar v. Bill et al., 181 Tenn. 100, 178 S.W. 2d 634 (1944); Drum v. Miller, 134 N.C. 204, 47 S.E. 421 (1904).

[54]Suits v. Glover, 71 So. 2d 49, 260 Ala. 449 (1954).

[55]Guerrieri v. Tyson, 147 Pa. Super. 239, 24 Atl. 2d 468; cf. Phillips v. Johns et al., 12 Tenn. App. 354 (1931); Gaincott v. Davis, 281 Mich. 515, 275 N.W. 229(1937).

The right to control behavior applies to all students, even though the student is over twenty-one, or is married and legally no longer responsible to his parents. Blackstone comments that, "If a person who has reached twenty-one years of age attends school, he thereby waives any privilege conferred by age, and may be lawfully punished by a teacher in a proper manner for refractory conduct." (8, p. 427) This was set forth in a case when the question of the right to discipline a student who was over twenty-one was in issue.[56] The judge noted that if a person over twenty-one presented himself as a pupil, was received and instructed by the master, he could not claim privilege, and was under the same restrictions and liabilities as the other pupils. This was followed in an Iowa case[57] in which the judge explained that a person over twenty-one years of age becomes a pupil only by his own voluntary act and by doing so waives any privilege his age confers.

In a 1929 case in which a married student had been refused admission to school solely on the basis of a school rule against admitting married students, the court, after commenting that marriage entered into with correct motives was refining and elevating and other students would be

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[56]Stevens v. Fassett, 27 Me. 266, 12 Cyc. 274 (1847).

[57]State v. Mizner, 45 Iowa 248, 24 Am. Rep. 769 (1876).

benefited by associating with people so elevated, added ". . . and they are as much subject to the rules of the school as unmarried pupils, and punishable to the same extent for a breach of such rules."[58]

In Pennsylvania this relationship is established by law:[59]

> Every teacher in the public schools in this Commonwealth shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians, or persons in parental relation to such pupil may exercise over them.

At times there have been conflicts between the authority of the parent and the schoolmaster, but within the province of education, the right of the schoolmaster has usually been upheld.[60] In one instance, a mother came into the schoolroom, accused the teacher of favoritism and argued with the teacher in front of the students. Later the mother returned and declared that the teacher was no lady. The children were suspended until their mother apologized. A petition for a writ of mandamus to compel the school to admit the children was refused by the court with this admonition:

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[58]McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

[59]Act of May 18, 1911 P.L. 309 section 1410.

[60]Sewell v. Board of Education et al., 29 Ohio St. 89, 1 N.P.2d 141 (1876).

> Our conclusion is that the board of education, either in the absence of a rule or the furtherance of a prescribed rule, had the right to exclude from the schools under its control any child whose parent, in the schoolroom, or its vicinity, in the presence of such child and other pupils, conducted himself or herself in such manner that their acts were calculated to produce disorder in the school, and break down and destroy its discipline.[61]

This case was decided under a voluntary education law and the judge recognized that under a compulsory school system the right of the child would probably not be affected by the conduct of the parent.

The parent's wishes were upheld when a teacher resorted to force to compel a pupil to study geography against his father's expressed desire. The court felt the punishment was not justified because the parent's wish was paramount where there were irreconcilible differences in views as to the course of study, the course was not required by statute and failure to study geography was not upsetting the order of the class.[62]

The opposite view was taken when a court decided a teacher was justified in chastising a pupil for refusing to declaim even though his father had so directed him. Since this was a reasonable rule, the court refused to

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[61]Board of Education et al., v. Purse et al., 28 S.E. 896, 101 Ga. 42 (1897).

[62]Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471 (1874).

follow the case cited above and pronounced, "However judicious it may be to consult the wishes of parents, the disintegrating principle of parental authority to prevent all classification and destroy all system in any school, public or private, is unknown to the law." Where specific courses are required by statute, consent to adherence to the prescribed course is considered a condition of attendance. (22, p. 39)[63] Without statutory enactment, on reasonable grounds, parents may have a child excused from studies not desired.[64]

The authority of the teacher is not always limited to the time the students are in class, but in certain matters extends beyond the confines of the school. This applies when the actions have ". . . a direct and immediate tendency to injure the school and bring the Master's authority into contempt. . ."[65]

The court said that the school had exceeded its bounds when the teachers and board members made a rule forbidding students to attend social parties during the school term. A

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[63]Kidder v. Chellis, 59 N.H. 473, 41 L.R.A. 594 (1879).

[64]State v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914); Hardwick v. Fruitridge School District, 235 Pac. 49, 54 Cal. App. 696.

[65]Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; and see, Hutton v. State, 23 Tex. App. 386, 5 S.W. 122, 59 Am. Rep. 776 (1887); O'Rourke v. Walker, 102 Conn. 130, 128 Atl. 25 (1925).

student was expelled for attending such an affair with his parents' permission. In the concurring opinion, the judge said that while children were in the teacher's charge, the parents have no right to invade the school room and interfere, but when they are sent home neither director nor teacher could follow and govern conduct.[66] This same ruling was applied when a teacher expelled a student for failure to obey a ruling made by the teachers and adopted by the school trustees which required that all pupils remain in their homes and study from seven until nine in the evening. A student attended a religious service with his father during these hours, and when given his choice between corporal punishment or staying in during the noon intermission for five days, he refused both and was sent home. The court recognized that school authorities might have the right to make certain regulations and rules for the good government of the school and that such rules might invade the province of parental authority ". . . but, if that power exists, it can only be done in matters which would per se have a direct and pernicious effect on the moral tone of the school, or have a tendency to subvert and destroy the proper administration of school affairs."[67] However, a 1917 case,[68] upheld a rule

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[66]Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343 (1877).

[67]Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1909).

[68]Mangum v. Keith, 147 Ga. 603, 95 S.E. 1 (1917).

forbidding pupils from attending moving-picture shows on school nights.

The confidential aspect of this relationship does not terminate at the close of the school day, but is ever present. In an appeal from a conviction of a teacher for carnally knowing a female student, the judge explained:[69]

> The confidential relation of teacher and pupil exists as well after the child reaches home as it does in the school room. It exists on Sunday as well as on a school day. The evil intended to be prevented is the abuse of the confidential relation, and that exists wherever they may be, and on all occasions, as long as the relation of teacher and pupil is in existence.

In the absence of regulations by the board, the teacher is empowered to make reasonable rules.[70] (236, p. 477) As one court noted, the teacher's right to make rules ". . . to promote good order and discipline, arises out of the very nature of his employment . . ."[71] Any reasonable rule that isn't inconsistent with the rule of higher authority is binding on the pupils.[72] (201, p. 526) It has been most ably stated by Justice Lyon.[73] The teacher

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[69]State v. Hesterly, 81 S.W. 624 (Mo. 1904); cf. State v. Oakes 102 Mo. 86, 100 S.W. 434 (1907); Ridout v. State, 6 Tex. App. 249.

[70]Patterson v. Nutter, 78 Me. 509, 7 Atl. 273 (1886).

[71]Deskins v. Gose 85 Mo. 485, 55 Am. Rep. 387 (1885).

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

[73]State ex rel. Burpee v. Burton, 45 Wis. 150, 30 Am. St. Rep. 706 (1898).

> . . . does not derive all of his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being in loco parentis to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exist on the part of the pupils the obligation of obedience to lawful command, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of school.

It is unusual in law for a stranger to be responsible for the well-being or behavior of another. The position of parent substitute abrogates this common law rule and places upon the teacher a responsibility for the care and custody of pupils, and grants to him the privilege of a certain amount of restraint or correction. The extent of this authority was set forth by one judge as follows:[74]

> The teacher of a school as to the children of his school, while under his care, occupies for the time being the position of parent or guardian, and it is his right and duty not only to enforce discipline and preserve order and to teach, but also to look after the morals, the health and the safety of his pupils; to do and require his pupils to do whatever is reasonably necessary to preserve and conserve all those interests, when not in conflict with the primary purpose of the school or opposed to law or a rule of the school board.

A teacher's action in disciplining a student would be tortious if it were not for the privilege that is granted,

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[74]Beaty v. Randall, 79 Mo. App. 226, 50 L.R.A.N.S. 269 (1899).

but there is no liability as long as punishment is administered in a reasonable manner.[75]

Teachers are individually liable when they exceed the limits of reasonableness,[76] or act outside the scope of their authority.[77] A principal negligently installed some plumbing for the school board and a pupil was burned when boiling water came out of the drinking fountain. The court, in overruling the defendant's demurrer, said ". . . we know of no legal theory which insulates a public official from liability for his own personal tortious act."[78] This applied the ". . . common law obligation that every person must so act or use that which he controls as not to injure another."[79]

The amount of care required to be shown varies with the circumstances, but the teacher must use due care not to injure a student, nor allow him to injure himself, nor be injured by another. (82, p. 7 and 56, p. 18) This will be discussed more completely in Chapter IV.

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[75]Marlsbury v. State, 10 Ind. App. 21, 37 N.E. 558; and see Nicholas v. State, 28 So.2d 422, 32 Ala. App. 574 (1946).

[76]Haycraft v. Grigsby, 88 Mo. App. 354, 67 S.W. 965 (1901); Commonwealth v. Randall, 4 Gray 36 (Mass. 1855); Melen v. McLaughlin, 107 Vt. 111, 176 A. 297 (1935).

[77]Woodman v. Hemet Union High School District of Riverside County et al., 136 Cal. App. 514, 29 P2d 257 (1934).

[78]Whitt v. Reed, 239 S.W.2d 489, 32 ALR2d 1160 (1951).

[79]Brooks v. Jacobs, 139 Me. 371, 31 A2d 414 (1943).

School District Liability

It is not the purpose of this study to include a thorough review of the tort liability of school districts. The subject has been amply covered by many learned writers. (10, p. 496; 95, p. 240-241; 2 and 84, p. 115-124) However, to the extent which the liability of the district influences suits against teachers, the subject will be treated herewith.

As a general rule school districts and their corporate governing bodies are not liable for torts unless liability has been imposed by statute.[80] (27, vol. 78, p. 1321 and 5, p. 17) The principle of government immunity for actions performed as a sovereign function, the king can do no wrong, is the legal theory underlying this stand.[81] Neither is there liability for negligence of its employees, since the courts do not apply to school districts the maxim of respondeat superior, i.e., in certain cases the master is liable for the wrongful acts of his servants. (7, p. 1546)

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[80]Mokovich v. Independent School District of Virginia, No. 22, 177 Minn. 446, 225 N.W. 292 (1929) and see Medsker et al. v. Etchison, 199 N.E. 429, 101 Ind. App. 369 (1936).

[81]Bigelow v. Inhabitants of Randolph, 14 Gray 541 (Mass.); and see Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332 (1877); Donovan v. Board of Education, 85 N.Y. 185, 39 Am. Rep. 649 (1881); Whitt v. Reed et al., 239 S.W.2d 489, 32 ALR2d 1160 (1951).

The court followed this rule in a 1950 case which arose as a result of an injury to a student's thumb which was caught by an unguarded planer during an industrial arts class. The judge reviewed many similar cases and found that,

> In almost every jurisdiction it is a uniform rule that a school district is not liable, except where made so by specific statutes, for the negligence of its officers, agents and servants in the exercise of their powers or in the performance of their governmental functions, the doctrine of respondeat superior being inapplicable. . .[82]

Some of the explanations that have been offered for this legalism are, negligent acts are outside the scope of authority so entail no liability;[83] school funds cannot be appropriated to pay damages to an individual,[84] (61, p. 597) districts would be besieged with lawsuits and would have little time or money for the purpose for which they were created,[85] the district is a quasi public corpora-

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[82]Golish v. School District of the Borough of Windber, 15 Som. 125 (Penn. 1950), and see, Graff v. Board of Education of City of New York, 15 N.Y.S.2d 941, 258 App. Div. 813 (1939); Fulgoni v. Johnson, 302 Mass. 421, 19 N.E.2d 542 (1939); School District v. Rivera, 30 Ariz. 1, 243 Pac. 609; Juul v. School District, 168 Wis. 111, 169 N.W. 309; Krutili v. Board of Education, 99 W. Va. 466, 129 S.E. 486; Kirchoff v. City of Janesville, 255 Wis. 202, 38 N.W.2d 698 (1949).

[83]Wiest v. School District No. 24 of Marion County, 68 Ore. 474, 137 Pac. 749 (1914).

[84]Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332 (1877).

[85]Dick v. Board of Education, 238 S.W. 1073, 21 ALR 1327 (1922). Anderson v. Board of Education of City of Fargo, 49 N.D. 181, 190 N.W. 807 (1922).

tion,[86] an involuntary instrumentality.[87] (29, p. 2888)

This doctrine of governmental immunity as applied to schools has been the subject of criticism in light of present conditions. (34, p. 34-50 and 83, p. 343) Since the application of this theory to school districts is derived through the status of the district as a branch of the state, change in the state's policy should be applicable to all of its lesser governmental bodies. The Federal Tort Claims Act[88] is an example of the present trend for governments to accept the responsibility of their actions under circumstances where a private individual would have been liable had he caused the harm. This act provides that district courts shall have exclusive jurisdiction of

> . . . civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

A quotation from an article in the Indiana Law Journal

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[86]First National Bank of Waldron v. Whisenhunt et al., 94 Ark. 583, 127 S.W. 968 (1910).

[87]Bank v. Brainerd School District, 49 Minn. 106, 51 N.W. 814 (1892); City of Chicago v. City of Chicago, 243 Ill. App. 327 (1927).

[88]United States Code, Title 28, Sec. 1346(b).

(83, p. 343) sums up the modern trend in this way, "When a person is injured by the tort of a municipality, the municipality ought to pay the injured party damages just the same as he would be paid were he injured by the tort of any other corporation." Reynold C. Seitz (84, p. 124) based his plea for a change in the rule on present-day educational philosophy, which encourages independent thought and investigation, but which may entail a greater possibility of injury to the pupils, with the legal and social philosophy of spreading the risk where it can best be absorbed.

A New Mexico judge[89] recognized the harshness of this ruling in a case involving a city owned sewage disposal plant. In overruling a demurrer entered by the city he said:

> The whole doctrine of governmental immunity from liability for tort rests upon rotten foundations. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the gov-

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[89]Barker v. City of Santa Fe, 47 N.M. 85, 136 P2d 480 (1943) and see Lovell v. School District No. 13 of Coos County, 172 Ore. 500, 143 P2d 236 (1943); McGraw v. Rural High School District No. 1 of Linn County, 120 Kan. 413, 243 Pac. 1038 (1926).

> ernment, where it could be borne without hardship upon any individual and where it justly belongs.

In a Utah case[90] where burning embers from the school incinerator were spread over an area of several feet adjacent to the playground and a three year old tot was badly burned when she fell from her tricycle into the embers, governmental immunity protected the defendant board of education, but two judges dissented on the grounds that it was not conscionable to wait until the dim future for pressure to force the legislature to change the law. Injuries should not be recompenseless, particularly since the governmental immunity principle was judge-made and developed.

In a few states the common law rule has been changed by statutory enactment. (5, vol. 160, p. 428) A Washington law[91] abrogates the common law rule of non-liability with respect to school districts where negligence is involved.[92]

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[90]Bingham v. Board of Education of Ogden City, 223 P2d 432, 118 Utah 582 (1950); but see Lovell v. School District No. 13, Coos County, 172 Ore. 500, 143 P2d 236 (1943).

[91]Washington Statutes, Section 5674.

[92]Redfield v. School District No. 3 in Kittitas County, 48 Wash. 85, 92 Pac. 770 (1907); and see Howard v. Tacoma School District No. 10 of Pierce County, 88 Wash. 167, 152 Pac. 1004 (1915); Stovall v. Toppenish School District No. 49, 110 Wash. 97, 188 Pac. 12 (1920); Hutchins v. School District No. 81, 195 Pac. 1020 (Wash. 1921); Rice v. School District No. 302 of Pierce County, 140 Wash. 189, 248 Pac. 388 (1926).

The extent of this liability was restricted by a later law[93] which excluded actions based on injury on playgrounds, athletic fields, athletic apparatus and manual training equipment. Courts have held districts liable when proper supervision was not provided for school grounds.[94] Two other states, Minnesota and Oregon, have similar general laws.[95] The Minnesota courts have consistently held that there was no change in immunity where governmental functions were in question.[96] One Oregon decision[97] construed the statute to impose a liability if the district was acting in a proprietary capacity, but this holding was expressly overruled in

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[93] Washington Compiled Statutes (1922), Section 4706.

[94] Holt v. School District No. 71 of King County, 102 Wash. 442, 173 Pac. 335 (1918); and see Kelley v. School District No. 71 of King County, 102 Wash. 343, 173 Pac. 333 (1918); Rice v. School District No. 302 of Pierce County, 140 Wash. 189, 248 Pac. 388 (1926).

[95] Minnesota Laws (1851), Chapter 79, Section 12-16; Oregon Laws (1887), Section 346-347.

[96] Bank v. Brainerd School District, 49 Minn. 106, 51 N.W. 814; and see Allen v. Independent School District No. 17, 173 Minn. 5, 216 N.W. 533; Bang v. Independent School District No. 27 of St. Louis County, 177 Minn. 454, 225 N.W. 449; Mokovich v. Independent School District of Virginia, No. 22, 177 Minn. 446, 225 N.W. 292 (1929).

[97] Lupke v. School District No. 1 of Multnomah County, 130 Ore. 409, 275 Pac. 686 (1929).

a 1943 decision.[98] In the latter, the court ascribed to the theory that the establishment and maintenance of schools was a governmental function which was delegated by the legislature to the school districts. Since the directors of these districts can act pursuant only to statutory authority, performance of such duties would be an exercise of governmental functions, and both the directors and the district would be immune from liability.

Another Oregon statute[99] is an example of permissive legislation which enables districts to procure insurance against injury.

> Any district school board may enter into contracts of insurance for liability covering all activities engaged in by the district, for medical and hospital benefits for students engaging in athletic contests and for public liability and property damage covering motor vehicles operated by the district, and may pay the necessary premiums thereon. Failure to procure such insurance shall in no case be construed as negligence or lack of diligence on the part of the district school board or the members thereof.

It is questionable whether or not a school district may carry liability insurance without specific legislative enactment such as previously quoted. Since a district

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[98]Lovell v. School District No. 13, Coos County, 172 Ore. 500, 143 P2d 236 (1943); and see Wiest v. School District No. 24 of Marion County, 68 Ore. 474 (1914); Spencer v. School District No. 1, 121 Ore. 51, 254 Pac. 357 (1927) and Ward v. School District No. 18 of Tillamook County, 157 Ore. 500, 73 P2d 379 (1937).

[99]Oregon Revised Statutes, Title 30, chapt. 332, sect. 170.

would not be liable in tort, payment of premiums would probably be considered as an illegal use of school funds. An interesting situation arose when a district which did carry insurance defended a tort action on the basis of governmental immunity and claimed it had no power to insure. The court admitted that a school district as a quasi-municipal corporation was not liable for injuries resulting from tort, but admonished that where a district carries insurance, tort action would lie and lack of authorization would not be a defense.[100]

In the event the law requires a district to carry insurance, failure to perform this ministerial function could entail personal liability for the school directors. Such was the holding in a Kentucky decision.[101]

School districts and their governing boards in California are liable according to statute[102] for their negligence and the negligent acts of their officers and employees.

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[100]Thomas v. Broadlands Community School District No. 201, 109 N.E.2d 636 (1953).

[101]Kirkpatrick's Adm'x. v. Murray, 294 Ky. 715, 172 S.W.2d 591(1943).

[102]Deering (1937) Codes of California, School Codes Section 2; 801 Damgaard v. Oakland High School District of Alameda County, 212 Cal. 316, 298 Pac. 983; see also Maede v. Oakland High School District of Alameda County, 298 Pac. 987 (1931); Henry v. Garden Grove Union High School District of Orange County, 7 P2d 192 (Cal. 1932); Kenney v. Antioch Live Oak School District, 18 Cal. App. 226, 63 P2d 1143 (1936).

Another law, The Public Liability Act of 1923,[103] in that state makes districts, as well as counties and municipalities, liable for injuries to persons or property resulting from the dangerous or defective condition of buildings and grounds where the condition is not remedied within a reasonable time after notice.[104]

Three states, Connecticut, New Jersey and New York, have laws which require school boards to save harmless and indemnify certain of their employees from financial loss arising from a suit for negligence.[105] Another New York law[106] which applies only to cities of more than one million population provides that the school board,

> . . . shall be liable for, and shall assume liability to the extent that it shall save harmless any duly appointed member of the teaching or supervising staff, officer, or employee of such board for damages arising out of negligence of any such appointed member, officer or employer resulting in personal injury or property damage within or without the school building.

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[103]Deering General Laws, Act. 5619.

[104]Huff v. Compton City Grammar School District, 267 Pac. 918 (Cal. 1928); Dawson v. Tulare High School District, 98 Cal. App. 138, 276 Pac. 424 (1929); Boyce v. San Diego High School District, 215 Cal. 293, 10 P2d 62 (1932).

[105]General Statutes of Connecticut (1949), Vol. 1, Sec. 1494.

New Jersey School Laws of 1939, Chapter 5, Art. 12, Sect. 18: 5-50.2.

Consolidated Laws of New York, Education Law, Art. 20, Section 569-a.

[106]Consolidated Laws of New York, Education Law, Art. 33-a, Sect. 881-a.

The above statute has been construed as imposing direct liability on the board.[107] The New York Court of Claims Act, Section 8, makes districts liable under the theory of respondeat superior by waving the state's immunity.[108]

A few courts have made exceptions to the tort non-liability rule primarily on the basis of nuisance.[109] New York courts adopted the view that school boards could be liable for their own acts or omissions as distinguished from those of their officers or agents before the above law was enacted.[110]

The extent to which a district or board assumes liability is important because, as Rosenfield in his book Liability for School Accidents warns,

> It is a pity to see indigent parents bringing fruitless suits against boards of education, the city and everyone of whom they can think, in an attempt to obtain some recompense for the expense and suffering they have undergone. The time will come, of course, when they will begin to think of suing the teacher. (80, p. 120)

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[107] Reeder et al. v. Board of Education of City of New York, 290 N.Y. 829, (1943).

[108] Rook v. State, 254 App. Div. 67, (1938).

[109] Ferris v. Board of Education of Detroit, 122 Mich. 315 (1899); Popow v. Central School District, 277 N.Y. 538 (1937); Sestro v. Town of Glastonbury, 110 A.2d 629 (Conn. 1954).

[110] Kolar v. Union Free School District No. 9, 8 N.Y.S.2d 985 (1939); Graff v. Board of Education of City of New York, 15 N.Y.S.2d 941 (1939).

One explanation that has been offered as to the relative infrequency of suing the teacher rather than the board or district, is the discrepancy between the district's and the teacher's ability to pay. One large judgment rendered against a teacher could mean financial ruin. Therefore, it is vastly important for all concerned to understand the tort liability of the public school teacher.

The majority of the cases in which teachers have had to defend their action have been for negligence or assault and battery. A few cases have arisen in defamation. These areas will be dealt with in the following chapters.

CHAPTER IV

TEACHER'S LIABILITY FOR NEGLIGENCE

Negligence has been defined, ". . . as any conduct, except conduct recklessly disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm." (4, vol. 2, p. 738) Obviously, no exact rules or lines of demarcation can be established for negligence. Behavior that might be actionable at one time because injury was inflicted, would not entail liability under similar circumstances, if through good fortune, no harm resulted. Only a slight variation in attending circumstances might sufficiently alter the facts so that in the court's opinion a different standard of care would be expected.

In a bulletin prepared by the National Education Association, the following statement appears,

> Every person has a right to freedom from bodily injury, intentionally or carelessly caused by others; yet in every human relationship there is some possibility of injury. If the risk is great, the legal liability for possible injuries should be investigated. (70, p. 4)

Courts usually follow former decisions on a similar question, but there is no guarantee that future holding will be identical with opinions in the past. A study of court decisions in which specific actions have been declared

negligent, though not establishing exact formulae, may serve as a criteria for teachers.

It is the purpose of this chapter to set forth case holdings that exemplify the general degree of care expected of a teacher, areas that necessitate a higher standard, and conduct that has been found to be below the norm.

General Standard of Care Expected of a Teacher

In determining the standard of care expected of a teacher, one must keep in mind that the teacher stands in a limited sense *in loco parentis*. The term indicates that his standard should be comparable to that of a parent -- a reasonably prudent parent under the same circumstances. This was expressed by a New York judge with this statement, ". . . a teacher may be charged only with reasonable care such as a parent of ordinary prudence would exercise under comparable circumstances."[111]

In ruling on the duties of a teacher in the care and custody of a pupil, a Michigan court had this to say, "In the faithful discharge of such duties the teacher is bound to use reasonable care, testing in the light of the existing relationship."[112]

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[111] Ohman v. Board of Education *et al.*, 275 App. Div. 840, 88 N.Y.S.2d 273 (1949).

[112] Gaincott v. Davis, 281 Mich. 515, 275 N.W. 229 (1937).

Another jurist pointed out that when a pupil attends a public school the ". . . protective custody of the teacher is substituted for that of the parent."[113]

The general care expected of a teacher will vary according to the maturity of her pupils.

> More care must be exercised toward children than toward persons of mature years. Children of tender years and youthful persons generally are entitled to care proportioned to their inability to foresee and avoid the perils that they may encounter, as well as to the superior knowledge of persons who come into contact with them. (3, vol. 38, p. 685)

Although the teacher is not liable for unavoidable accidents,[114] he is expected to anticipate and prevent foreseeable dangers. (49, p. 174 and 58, p. 18) In a New York case[115] a boy's eye was injured when he was struck by an eraser thrown by a student. The accident occurred before the teacher arrived in the room. The student had previously thrown missiles and for some time had been required to wait outside the classroom until the teacher arrived. The ban had been lifted two weeks prior to the incident described. The court said it was a material issue whether or not it was reasonable for the teacher to allow

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[113]Briscoe v. School Dist. No. 123, 201 P2d 697, 32 Wash. 2d 353 (1949).

[114]Underhill v. Alameda Elementary School District, 24 P2d 849, 133 Cal. App. 733 (1933).

[115]Wiener v. Board of Education of the City of New York, 277 App. Div. 934, 98 N.Y.S.2d 608 (1950).

the student to return to the classroom after he had been excluded.

If an injury occurs despite reasonably prudent care on the part of the teacher, there is no liability.[116]

Classroom

Although the same general requirement of a reasonably prudent person applies to the teacher in the classroom, there are a few areas that should be called especially to mind.

Cohler (19, p. 37) points out the need to maintain the room and its appurtenances in a safe condition and cautions the teacher to consider heavy articles on top of bookshelves, broken windows, or even unsafe conditions in the building itself. The duty to maintain the premises in safe repair is usually the responsibility of the school board, and in order to place liability on them there must be a reasonable opportunity for them to be aware of the conditions. However, as illustrated by the following

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[116] Perumean v. Wills et al., 8 Cal. 2d 578, 67 P2d 96 (1937).

Thompson v. Board of Education of City of New York et al., 19 N.E.2d 796, 280 N.Y. 92 (1939).

Meyer v. Board of Education, 9 N.Y. 46, 86 A2d 761 (1952).

case,[117] the board need not have actual notice of the defective condition. In a room used for a gym, a piano was kept on a dolly to facilitate its being moved. The piano was so unstable it rocked whenever students ran or jumped in the room. It had fallen over a short time previously and the incident had been reported to the principal. The accident which was the basis for a suit against the district occurred when the piano fell over on a pupil's foot during class. The court found sufficient evidence to warrant the inference that the maintenance of such a defective condition was negligence and that actual notice was not necessary due to the long continued existence of the condition.

At times, pupils have been injured while obeying the teacher's orders as the following case illustrates. An eight year old was told to water some plants in a conservatory which was used for nature study. The plants were suspended about four feet above the concrete floor. The teacher knew the youngster was using a chair to enable her to reach the plants, and that she was using a milk bottle for a water container. The child slipped and fell, cutting herself on the broken glass of the bottle. The court felt that the injury could not be predicated on the teacher's

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[117]Dawson v. Tulare Union High School District, 98 Cal. App. 138, 276 Pac. 424 (1929); and see Huff v. Compton City Grammar School District 92 Cal. App. 44, 267 Pac. 918 (1928); Popow v. Central School District, 277 N.Y. 538, 13 N.E.2d 463 (1937).

negligence since the act of caring for the plants was part of the educational process.[118] Neither was there liability when a teacher told some students to bring a stage flat from another room where many were stacked against the wall. The particular one which the boys were directed to procure was on the bottom. As the students attempted to extricate it, the boy holding up the flats, being unable to support them any longer, moved aside and let them fall. The flats fell on another student who had entered the room at her teacher's request to get some paint. The judge commented,

> In conducting class work a teacher must frequently give directions. While carrying out such directions, the student may, in many ways, act without due care. But for their negligence in such matters the statutes have not gone to the extent of imposing a liability on the school district.[119]

But in a New York case[120] in which a student procured a seven foot pole with which to open windows at the principal's request, and was injured by shattered glass when the pole hit a light globe, the court found the principal negligent in having an eleven year old open windows and in not supervising the act. The dissenting opinion objected on the grounds that school boards and districts are not

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[118]Gaincott v. Davis, 281 Mich. 515, 275 N.W. 229(1937).

[119]Hack v. Sacramento Junior College District, 131 Cal. App. 444, 21 P2d 477 (1933).

[120]Applebaum v. Board of Education, 297 N.Y. 762, 71 N.Y.S.2d 140, 77 N.E.2d 785.

insurers of safety for missions apparently so harmless in nature.

"There is marked distinction in law between the consequences of participation in an activity recognized as a part of the normal learning process and untoward events that may occur in carrying out assignments not strictly educational." (18, p. 24) Teachers are reminded that students are not messengers, and should not be sent off school grounds particularly if it is not necessary for the school program.

In an annotation on tort liability of schools, American Law Reports (5, vol. 160, p. 229) explains that a teacher may be found negligent if he orders or directs a pupil to perform an errand or task for the benefit of the teacher or class, and because of immaturity or inexperience of the pupil, or other factors such as recklessness of the student, an injury results.

At times the teacher must be absent from the classroom and liability may follow if an injury occurs which is a direct result of lack of supervision. (19, p. 37)

In an Ohio school the teacher for a class of defective and incorrigible pupils left the room to gossip. The pupils had milk in bottles and while the teacher was out, a seventeen year old boy, who was vicious and violent, threw a bottle at a younger boy, blinding him in one eye and impairing the vision in the other. This was the second attack

by the older on the younger boy. The court recognized, ". . . if a teacher is liable for malfeasance, there appears no sound reason why he should not be held liable for either misfeasance or nonfeasance, if his acts or neglect are the direct proximate cause of injury to the pupil," but felt this act might have occurred even in the presence of the teacher and that his absence was only a remote cause, if any.[121] The case has been criticized on the basis that the teacher should have foreseen that the accident might occur since there had been a previous attack. (45, p. 54, 87, p. 11 and 91, p. 355)

In another case,[122] a teacher was absent for approximately one hour and fifteen minutes while performing a task in the supply room. A boy entered the unsupervised classroom carrying supplies at the teacher's request and was hit in the eye with a pencil thrown by a boy at a third pupil. The court held that the teacher was not liable since the proximate cause of the injury was the unforeseen act of throwing the pencil. A vigorous dissent by Judge Conway noted: "When a large number of children are gathered together in a single classroom, without any effective control

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[121]Guyten v. Rhodes, 65 Ohio App. 168, 29 N.E.2d 444 (1940).

[122]Ohman v. Board of Education et al., 275 App. Div. 840, 88 N.Y.S.2d 273 (1949).

or supervision, it may reasonably be anticipated that certain of them may so act as to inflict an unintentional injury upon themselves or their classmates."

Harper says (49, p. 174), ". . . only where the dangerous conduct of the third person is expectable that negligence can be charged against one who makes such conduct possible, and this factor of foreseeability solves the problem of causation."

Leaving Classroom

The students must be supervised as they leave the classroom, but courts have not required a standard of care that would make a teacher liable if reasonable precautions have been taken.

A youngster was knocked down and stepped on by pupils descending the stairs. Monitors had been posted all along the way and the court felt there was no duty to supervise the students every step of the way.[123] Another court[124] came to the same conclusion on similar facts since rules had been promulgated and many precautionary measures taken. In a California case[125] a high school pupil was injured

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[123] Leibowitz v. Board of Education, 112 N.Y.S.2d 698 (1952).

[124] Thompson v. Board of Education of City of New York et al., 19 N.E.2d 796, 280 N. Y. 92 (1939).

[125] Reithardt et al. v. Board of Education of Yuba County et al., 111 P2d 440 43 Cal. App.2d 629 (1941).

during the ten minute interval between classes. The girl perched on a window ledge until class time and another student grabbed her ankles and caused her to fall. The court held there was no negligence on the part of the teacher since it would not be possible to follow each student from place to place.

Recess

A ten year old child in New York was blinded when hit in the eye with a goldenrod stalk during recess. A group of pupils had gone across the road and were playing in a ravine. Suit was brought against the district but there was no liability since the district's duty had been fully discharged by hiring a competent teacher and there was no dangerous condition on the grounds. However, the court noted:[126]

> At recess periods, not less than in the classroom, a teacher owes it to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances. . . .the danger lay in the probability that the pupils would play as they did. The effective cause of the plaintiff's injuries was a failure to protect the boys against themselves. Any dereliction in this aspect was the fault of the teachers, for which the trustees cannot be held to answer to the plaintiff.

An article in the University of Pennsylvania Law

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[126]Hoose v. Drum, 281 N. Y. 54, 22 N.E.2d 233 (1939).

Review (98, p. 234) about this case stated: "If there was a breach of any duty to supervise the child's activities arising from the in loco parentis relationship, recovery would have to be had in an action against the negligent teacher." Kramer, writing in the Insurance Law Journal (55, p. 598) thought the district would have been liable if the teacher had actual notice of the goldenrod throwing and supervision had not been furnished.

A California district was liable for a teacher's negligence in allowing boys to ride bicycles on the playground where small pupils were playing during recess.[127] The activity had been allowed for some weeks by the teacher who was on the playground with her pupils. One day a seven year old girl's leg was broken when she was struck and run over by a bicycle. The court based their decision on a California statute[128] which provides, "Every teacher in the public schools must hold pupils to a strict account for their conduct on their way to and from school, on the playground or during recess."

The decision in a Washington case[129] in which an eleven

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[127]Buzzard v. East Lake School District, 34 Cal. App.2d 316 93 P2d 233 (1939).

[128]California School Code, Sect. 5.543.

[129]Briscoe v. School District No. 123, 201 P2d 697, 32 Wash. 2d 353 (1949); and see Gattavara v. Lundin et al., 7 P2d 958 166 Wash. 548 (1932).

year old had her arm broken while playing keep away with a football during the recess, was based on a similar statute. However, even without such a statute the result would probably have been the same.

A demurrer on governmental immunity to an action brought as a result of injury sustained when an elementary school child was pushed down on the playground was overruled in a 1954 case. ". . . (the) defense of governmental immunity does not avail as against a cause of action founded on nuisance created by positive act."[130]

Rosenfield (80, p. 70), expressing concern over the appalling number of accidents during recess, says parents have as much right to expect adequate supervision during recess as during class periods.

School Grounds

As a teacher in Nevada approached the school one morning she stepped on a rock and was injured. The accident occurred just outside the fence delineating school property, and the question arose when she applied to the Nevada Industrial Commission for Workmen's Compensation, whether or not she was engaged in school business at the time.[131] The

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[130]Sestero v. Town of Glastonbury et al., 110 A2d 629, 19 Conn. Super. 156 (1954).

[131]Nevada Industrial Commission v. Leonard, 58 Nev. 16, 68 P2d 577 (1937).

teacher contended she was watching her step but at the same time observing the children at play on the school grounds. To quote the court:

> We are clearly of the opinion that the Nevada statute requiring public school teachers to hold pupils to a strict account for their conduct on the way to and from school, and on the playground and during any intermission, imposes upon such teachers, not merely the duty of disciplining pupils after learning of any misconduct on their part, but the further duty of observing their conduct to the end that they may be properly dealt with in the event of any misconduct. It is not sufficient, under this statute, that teachers apply disciplinary measures to pupils whose misconduct may be reported to them or may come under their observation by mere chance. The duty of teachers, under said statute, extends further than this, and they must, to a reasonable extent, watch the pupils for the purpose of seeing to it that their conduct, while on their way to and from school, on the playgrounds, and during all intermissions, is proper.

In an action brought against a school district based on negligence of a teacher, the evidence was to the effect that school boys removed the teeter board and placed it on a swing. When the school bell rang, one boy jumped off and ran to the building. The teeter board fell on the other boy's ankle causing injury. The court stated about the teacher on duty on the playground, "If the teacher knew it, it was negligence to permit it, and, if she did not know it, it was negligence not to have observed it."[132] But

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[132]Bruenn v. North Yakima School District No. 7, 101 Wash. 374, 172 Pac. 569 (1914).
Rice v. School District No. 302 of Pierce County, 140 Wash. 189, 248 Pac. 388 (1926).

courts of the same state did not feel there was dereliction of duty when high school boys took a girl to a darkened room under the bleachers and raped her. The act occurred during the noon intermission and the teacher who was supposed to supervise the gym at that time was absent. This was an unforeseeable contingency and the district could not have been expected to anticipate it.[133]

There was lack of proper care when 100-150 children were restricted to an area 180 x 120-130 feet. Quarrels and fights had occurred on several occasions. In the instant case[134] two boys quarrelled and fought--one twisting the other's leg, despite his screams, until it broke. The court observed that the teacher who was in close proximity would and should have prevented the injury if she had used ordinary or any reasonable care to observe the conduct of the children under her supervision. Negligence could also be found in assigning only one teacher to supervise so many children.

Another example of injury due to improper supervision on the part of teachers occurred during a noon recess, as the pupils played hide and seek. A French door leading to the auditorium was used as home base. A little girl in her

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[133]McLeod v. Grant County School District No. 128, 255 P2d 360, 42 Wash. 316 (1953).

[134]Charonnat v. San Francisco Unified School District, 56 Cal. App. 2d 840, 133 P2d 643 (1943).

eagerness to touch base, pushed her arm through the glass and received a severe cut. The two teachers on duty on the courtyard had gone elsewhere, and the frightened child ran about the yard until caught by an older student and taken to the nurse. Subsequently the child died from loss of blood. The court explained,

> Among the rules and regulations promulgated by the state board of education governing the duties of school principals and teachers, and which are doubtless founded on the rule of liability under the common law, are the following: Where special playground supervision is not provided (and admittedly there was none here), teachers shall supervise the conduct and direct the play of the pupils of their classes in the school or on the school grounds during intermissions and before and after school.[135]

Although the question of the teacher's negligence was not passed on directly in the following case,[136] the court said there was evidence which required a finding that the teacher had failed in her duty to supervise. The teacher who was on duty at noon watched the children on the schoolground from a window. Unfortunately, the window did not afford a view of the entire area and she was unable to see a fire escape on which the lower exit door was broken and would not stay shut. A child climbed to the top, fell and

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[135] Ogando v. Carquinez Grammar School District of Contra Costa County et al., 75 P2d 641, 34 Cal. App.2d 567 (1938).

[136] Miller v. Board of Education, Union Free School, District No. 1, Town of Albion, 291 N.Y. 25, 50 N.E.2d 529 (1943).

was injured. Neither was negligence attributed to the teacher when a child was struck in the eye with a rubber ball. The court decided there was adequate supervision on the playground and a rubber ball was not inherently dangerous.[137]

In another playground mishap, a rock batted by a pupil hit an eight-year old in the eye. The principal who usually supervised the school yard, had gone into the building to answer the phone. The court recognized that the incident might have happened even if a teacher had been present and that, "Teachers could not be expected to watch all movements of pupils."[138]

Areas Requiring Higher Degree of Care

Some activities of modern schools entail a greater risk of injury than others. Industrial arts classes which provide planers, saws, and other power tools may be dangerous if the implements are used improperly. Laboratories, physical education classes, athletics and field trips increase the possibility of accident if sufficient caution is not exercised. In these areas the standard of care

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[137]Graff v. Board of Education of City of New York, 15 N.Y.S.2d 941, 258 App. Div. 813 (1939).

[138]Wilbur v. City of Binghamton et al., 66 N.Y.S.2d 250,271 App. Div. 402 (1946).

expected of a teacher is higher. According to American Jurisprudence,

> Generally speaking, the degree of care required of one is graduated according to the danger attendant upon the activity which he pursues or the instrumentality which he uses. The greater the danger the greater the degree of care which is required. (3, vol. 38, pp. 677-678)

Because of the number of cases and the language of the court in these decisions, these areas will be dealt with separately.

Chemistry

A teacher was performing a demonstration experiment for the class when an explosion occurred which blinded a student. The cause of the explosion was not determined, but it could have been the result of defective appliances, presence of combustible material in the test tube, impure chemicals or improper application of heat. The court in affirming an award of $15,000 said,

> . . . if the jury found that the thing which exploded or caused the explosion was under management of defendant or their employees, and that the explosion was such as in ordinary course of things does not happen if those who have management use proper care, it afforded reasonable evidence, in absence of explanation by defendants, that the accident arose from want of care on part of defendants.[139]

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[139]Damgaard v. Oakland High School District of Alameda County, 298 Pac. 983, 212 Cal. 316 (1931).

In another chemistry class the students were performing an experiment with gun powder. The students were supposed to follow directions in their laboratory manuals, but one student dumped the ingredients into an iron mortar and ground them together instead of pulverizing each separately. He also used potassium chlorate instead of potassium nitrate. The teacher was present in the laboratory and standing about fifteen feet away when the material exploded. The student lost a hand and an eye and sustained further serious injury. The appellate court stated:

> It is 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 instruction to follow the text. This would seem to be particularly true when young and inexperienced students are expected to select from similar containers a proper harmless substance rather than another dangerous one which is very similar in appearance.[140]

The court questioned whether the value of such an experiment in an introductory course offset the dangers and admonished that if it were to be performed, ". . . it necessarily required the strictest personal attention and supervision of the instructor."[141]

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[140]Mastrangelo v. West Side Union High School District, 2 Cal. 2d 540, 42 P2d 634 (1935).

[141]Ibid.

There was no liability on the part of the school when students persuaded a custodian to let them enter a supply room, from which they stole chemicals.[142] Subsequently, they gave some to another student who was injured when he improperly mixed them, causing an explosion. The chain of causation was broken by the intervening action of the boys in stealing the chemicals.

Shop Classes

There are many potentially dangerous instrumentalities in industrial arts classes, according to the cases, but injuries caused by power-driven saws and planers outnumber the others. In many of the cases the guard was missing,[143] the tool was out of adjustment,[144] or was not used according to instructions.[145]

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[142]Frace v. Long Beach City High School District, 137 P2d 60 (Cal. 1943).

[143]Kerchoff v. City of Janesville, 255 Wis. 202, 38 N.W.2d 698 (1949).

Bowman v. Union High School District No. 1, Kitsap County, 22 P2d 991, 172 Wash. 299 (1933).

Golish v. School District of the Borough of Windber, Somerset County, 15 Som. 125 (Penn. 1950).

[144]Fulgoni v. Johnson, 19 N.W.2d 542, 302 Mass. 421 (Mass. 1939).

[145]Klenzendorf et al. v. Shasta Union High School District et al., 40 P2d 878, 4 Cal. App.2d 164 (1935).

Often the alleged basis for liability is the lack of instructions in the proper use of the tool.[146] Where there is conflicting evidence as to whether or not the students were duly prepared, it will be determined as any question of fact.[147]

A sixteen year old student in an industrial arts class knew that the purpose of the guard was to prevent injury. However, the fence to guide the wood had been broken for some time and it was difficult to use the guard without the fence. The boy had seen other students and also the teacher use the saw without the guard, but when he attempted to do so his fingers were injured. To the defense that the boy was guilty of contributory negligence the court said,

> Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by such danger. The doing of an act with appreciation of the amount of danger in addition to mere appreciation of the danger is necessary in order to say as a matter of law that a person is negligent.[148]

The following case[149] created a great deal of interest

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[146]Henry v. Garden Grove Union High School District of Orange County, 7 Pac.2d 192, 119 Cal. App. 638 (1932).
Ridge et al. v. Boulder Creek Union Junior-Senior High School District of Santa Cruz County, 140 P2d 990, 60 Cal. App.2d 453 (1943).

[147]Henry v. Garden Grove, supra.

[148]Ridge et al. v. Boulder Creek, supra.

[149]Grosso v. Witteman, 266 Wis. 17, 62 N.W.2d 386 (1954).

on the part of teachers. (77, pp. 130-132) A fifteen year old student in industrial arts course helped the teacher clean the oil room where paints, acids, inflammable liquids and other material was stored. They found an unmarked bottle of acid which they took out to dump on ashes. There were no ashes, so they returned to the oil room and the teacher placed the bottle on a steel shelf that was fifty-four inches above the floor and was not subject to any vibration. The bottle was about the size and shape of a quart Mason jar and was approximately three-fourths full. A day or two later the plaintiff and another student volunteered to scrape wax off of the floor of the oil room. While they were thus engaged they began scuffling and the bottle was knocked from the shelf. The plaintiff was burned by the chemicals. The bottle was found minus its cork, but there was no finding of fact as to what exactly happened. The teacher had warned the boys of the danger. The trial court found that 55% of the negligence could be attributed to the defendant and 45% to the plaintiff. However, the court granted the defendant's motion for judgment notwithstanding verdict and dismissed the complaint. This judgment was affirmed by the appellate court which took into consideration that the plaintiff was not a child of tender years and the bottle was knocked over by careless acts of the plaintiff in disregard of the teacher's warning.

In an auto mechanics course, an experienced student was assigned to adjust the tappets in a car. He stepped on the starter while the car was in gear and the car backed up and pinned another student against the bench. The injured student brought suit against the teacher and the district. The court found no evidence of negligence since the teacher had established safety rules and had frequently repeated them. The question was brought up whether or not negligence could be imputed to the teacher for not scrutinizing the students more carefully. The answer was negative, since the student had received two years of training, owned his own car, had been issued a driver's license and had never been observed taking chances.[150]

In another case[151] while a student at the teacher's request assisted in moving an automobile from one room to another, the motor became dislodged and injured the student's hand. Suit was instituted against both teacher and the board but action against the former was dropped. Judgment for the pupil was upheld by the appellate court.

A class in oxyacetylene welding proved disastrous for a student in California.[152] The teacher was told that the

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[150]Perumean v. Wills et al., 8 Cal.2d 578, 67 P2d 96 (1937).

[151]Reeder et al v. Board of Education of City of New York, 290 N. Y. 829, 50 N.E.2d 236 (1943).

[152]Maede v. Oakland High School District of Alameda County, 298 Pac. 987, 212 Cal. 419 (1931).

gauge on the tank was leaking. He procured another which was attached to the tank but when the pressure was turned on, the gauge blew out blinding a student in one eye. Later it was found that the replacement gauge did not have the capacity to withstand high pressure. The injury was the result of the instructor's negligence, and he had constructive, if not active, notice that the gauge was not proper. The $35,000 award of the lower court was reduced to $16,000 by the appellate court.

Another injury caused by inadequate supervision was in evidence in a New York court.[153] A student brought the barrel and breech mechanism of a .22 caliber rifle to the machine shop class to be repaired. After he had completed his work, the teacher inspected the gun. Shortly thereafter the student tested the gun in the classroom with a live bullet. Govel, another student, was shot in both arms. The teacher did not know the boy had live ammunition with him and did not see him load or fire the gun. Action was brought against the teacher and the board. Although the latter could not be liable under respondeat superior, the court said they had failed to enact rules as to care and supervision of students when guns or other inherently dangerous instrumentalities were brought into the class

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[153]Govel v. Board of Education, 267 App. Div. 621, 48 N.Y.S.2d 941 (1939).

for repairs.

The teacher was found to be negligent when a student stepped on a treadle of a machine, injuring another student who was using it.[154] The teacher was standing about nine feet away. The court said there was evidence from which the jury could find negligence in failing to have the machine locked, or in leaving machines unattended over an unreasonable period of time, or in the teacher's failure to observe whether the machine was being used or tampered with. (81, p. 31-2)

In another state, an accident to a student who was cleaning a printing press was caused by a fellow student moving the flywheel. In that case[155] the teacher was not liable since the court found that the act of the other student in moving the flywheel was the proximate cause of injury. His action was an intervening agency which broke the chain of causation between the accident and any conduct of the teacher. It must be noted that the court pointed out that the machine was installed for school work and this was part of the course.

There was no legal duty on the school board to provide protective aprons to students in class, said the court when

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[154]DeBenedittis v. Board of Education, 271 App. Div. 886, 67 N.Y.S.2d 30 (1946).

[155]Taylor v. Kevlin, 1 A.2d 433, (1938).

the point arose after a student's slipover sweater was caught in an electrically driven power lathe.[156] In an effort to extricate it, the student's thumb was crushed and had to be amputated. The lower court found no negligence in the teacher's actions and the appellate court revised the holding against the board.

Negligence was not proved in failing to provide goggles for students where aluminum was being pounded.[157] They were required to wear protective goggles when using the emery wheel, but no other task was deemed dangerous enough to require them. One student in class had been assigned written work and when it was completed he walked over and stood about twelve feet from a vise where others were pounding aluminum. A sliver pierced his eye. There was no evidence to show that this would be expected to happen.

In a 1953 California case,[158] the appeal court said the questions of negligence and contributory negligence should have been answered by the jury, and set aside a judgment of nonsuit. In that case a teacher requested a student to polish some silver rings on reins which belonged

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[156]Edkins v. Board of Education, 261 App. Div. 1096, 26 N.Y.S.2d 996 (1941).

[157]Goodman v. Pasadena City High School District, 4 Cal. App.2d 65, 40 P2d 854 (1935).

[158]Ross v. San Francisco Unified School District 260 P2d, 663, 120 Cal. App.2d 185 (1953).

to the teacher. He had been a student in the metal class the year before and had learned the safety rules in using the buffer. He did not complete the task that day and the teacher sent for him while he was in his mathematics class the next day. Another teacher was in the metal room and the student requested him to turn on the power. The teacher asked if he had goggles and his reply was affirmative. Unfortunately, the strap broke, and being unable to find another pair of goggles in good order, he buffed without them. The long pliable leather strap caught in the buffer and a sliver from the ring broke and flew into his eye. The court said negligence could be found in the maintenance and supervision of the buffer, failure to have goggles on hand, failure to see that the student wore the goggles and failure to warn the student about the type of item being buffed. Contributory negligence could be based on the almost sixteen year old student's knowledge that glasses should be worn. The case was returned to the lower court for rehearing.

In Maine, students were constructing a manual training building under the supervision of two industrial arts teachers. No student was required to participate and none were allowed if permission from parents had been refused. Credit, but no salary was given. Two students were sent to clear the snow from the staging and the roof when a ledger board from the window sill to the outside upright broke in

the vicinity of a knothole. One of the students was thrown to the ground and injured. The appellate court reversed the lower court's decision in favor of the defendant on the grounds of improper instructions to the jury. The appellate court recognized that in Maine ". . . a public officer is liable not only for his own affirmative act of negligence but as well for his own negligent inaction."[159]

Tischendorf (94, p. 50) warns that "the teacher has the responsibility to anticipate danger or an accident and to remove the circumstances which may cause the accident. Should the teacher fail to act, he is negligent."

Physical Education

There have been many cases where liability stemmed from an injury incurred during participation in physical education or athletics, but unless the courts found negligence, there was no liability. In a California school, students were shooting baskets during a free-play period. The teacher was not refereeing the game but was in the gym engaged in covering the windows. The ball went out of bounds and when a student threw it back in, it hit Howard Kerby, a sixteen year old, robust student, on the forehead. Howard died the next day. An autopsy revealed that an aneurism of the cerebral artery had ruptured. The court

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[159]Brooks v. Jacobs, 139 Me. 371, 31 A.2d 414(1943).

found that the blow on the head was not the result of negligence since the boy was proficient at basketball, knew the rules, refereeing was not customary during free play, and basketball was part of the required course. The court cautioned that even though no one knew of the aneurism, if negligence had been the cause of the blow that resulted in death, liability would have resulted.[160]

In another case the members of a class composed of the tennis team and aspirants for that position, were told to remain in the vicinity of the dressing room or foyer of the gymnasium and that roll would be taken at the end of the period. The teacher went to his office to make out brackets for the tennis tournament to be held that afternoon. Some of the boys changed their clothes and went into the gym where they played handball or batted tennis balls with their hands. As the shower bell rang, a boy turned and ran into the line of flight of a tennis ball which hit his rimless glasses, breaking them and injuring his eye. The court held,

> The teacher was engaged in other work in the line of his duty, in connection with a tournament which was directly connected with the activities of this class. In view of his duties and the nature of the class and its purposes, it cannot reasonably be said that the teacher was negligent in failing to be with and to watch these boys during this time, or that proper supervision would have required a

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[160]Kerby v. Elk Grove Union High School District, 1 Cal. App.2d 246, 36 P2d 431 (1934).

person of ordinary prudence to prevent the activity in the first place, or to stop the game.[161]

The court found negligence on the part of a teacher in her instructions to a pupil during the required course in physical education.[162] The youngsters were engaged in playing ball and at the teacher's direction, a ten year old boy stood to the left of and about three feet behind the boy "at bat." The bat flew from the batter's hands knocking out the schoolmate's front teeth.

It was also negligent for a teacher to take his physical education class out into the street to play since he knew the street was open to traffic.[163] A student was hit by a car during a game of association football. The lower court dismissed the suit against the teacher and the district, but the appellate court reversed and remanded the case. However, there was no liability when students injured a pedestrian while racing on the sidewalk where the class had been sent, since there was not enough room indoors.[164]

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[161]Wright v. City of San Bernardino High School District, 121 Cal. App.2d 342 (1953); and see Ellis v. Burns Valley School District 18 P2d 79, 128 Cal. App. 550, (1933). Katterschinsky v. Board of Education 212 N.Y.S. 424, 215 N.Y. App. Div. 695 (1925).

[162]Kenney v. Antioch Live Oak School District, 18 Cal. App.2d 226, 63 P2d 1143 (1936).

[163]Lee v. Board of Education, 263 App. Div. 23, 31 Y.Y.S.2d 113 (1941).

[164]McDonald v. Brozo, 285 Mich. 38, 280 N.W. 100 (1938).

Crowded condition of the gym was the basis of liability when forty-eight boys were playing basketball in an area measuring 80 x 43 feet.[165] The boys were moving rapidly, eight games were in session and the sidelines were contiguous or overlapping. The court held that such a crowded condition created a danger from which injury should have been anticipated. A crowded swimming pool was not acceptable basis for liability when evidence showed that a teacher and several assistants fulfilled the need for proper supervision.[166]

Although the condition of the premises can be the basis for liability,[167] to allege simply that the gymnasium was narrow, walls rough, the floor was sagging, and some of the boards were slightly raised at one end, is not sufficient grounds for liability unless these conditions were the causative factors of injury. This was the state of the premises in a Washington school. However, the injury of which the student complained was caused by someone hitting him with an

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[165]Bauer v. Board of Education, 285 App. N. Y. 1148, 140 N.Y.S.2d 167 (1955).

[166]Maurer v. Board of Education 294 N. Y. 672, 60 N.E.2d 759 (1945).

[167]Dawson v. Tulare Union High School District, 276 Pac. 424, 98 Cal. App. 138 (1929); Howard v. Tacoma School District No. 10, 88 Wash. 167, 152 Pac. 1004 (1915); Bradley v. Board of Education, 286 N.Y.S. 186, 245 App. Div. 649 (1936); Contra, Medsker v. Etchison, 101 Ind. App. 369, 199 N.E. 429 (1935).

elbow, knee, or foot as he leaned over to retrieve the ball. He also blamed the teacher since he was participating in the game and couldn't properly observe the students. The court said,

> Schools are not insurers of safety of those who participate in their athletic activities . . . . It is an elementary proposition that a liability for injuries cannot be predicated upon conjecture or speculation. It must be based upon actual proof both of negligence and of a causal relation between that negligence and the injury sustained.[168]

The following cases represent very violent incidents, all of which could have been prevented had the teacher used a reasonable amount of care.

In a class in physical education in New York, a teacher told two students to box three rounds. Neither boy had received any instruction in that sport. The teacher watched from the bleachers as the blows were exchanged. In the second round a blow on the temple resulted in a cerebral hemorrhage for one of the boys. It was necessary to perform a trephening operation to drain the hemorrhaged blood from his skull and another operation to remove fluid from the spine.

These are the words of the court:[169]

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[168]Read v. School District No. 211 of Lewis County, 7 Wash.2d 502, 110 P2d 179 (1941).

[169]LaValley v. Stanford, 70 N.Y.S.2d. 421, 272 App. Div. 23, (1941).

> It is the duty of a teacher to exercise reasonable care to prevent injuries. Pupils should be warned before being permitted to engage in a dangerous and hazardous exercise. Skill-boxers are at times injured. . . . (the students) should have been taught principles of defense if indeed it was a reasonable thing to permit a slugging match of this kind.

In a Montana case[170] the principal, who was also a coach of the field event of shot-put, asked a student who was not on the track team to stand near the spot where the shot would fall and mark the place. The boy walked over and the principal, without any warning, threw the heavy shot, hitting the boy in the head and inflicting serious and permanent injuries. Action was instituted only against the school district which escaped under the cloak of governmental immunity. The court remarked that, "It is unquestioned that physical training is part of the educational duty entrusted to the public schools." There was no necessity to consider whether or not placing the boy in that position was the proximate cause of the injury, but a different conclusion might have resulted had the principal-coach been named defendant.

A tennis coach undertook to arrange for transportation for those students on the tennis team who stayed at school after the school buses had departed. One of the boys agreed

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[170]Bartell v. School District No. 28, 114 Mont. 451, 137 P2d 422 (1943).

to take students home and was paid with one gallon of gasoline from the school pump for every ten miles he traveled. He drove a 1930 Ford roadster stripped down to what is known as a "bug", without a horn, runningboard or top. It had a special carburetor and a high compression head. The teacher had seen the car but had never examined it. He testified that he thought the boy was a "harum-scarum driver" and explained this phrase as meaning a tendency toward recklessness. The teacher had never cautioned the driver. After class on the way home one day, while driving about fifty five miles per hour, the boy attempted to pass a slowly moving car which turned to the left without signaling. In the accident, one girl was killed and another seriously injured. The district defended on the grounds that the boy was not their agent since he was not hired by the board of trustees; the teacher had no authority to furnish transportation and the district had no right to furnish transportation without bids. A judgment for the defendants was reversed by the appellate court for this reason,

> Whether or not the teacher in charge of this class was authorized to provide transportation to their homes for the pupils participating therein, if he undertook to do so as a part of his conduct of the class and as a thing essential to the continuance of the class, it was his duty to use such ordinary care in connection therewith as would have been exercised by a reasonably prudent person under the circumstances, and if he failed to do this he would be guilty of negligence.

The court questioned whether a reasonably prudent person would have acted as the teacher did, knowing the condition of the car, the driver and that six students were to accompany him. It was at least a question of fact and could not be held as a matter of law that such action was not negligent.[171]

A high school coach requested the use of the gymnasium for the initiation of lettermen into the "H" club. It was customary to give the new members mild electric shock as part of the ceremony. On this occasion since there was no transformer available as had been used before, some of the boys prepared a jar of water with salt in it to be used for a rheostat. The light socket to which the wires were attached carried 117-120 volts. Each blindfolded candidate, dressed only in shorts, was escorted in separately and made to lie down across parallel wires. A glass of water was set on his chest or handed to him, then current was turned on, which caused him to jump and spill the water over himself. After the fourth initiate complained of the strength of the shock, the boys emptied half of the solution from the jar and filled it with city water. The floor was mopped and the coach tested the current between candidates, but his hand was only on two of the eight wires. When the cur-

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[171]Hanson v. Reedley Joint Union High School District, 43 Cal. App.2d. 643, 11 P2d 415 (1941).

rent was applied to Gerald DeGooyer, he raised up, said, "Oh my God!" and fell to the floor. He was dead by the time the doctor arrived. The court held the superintendent of the schools blameless although he was the one who gave permission to use the building, for he had no duty to be present since the coach was to be there. The court commented that the coach was charged with the knowledge that electricity is dangerous and this danger increases when a person is in contact with a damp surface, the rheostat was hastily contrived and the wires were not all tested at once. The high degree of duty that he owed to the boys was not observed.[172]

Tumbling and Apparatus Classes

In two very similar cases[173] students received broken arms in attempting to jump over gymnasium horses. In both instances the students had been instructed, mats were properly placed and the teachers were competent. There was no negligence in either. (39, p. 64) The court reached a different decision in another case in which the student was to jump on a spring board, then somersault over parallel

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

[173]Kolar v. Union Free School District, 8 N.Y.S.2d 985 (1939); Sayers v. Ranger 83 A.2d 775, 16 N. J. Super. 22 (1951).

bars which were draped with mats. This exercise was not a part of the prescribed course of study. When the plaintiff attempted the stunt, he landed on the unmatted floor and broke his leg. Another student had broken his arm performing the same stunt two days before. Since the board had established rules and had hired a competent teacher they had fulfilled their obligation, but of the teacher the court said,

> It is the duty of a teacher to use reasonable care to prevent their injuries; to assign pupils such exercises as are within their abilities and properly and adequately to supervise their activities. Failure to do so constitutes actionable negligence.[174]

A simple balance beam was the cause of injury when it was used on a newly oiled floor and the beam had recently been varnished. The district recognized that this was a negligent action but it denied liability under governmental immunity. The court failed to agree and observed that

> . . . the jury might have found that the negligence of the defendant's employees in placing the beam upon slippery floor had resulted in a continuing condition, the natural tendency of which was to create danger and to inflict injury upon all children using it and that, as matter of fact, a nuisance was created by the use of the beam upon the floor.[175]

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[174]Govel v. Board of Education, 84 N.Y.S.2d 299, 267 App. Div. 621 (1944).

[175]Bush v. City of Norwalk, 122 Conn. 426, 189 A. 608 (1937).

If the district were liable for nuisance, it would be liable here.

An example of the far reaching duty required of a teacher is found in the following California case. Students in a tumbling class were required to perform ten stunts in order to get credit, additional ones up to eighteen could be mastered for higher grades. A sophomore girl volunteered to perform the extra number. Before the final day she had successfully executed what was known as "a roll over two", which was one of the last of the eighteen to be performed. However, when attempting this for the grade, her arm flexed as she landed, and her skull was fractured. There was a great deal of conflicting testimony but the evidence showed that she had been reluctant to take the course, but none other was open to her; her knee had been injured about two weeks prior, older students had assisted in the instruction. The jury found the stunt was inherently dangerous, and that it was common knowledge that some students show more aptitude for physical education than others, requiring the teacher to consider the ability of each in selecting exercises. The appellate court thought the $15,000 award was excessive and reduced it to $5,000. This was a split decision and three judges dissented since this was a part of the required course, the state adopted text was followed, the teacher was competent, and negligence was not estab-

lished--just implied.[176]

Tumbling, as a part of the required physical education course, was strongly criticized by a court in New York.[177] An eleven year old student dislocated a cervical vertebra while attempting to do a headstand. At the time of the accident, the class was being conducted by a practice-teacher, a third-year student at a state normal school. The prescribed syllabus was being followed and the youngster had performed this stunt before. According to the law of that state, a physical education teacher must complete an approved four-year course. The court reproached the defendants in this manner:

> They compelled a child of tender years to participate in a dangerous exercise without any attempt to comply with the rule relating to supervision adopted by the Board of Regents. . . . If children are forcibly taken from their parents and guardians by the State and compelled to perform such fantastic and perilous antics as the head stand, then the State should be held strictly to account for the safety of the children. Compelling children, especially young girls, to stand on their heads and turn somersaults as part of their education, is distinctly unique and novel. Perhaps our notions on the subject of education are outmoded but the view that exercises such as these form a necessary part of education impresses us as being absurd.

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[176]Bellman v. San Francisco High School District, 11 Cal.2d 576, 81 P2d 894 (1938).

[177]Gardner v. State of New York, 281 N. Y. 212, 10 N.Y.S.2d 274 (1939).

Football

A football player received injuries to his back and spine during practice. Two weeks later the coach requested him to play even though he knew, or should have known, that the boy had not yet recovered. As a result of playing, he suffered serious back and internal injuries which progressed into tuberculosis of the spine, necessitating a number of major operations. The court remarked:[178]

> . . . that if the school district organized and maintained a football team and one of its teachers, with the knowledge and consent of the board of directors, acted as coach and trainer thereof, and if the coach knew that a student in the school was physically unable to play football, or in the exercise of reasonable care should have known it, but nevertheless permitted, persuaded, and coerced such student to play, with the result that he sustained injuries, the district would be liable.

In a 1952 Georgia case,[179] a football player's shoulder was injured in practice. The coach later ordered him to play although he complained he was not well. His shoulder received further injury. The court, in considering that the student was sixteen years old and aware of the dangers of the game, declared that there was no liability. The court recognized that physical education, including

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[178]Morris v. Union High School District, 294 Pac. 998 (1931).

[179]Hale v. Davies, 86 Ga. App. 126, 70 S.E.2d 923 (1952).

athletics, was a part of the governmental function of the school and immunity precluded recovery for tort actions. The coach could not be liable for simple negligence.

Unfortunately for the injured student, a school district in Minnesota was not liable even where the court admitted there had been negligence.[180] A student on the football team was tackled and his face came in contact with the unslaked lime that had been used to mark the field. Vision was destroyed in one eye and impaired in the other. Failure of the district to perform a governmental function or negligence in the performance thereof was not actionable, whether termed nuisance or mere negligence.

Even touch football can be hazardous as was shown when a seventh grade played the eighth grade during the noon free-play period. Instruction in the sport was given during the physical education class and the teacher refereed during the noon period. A seventh grader, who was fourteen-years, ten-months old and weighed 145 pounds, struck an eighty-five pound, thirteen-year old seventh grader in the abdomen. His spleen and left kidney had to be removed as a result of the blow. In this action against the teacher, the principal and the district, the court found that classification of teams according to grade was used throughout the

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[180]Mokovich v. Independent School District 177, Minn. 446, 225 N. W. 292.

state, for there might not be sufficient players if the boys were selected according to size and not all would have a chance to play. Besides, evidence showed that touch football was not a dangerous or rough game, and the boys were well instructed and experienced. There was no legal basis for negligence.[181]

Emergencies

When a pupil is injured a teacher is under the duty to secure first aid and, if it is deemed serious, notify the child's parents or a doctor. Failure to render aid may result in charges of criminal negligence as well as a civil suit. (71, p. 32) As a New Jersey court pointed out,[182]

> The emergency from which would arise the stipulated duty can be said to exist when a reasonable man having the knowledge of facts known to the teachers, or which they might reasonably be expected to know would recognize a pressing necessity for medical aid, and the dictates of humanity, duty and fair dealing would require that there be put in the boy's reach such medical care and other assistance as the situation might in reason demand so that the pupil might be relieved of his hurt and more serious consequences avoided.

In that case a boy's shoulder had been dislocated during football practice. The coach snapped it back in place

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[181]Pirkle v. Oakdale Union Grammar School District, 40 Cal.2d 207, 253 P2d 1 (1953).

[182]Duda v. Gaines, 12 N. J. Super. 326, 79 A2d 695 (1951).

and sent the boy to a doctor. The doctor put his arm in a sling and advised no football for two weeks. At the end of that period of time, the lad attended practice session and his arm was again dislocated by the first tackle. The arm went into place unaided as the coach assisted the boy to his feet. He went to the shower room, dressed, put his arm in a sling and went home. It was three days before he sought the advice of a physician. He sued, claiming he did not receive proper care in an emergency situation. The court found differently on the facts just stated.

In another example of a charge of negligence for failure to procure medical attention promptly,[183] a boy was injured while playing touch football and was sent to the first aid room to lie down. The principal covered him with a blanket. Later the physical education teacher went in to see how he was. When the boy urinated the teacher noticed blood in the specimen and took him home. This was about two hours after the injury. The court decided there was no negligence since a doctor testified that a layman couldn't have discovered the injury sooner and delay did not cause further damage.

The reader is asked to recall the previously mentioned

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[183]Pirkle v. Oakdale Union Grammar School, Supra.

case in which a little child plunged her arm through the French door which was home base for the noon hide-and-seek game.[184] The presence of a teacher on the school yard might have prevented the accident or might have meant saving the girl's life by administering first aid.

The authority and obligation to render first aid does not entail a greater degree of care than that of the ordinary prudent parent under similar circumstances. Courts do not expect teachers to be physicians, but the scope of the treatment will vary with the degree of skill possessed by the teacher. (71, p. 33)

The teacher's authority does not extend to other than first aid treatment and even in case of emergency, if his bungling treatment aggravates the condition, he is liable. (71, p. 33) In a 1942 Pennsylvania case,[185] a ten year old boy named Anthony had an infected little finger. The teacher noticed it during recess when he was playing ball, and told him to report to the office after school. At that time, the teacher placed a pan of water on a hot plate and heated it to the boiling point. With the assistance of another teacher who held a paper towel over Anthony's face, the teacher immersed his hand in the water and held it there

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[184] Ogando v. Carquinez, 24 Cal. App.2d 567, 75 P2d 641 (1938).

[185] Guerrieri v. Tyson, 147 Pa. Super. 239, 24 A2d 468 (1942).

for ten minutes. When his hand was withdrawn from the water, it was covered with blisters which the teacher opened with a needle. The boy who was in great pain was taken home by the teacher. He was hospitalized for twenty-eight days and his hand was permanently scarred. The court held the teacher, being in loco parentis but under delegated authority, had no delegation of authority to exercise lay judgment as a parent would in matter of treatment of injury or disease. There was no emergency, the teachers were not nurses, nor had they had medical training. Whether or not treatment was necessary was a decision for the parents.

Leipold (57, p. 42) makes a wise suggestion, "A good rule to follow is this one: When in doubt about treatment, don't. Call the parents or the child's doctor." In case of a serious injury where the services of a physician are necessary, Cohler (21, p. 31) advises, "Although the consent of the parent is not required to authorize such professional first aid, a decent consideration for the parent and the school-community relations demands that the parent be informed and his consent asked whenever possible."

Field Trips

Field trips have become an accepted part of the educational experience, and with the hundreds of students participating in these excursions away from school, it is

a wonder that there has been so little litigation on the subject. In none of the cases has a teacher been named as the defendant. Usually suit has been instituted against a host business firm, but in one instance, it was against a school district. Whether or not the company is liable often depends on the status of the students while at the place of business. As one court explained,[186] there was no duty owing to a bare licensee except to warn him of hidden dangers or traps, he must take the premises as he finds them. However, if a person is on the premises by invitation which is based on common interest or mutual advantage, he is classed as an invitee and there is a duty to use reasonable care.

In an early case on the subject,[187] the principal-teacher of a manual training school took thirty students on a trip through the power house. The president of the traction company had granted permission to the class on request of the principal. An employee showed the students around and cautioned them when they approached the dangerous machinery. After the group was taken to the basement of the building, the employee left them without further

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[186]Myers v. Gulf Public Service Corporation, 15 La. App. 589, 132 So. 416 (1931).

[187]Benson v. Baltimore Traction Co., 77 Md. 535, 26 A. 973, (1893).

warnings. One of the students was walking in a poorly lighted section when he fell into a vat that was flush with the floor. It was about two and a half feet deep and filled with boiling water. The court, in finding no liability for the traction company, took cognizance that the building was not used for exhibiting, permission had been sought to visit it, the vat was part of the appliances used -- not a man trap, and lack of light was not negligence on the company's part but on the students for groping around in a dark building where dangerous machines and appliances were used. The court admonished, "If there was negligence anywhere, it consisted in bringing thirty-odd boys at one time to a building filled with dangerous machinery."

In a similar case in Louisiana,[188] a principal requested permission to take a chemistry class to see how ammonia was used in making ice. The employee who guided the students warned them three times not to touch the copper wires which were six feet, three inches overhead. A boy slipped while walking over the cover of a vat and grabbed the wire to keep from falling. The current was on and the boy was electrocuted. Again the court found that the student was a bare licensee and must take the premises as he found them. Refer-

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[188]Myer v. Gulf Public Service Corp., 15 La. App. 589, 132 So. 416 (1931) and see Roe v. St. Louis Independent Packing Co., 203 Mo. App. 11, 217 S.W. 335 (1920).

ence was made to the previously mentioned case and the judge reiterated the view that if there was negligence it was in taking students to such a place.

An example of a decision based on the liability toward an invitee is found in a Missouri case.[189] A home economics class visited a bakery and dairy products company. The students were not accorded a choice but simply told they were going. The host company displayed a sign in their window which attested, "Inspection Invited." Classes had visited it regularly over the past five or six years. When a class was anticipated, the plant was cleaned and unnecessary machinery was turned off. The manager accompanied the classes and instructed the students in the method of handling the material. As the students listened to an explanation of the churn, several of them picked up bits of ice from a crusher nearby. The front of the crusher was broken which enabled the students to reach up into the machine. A fifteen year old girl reached for a piece of ice just as the manager turned on the churn. The crusher was powered by the same drive shaft and prongs of the machine caught and mangled the girl's arm. The court accorded the girl the status of an invitee on the basis that the evidence showed a general invitation to the public as prospective customers,

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[189]Gilliland v. Bondurant, 332 Mo. 881, 59 S.W.2d 679 (1933).

as a part of the defendant company's advertising method, and instruction was a special inducement to school people.

Agriculture students were taken on a tour of farming communities during a vacation. Two teachers accompanied the boys and drove the bus which belonged to another school district. The bus was involved in an accident which an injured student contended was the result of negligent driving. The appeal court reversed a decision for the defendant school district on this basis, ". . . if the tour was a regularly and legally constituted school activity of the respondent high schools, that a liability would attach for injury to person or property arising because of the negligence of the . . . employee."[190] It would be a question of fact whether there was such negligence.

Teachers are reminded that parental consent, ". . . to take the children on field trips does not absolve the teacher of liability where there is negligence occurring in the administration of the trip." (80, p. 89 and 58, p. 17). Hamilton (44, p. 100) advised that "The educational benefits of any contemplated trip should be balanced against the possible legal and other dangers involved."

Teachers should plan with care, use public conveyances, and never attempt to conduct the pupils through business

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[190]Bates v. Escondido Union High School District, 133 Cal. App. 725, 24 P2d 885 (1933).

plants themselves. Teachers should ascertain from their school code or board regulations whether they have the right to take pupils on any trip away from the school. (57, p. 42).

CHAPTER V

TEACHER'S LIABILITY FOR ASSAULT AND BATTERY

The tort action of assault and battery protects a person's interest of freedom from bodily harm. No one has a right to hit, strike or forcibly injure another, or to place another in fear of such injury, except where the law has extended a special privilege. Sir Francis Pollock, in his book, The Law of Torts (75, p. 131) explains,

> There are also several kinds of authority in the way of summary force or restraint which the necessities of society require to be exercised by private persons. And such persons are protected in the exercise thereof if they act with good faith and in a reasonable and moderate manner. Parental authority (whether in the hands of a father or guardian, or of a person to whom it is delegated, such as a schoolmaster) is the most obvious and universal instance.

The need and right to use reasonable means for restraint or correction of pupils in school has long been recognized, (96, p. 2 and 27, vol. 6, p. 828) and courts will not interfere unless the right is illegally or unreasonably used. (64, p. 136 and 60, p. 598) In a Syracuse Law Review article (69, p. 247), Miller explains the difficulty of the teacher's task of helping many youngsters whose sole concern up to now has been their individual desires, to make the transition to the acceptance of rules and regulations made for the group. The teacher must control a classroom of

pupils with varying backgrounds and abilities; often the school is the single contact point for them. To fulfill this job, there must be rules and adequate means of enforcing them.

The teacher has more than the bare authority to discipline pupils; he has an affirmative duty to maintain order and require a faithful performance from his pupils. (3, vol. 47, p. 431) Over a century ago a court recalled,

> The practice, which has generally prevailed in our town schools, since the first settlement of the country, has been in accordance with the law expressed, and resort has been had to personal chastisement, where milder means of restraint have been unavailing.[191]

Another judge related the following story in upholding the teacher's right to control his class,[192]

> Many years ago a learned and judicious schoolmaster said to Charles II in the plenitude of his power: "Sire, pull off thy hat in my school; for if my scholars discover that the king is above me in authority, they will soon cease to respect me." And the king pulled off his hat, to demonstrate, by example, that the schoolmaster's authority should be respected even by a king.

In Arkansas the court upheld the school board in dismissing a first year teacher for failure to maintain discipline.[193] A definite stand was taken by a court in

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[191]Stevens v. Fassett, 27 Me. 266, 12 Cyc. 274 (1847).

[192]People v. Petrie, 120 Misc. 221, 198 N.Y.S. 81 (1923).

[193]Crownover v. Alread School District No. 7, 211 Ark. 449, 200 S.W.2d 809 (1947).

Pennsylvania, ". . . we also must recognize that discipline is an absolute necessity in the operation of a school. A school with no discipline is no school at all."[194]

This was the question in issue as a result of an incident that occurred on class day. The assembly was for seniors, juniors and those sophomores who wished to participate. Others were told to go home and stay away from the vicinity of the school. A sophomore named Steve went to the auditorium but refused to be seated even at the request of the principal. Steve was given permission to go to the boys' restroom but instead went outside and crossed the street to a car-stand called "Hot Dog Joe's." Newton, a teacher and athletic coach who was assigned to check the school grounds, told Steve to leave. Steve's past conduct had been far from exemplary and there was evidence that on this particular day he had been drinking beer. He refused to comply and proceeded to curse the teacher. Newton grabbed Steve's shirt, shaking and choking him until he stumbled backwards and fell over some bushes. The court, after recognizing that the New York Statute placed the teacher and pupil in the same category as a parent and child, said,

> A school or a school system is entitled to maintain discipline, just as much as the courts are entitled to maintain respect for laws and enforce the laws. Accordingly, if a school

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[194]Mando v. Wesleyville School Board, 35 Erie 74, 81 D. & C. 125 (1952).

> teacher cannot maintain respect for, or obedience to a school rule or instruction, the teacher is entitled to and should maintain such respect or obedience with force, if necessary under the proper conditions.[195]

This authority, although similar to that of the parent's is not as inclusive, as was pointed out in an Indiana case, "The teacher has no general right of chastisement for all offenses. . . but is restricted to the limits of his jurisdiction and responsibility as a teacher."[196]

A recent Ohio case[197] carefully reviewed the teacher's authority to discipline. The case arose when a teacher-principal punished an eleven year old boy who was believed to have thrown a stone at a little girl on the way to school, which knocked off her glasses. The boy was spanked with a paddle; six to fifteen blows being administered. The lad's room teacher was present. The boy, who was an epileptic, had three seizures that day and the bruises and discoloration lasted about five days. The boy's father reported the incident to the superintendent of schools the following day. No action seemed forthcoming so the father went to the juvenile court and discussed it with a probation officer. The next day the father signed a complaint against

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[195]People v. Newton, 185 Misc. 405, 56 N.Y.S.2d 779 (1945).

[196]Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1887).

[197]State v. Lutz, 113 N.E.2d 757 (1953).

the teacher. The lower court convicted her of assault and battery but the appellate court found error in the decision and dismissed the charge. The court found no causal connection between the seizures and the punishment, nor evidence of cruel or excessive punishment. The court, in delineating the teacher's right, enumerated the following principles:

> First, the teacher stands in loco parentis (i.e., in the place of a parent), and acts in a quasi judicial capacity and is not liable for an error in judgment in the matter of punishment.
>
> Second, the teacher's responsibility attaches home to home (i.e., while the pupil is on the way to and from school).
>
> Third, there is a presumption of correctness of the teacher's actions.
>
> Fourth, there is a presumption that the teacher acts in good faith.
>
> Fifth, mere excessive or severe punishment on the part of the teacher does not constitute a crime unless it is of such a nature as to produce or threaten lasting or permanent injury, or unless the State has shown that it was administered with either express malice (i.e., spite, hatred or revenge), or implied malice (i.e., a wrongful act wantonly done without just cause or excuse), and beyond a reasonable doubt.
>
> Sixth, the defendant teacher is entitled to all the benefits and safeguards of the well known presumption of innocence.

As long as the punishment administered is neither unreasonable "(a) as being disproportionate to the offense for which the child is being punished, or (b) as not being

reasonably necessary and appropriate to compel obedience to a proper command," (4, vol. 1, p. 347) the teacher is not liable. However, if punishment exceeds these bounds the teacher may have to answer to a criminal charge of assault and battery, as well as to a civil suit for damages (47, p. 473 and 96, p. 30), or dismissal for unprofessional conduct. (72, p. 64)

Corporal punishment is allowed by law in only six states, but since it was established by common law as an inherent part of the delegated authority of the teacher, it would appear to need specific legislation in order to eliminate it. (41, p. 84 and 69, p. 252) New Jersey is the only state which prohibits the use of corporal punishment. (50, p. 177) According to a National Education Association bulletin, (70, p. 9)

> In states where state law authorizes reasonable corporal punishment, local schoolboards have no right to forbid such correction. When a board adopts a rule against all physical punishment inconsistent with the state law, the rule would not be upheld in court.

However, if a teacher punishes a child in contradiction to local rules, he may be subject to dismissal. On an appeal from a ruling of dismissal for striking a pupil with a ruler, the court commented:[198]

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[198]Matter of Hynie, 53 State Dept. R. 208 (N. Y. 1936).

> As a matter of law, a teacher has the same power to punish a child as has the parent, the limitation being that the act of punishment may not be immoderate in degree or unreasonable in manner. Even though the statute gives the teacher the power to inflict corporal punishment, the teacher would also be bound by reasonable rules of the board of education in respect thereto. If the board of education of a school district had, by formal resolution, established a regulation to the effect that teachers were not to use corporal punishment, an infraction of such rule by the teacher might, because of such infraction, be a sufficient basis for dismissal.

In Arkansas the Supreme Court upheld a local school board's dismissal of a teacher for excessive and cruel punishment.[199] A boy was whipped twice in one day with a paddle made of flooring; first for telling a riddle, next for throwing a paper wad at the teacher. The latter act justified correction, but not to the degree administered. (15, p. 13)

A 1953 Louisiana decision,[200] overruled a school board's resolution which placed a teacher on probation, prohibited her from using corporal punishment at any time, and transferred her to another school twelve miles away. The teacher, who had fifteen years' experience and had been placed on tenure, had parental permission to spank an eight year old boy if such was needed. When the boy was

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[199] Berry v. Arnold School District, 199 Ark. 1118, 137 S.W.2d 256 (1940).

[200] Watts v. Winn Parish School Board, 66 So.2d 350 (La. 1953).

questioned about failing to do his homework, he put his hands behind his ears and clicked his tongue. The teacher used a paddle, and when it broke, she secured another and completed her task. She took him to his father's store after school and explained her actions. That night the boy went to the carnival, rode ponies but did not complain. The next morning when bruises were noticed on his buttocks his father signed a complaint. The school board agreed it could not condone the type of punishment used and passed the previously stated resolution. According to Louisiana law a permanent teacher can be removed or disciplined only if found guilty of willful neglect of duty, incompetency, or dishonesty. The court held that failing to condone was not the same as finding her guilty, particularly since there were no rules regarding punishment that she could have violated.

However, later that same year, another school board's ruling of dismissal was upheld by the Supreme court of the same state on the grounds that a charge of incompetency could be substantiated by evidence of a severe beating of a twelve year old.[201]

The use of physical punishment as a disciplinary

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[201]Houeye v. St. Helena Parish School Board, 67 So.2d 553 (1953).
See Matter of Hodge, 86 Misc. Rep. 367 (N. Y. 1915).

measure in schools has declined and the number of cases on this subject has shown a marked decrease, (71, p. 26 and 28, p. 266-70) but according to one jurist the need is still present. In a Pennsylvania case in 1941, the judge observed,[202] "Many of the cases which appear in juvenile court would not be there if parents and school authorities upheld the teachers in supporting discipline and in permitting corporal punishment."

Miller (69, p. 265) expressed the same concern,

> Training for teaching is compulsory--training for parenthood is not. Until our present high rate of juvenile delinquency abates and parents are either taught or forced to work with the teachers in educating and disciplining their children, the power of the teacher over the pupils should not be weakened or taken away.

One court[203] recognized that a parent might have ill-will toward one member of the family and vent his spleen on another, but that would not be likely with a teacher.

> Such a situation does not exist in our school rooms, and a school teacher rarely punishes one pupil for the misdeeds of another. The quasi judicial capacity of the school-teacher punisher is therefore more impersonal and more impartial than that of a parent or step-parent punisher.

The teacher's discretionary power was upheld in an

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[202] Appeal of School District of the Borough of Old Farge, 43 D.&C. 167, 43 Lack. Jur. 187 (1941).

[203] State v. Lutz, 113 N.E.2d 757 (Ohio, 1953).

1851 case[204] with this comment,

> The character and interest of the teacher combined with the refinement which education gives to the human mind in softening the heart, like parental love, is generally found a sufficient protection for the children.

Reasonableness of Grounds for Disciplinary Actions

The right of the school to make reasonable rules and regulations to govern the pupils is unquestionable. As was pointed out in a 1916 decision in Texas,[205]

> Reasonable rules to enforce discipline, to preserve order, both in the school buildings and upon the grounds, to protect the morals, the health, and the safety of pupils, and to do and require pupils to do whatever is reasonably necessary to do to preserve and conserve all of these interests may be made and enforced.

An early Iowa case,[206] provided, any rule ". . . not subversive of the rights of children or parents, or in conflict with humanity and the precepts of divine law, which tends to advance the object of the law in establishing public schools, must be considered reasonable and proper." The basic need for such rules was acknowledged by a court which said,[207] "Neither the schools nor the state can carry on

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[204]Commonwealth v. Seed, 5 Clark 78 (Penn. 1851).

[205]Hailey v. Brooks, 191 S.W. 781, 32 A.L.R. 1343 (Tex. 1916).

[206]Burdick v. Babcock, 31 Iowa 562 (1871).

[207]Byrd v. Begley, 262 Ky. 422, 90 S.W.2d 370 (1936).

without rules or laws regulating the conduct of the student or citizen, and those who are taught obedience to the rules and regulations of the school will be less apt to violate the laws of the state."

It is not necessary that all rules and orders required for good order be a matter of record. "Much must necessarily be left to the individual members of the committee and to the teachers of the several schools," stated the court in Massachusetts.[208] If a higher authority has made a pronouncement on a subject, the teacher's task is to enforce it, but in the absence of such a rule, the teacher is empowered to formulate any reasonable regulation. (68, pp. 475-476) The Missouri court held that the teacher has the ". . . lawful right to adopt such reasonable rules for the government of said school, and the presumption is that it was in the exercise of, and in the bounds of lawful authority."[209]

Where the district has promulgated rules on a subject the teacher's task is ministerial and the majority hold that the teacher is not liable for a mistake in judgment when acting in good faith on a discretionary matter.[210]

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[208] Russell v. Inhabitants of Lynnfield, 116 Mass. 365 (1874).

[209] State v. Boyer, 70 Mo. App. 156, (1897).

[210] Patterson v. Nutter, 78 Me. 409, 7 A. 273 (1886).

In a New Hampshire case,[211] a pupil sought damages for punishment inflicted by the teacher. The pupil said he had merely coughed in school but the teacher considered the coughing noise an act of contempt and defiance of his authority. The court said the teacher was justified in his actions as long as reasonably and prudently believed, and had reasonable grounds for so believing that the coughing noise was intentionally made for the purpose of showing defiance.

However, if the rule is one which is not within the province of the school's authority to make, enforcing it would be an illegal act. (96, p. 82) Courts have held the following rules to be unreasonable, which meant attempts to enforce them through the use of punishment, unjustifiable: teacher made rule that pupils must pay for wanton and careless destruction of school property;[212] requirement that a student take bookkeeping;[213] a rule that every pupil, including one whose father had requested that the child be excused as he was not well, must bring in a stick of wood when returning from the playground;[214] and enforcement of

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[211]Heritage v. Dodge, 64 N. H. 297, 9 A. 722 (1886).

[212]State v. Vanderbilt, 116 Ind. St. Rep. 11, 18 N.E. 266 (1888).

[213]Rulison v. Post, 79 Ill. 567 (1875).

[214]State ex rel Bowe v. Board of Education, 23 N.W. 102, 63 Wis. 234 (1885).

a board rule of charging students a fee which was used to supplement the teacher's salary.[215]

Grounds for Disciplinary Measures at School

Infractions of reasonable rules would, of course, be acceptable grounds for punishment.[216] What is "reasonable punishment" according to the courts will be discussed later in this chapter, but it is conceded that a teacher has the authority to maintain the degree of order consistent with the needs of that particular class.

The courts have held that there was no assault and battery for administering chastisement in the following situations: repeated occurrences of misconduct in school;[217] misconduct during the noon hour;[218] scuffling in the hall and insubordination;[219] entering the school room during recess and denying having done so;[220] causing trouble in

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[215] Williams v. Smith, 68 So. 323, 192 Ala. 428 (1915).

[216] Wilbur v. Berry, 51 Atl. 904, 71 N.H. 619 (1902).

[217] Robertson v. State, 116 So. 317, 22 Ala. 413 (1928).

[218] Fox v. People, 84 Ill. App. 270 (1899).

[219] Suits v. Glover, 71 So.2d 49, 260 Ala. 449 (1954).

[220] Marlar v. Bill, 178 S.W.2d 634, 181 Tenn. 100 (1944).

class.[221]

In an 1886 Texas case,[222] the teacher who armed herself with a stick before demanding that a student hand over a pistol which he had brought to school "to shoot off and raise a row," was commended by the court for her effort to maintain obedience to the rules of the school and laws of the state.

The right of a teacher to punish a pupil who was not in her class was in issue in Pennsylvania.[223] A fourth grade teacher was dismissed on the grounds of cruelty for slapping a pupil. The teacher had heard reports that the child had made vile statements concerning the teacher in the hearing of other children in the school yard, which the youngster admitted. The teacher slapped him and sent him to his own room. The board dismissed the teacher but the Superintendent of Public Instruction re-instated her. The court dismissed the board's appeal with this statement:

> To say that a pupil in another room can subject a teacher from another room to insult or abuse and is free to conduct himself improperly without interference from any teacher except the principal and the one in control of the room would be subversive to discipline and a narrow construction of the act.

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[221]Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941).
People v. Petrie, 198 N.Y.S. 81, 120 Misc. 221.

[222]Metcalf v. State, 21 Tex. App. 174, 17 S.W. 142.

[223]Appeal of School District of the Borough of Old Farge, 43 D. &C. 167, 43 Lack. Jur. 187 (Penn. 1941).

This appears to be contrary to an earlier Tennessee decision. In that case,[224] $21.00 was missing from the teacher's desk shortly after a young girl had placed flowers thereon. A boy had also been in the room and since the room door opened to the outside, there was opportunity for many others to enter. Mr. Johns, the principal, took the boy to his office and directed another teacher to search the girl. In the action for damages for being forcibly searched, the teacher and principal pleaded justification. The judge directed a verdict for the plaintiff on the grounds that there was no justification since the teacher-pupil relationship does not exist for acts done for the benefit of a third person.

A teacher in Arkansas appealed from a conviction of assault and battery based on striking a student three times with a switch.[225] The boy had not been at school for two days as his parents were planning to have him withdrawn. It did not appear that he had as yet withdrawn, but if so, the teacher had not been notified. The court reversed and remanded the case since the teacher was warranted on the facts in treating him as a pupil and requiring him to obey her commands.

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[224]Phillips v. Johns, 12 Tenn. App. 354 (1931).

[225]Dodd v. State, 94 Ark. 297, 126 S.W. 834 (1910).

If a pupil has a hidden defect which might become aggravated by punishment permitted by school rules, the parents should inform the teacher of the condition. Otherwise, the teacher is not liable for injurious consequences, according to an Ohio court.[226]

The right to use corporal punishment for failure to recite lessons or to give an explanation therefor, was the decision in Texas.[227]

Grounds for Disciplinary Measures Out of School

It has been said that teachers and other school authorities are limited in their control over the pupils to the time the children are in attendance at school; however, in some respects the authority of the school and teacher does not cease at the time the pupil leaves the school. (3, p. 427 and 5, vol. 41, p. 1312) School rules have been upheld which forbade playing football as a school team;[228] attending social events on a school night;[229] using face paint or

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[226]Quinn v. Nolan, 7 Ohio Dec. Reprint 585 (1879).

[227]Thomason v. State, 38 Tex. Crim. App. 335, 43 S.W. 1013 (1898).

[228]Kinzer v. Independent School District, 129 Iowa 441, 105 N.W. 686 (1906).

[229]Mangum v. Keith, 147 Ga. 603, 95 S.E. 1 (1917).

cosmetics;[230] being absent or tardy without excuse;[231] fighting or similar misconduct;[232] leaving school grounds at noon;[233] showing disrespect for school authorities;[234] smoking, drinking or immorality;[235] failure to prepare school work;[236] failure to obey teachers;[237] joining fra-

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[230]Pugsley v. Sellmeyer, 259 S.W. 538, 158 Ark. 247 (1923).

[231]Burdick v. Babcock, 31 Iowa 562 (1871).
Churchill v. Fewkes, 13 Ill, App. 520 (1883).
Fertich v. Michener, 111 Ind. 472, 11 N.E. 605 (1887).
Russell v. Inhabitants of Lynnfield, 116 Mass. 365 (1874).

[232]Burpee v. Burton, 45 Wis. 150, 30 Am. St. Rep. 706 (1898).
Hutton v. State, 23 Tex. App. 386, 5 S.W. 122 (1887).

[233]Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926).

[234]State ex rel Dresser v. District Board, 116 N.W. 232, 135 Wis. 619 (1908); contra, Murphy v. Board of Directors, 30 Iowa 429 (1870).

[235]Douglas v. Campbell, 89 Ark. 211, 116 S.W. 211 (1909).
Sherman v. Inhabitants of Charlestown, 8 Cush. Mass. 160 (1851).

[236]Samuel Benedict Memorial School v. Bradford, 36 S.E. 920, 11 Ga. 801 (1900).
Balding v. State 23 Tex. App. 172 (1887).

[237]Beaty v. Randall, 79 Mo. App. 226, 50 LRANS 269 (1899).

ternities.[238]

A Vermont court[239] established the precedent for allowing corporal punishment to be administered for behavior that occurred away from the school grounds and after the pupil had returned to the control of his parents. The pupil was punished at school for misbehaving. An hour and a half after the close of school, the pupil while driving his father's cow past the teacher's house, called out in the hearing of the teacher and some fellow students, "Old Jack Seaver." The following morning the teacher whipped the boy with a rawhide. The court said there was ". . . no reasonable doubt that supervision and control of the master over the scholar extend from the time he leaves home to go to school till he returns home from school." The court continued, that where an offense committed after parental authority is resumed,

> . . . has a direct and immediate tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with a design to insult him, we think he has the right to punish the scholar for such acts if he comes again to school.

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[238]Satan Fraternity v. Board of Public Instruction, 156 Fla. 232, 22 So.2d 892 (1945).
Burkitt et al. v. School District No. 1 et al., 195 Ore. 471, 246 P2d 566 (1952).

[239]Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

An action for damages was brought against a teacher for whipping a pupil.[240] The pupil had violated a school rule against using profane language and quarrelling and fighting with other students. The fracas occurred one-half to three-quarters of a mile from the school. The decision against the teacher was reversed on appeal on the grounds that,

> The effects of the scholars using to and with each other obscene and profane language, quarrelling and fighting among themselves on the way to their homes, would necessarily be felt in the school room, engender hostile feelings between scholars, arraying one against the other, as well as the parents of each and destroying that harmony and good will which should always exist among the scholars who are daily brought in contact with each other in the school room.

This rule was applied to a pupil who had returned home and was standing in his own yard when the incident occurred.[241] The boy bullied and abused two little girls as they walked past his house on their way to their homes. When the teacher-principal questioned the boy, he admitted his actions. Punishment was administered by hitting him eight times on each hand with a flat stick one-half inch thick and two feet long. In the action for damages for battery against the teacher, the court held that the test of authority for punishing students for offenses committed after the pupil has reached home is, ". . . the effect of the offense upon

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[240] Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387 (1885).

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

the morale and efficiency of the school." (90, p. 415; 88, p. 187 and 32, p. 619)

Suspension or Expulsion as a Disciplinary Measure

Suspension or expulsion of a student for infraction of school rules is usually by action of the school board. However, certain circumstances where the student's actions interfere with the order of the class, the teacher's power to suspend a pupil has been upheld.[242] (30, p. 569) For example, a teacher who had resigned from her position when forced to reinstate a student whom she had expelled, sued for her salary. The court affirmed her right by stating,[243]

> The teacher could not perform the duties of her employment without maintaining proper and necessary discipline in the school, and when all her other means for doing so failed in respect to the boy, it was her right, and might be her duty, to expell him, to save the rest of the school from being injured by his presence.

Parents of a boy who had been expelled for misconduct, requested a writ of mandamus to compel the principal to reinstate their son. In refusing the petition, the court said,[244] "We conclude, therefore, that the teacher has, in

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[242]Beaty v. Randall, 79 Mo. App. 226, 50 LRANS 269 (1899).

[243]Scott v. School District 46 Vt. 452, 35 Cyc. 1072 (1874).

[244]State ex rel Burpee v. Burton, 45 Wis. 150, 30 Am. St. Rep. 706 (1898).

a proper case, the inherent power to suspend a pupil from the privileges of his school, unless he has been deprived of the power by the affirmative action of the proper board."

When a pupil has been excluded from school, an action for damages will not lie against the teacher or the school directors as long as they have acted in good faith. (5, vol. 42, p. 763 and 30, pp. 574-5).

A Missouri court[245] found that the directors and the teacher had exceeded their authority in promulgating a rule which conflicted with parental rights and in expelling a student for violating that rule. However, since no malice was shown, they were not liable in damages. In an Illinois case[246] the court held, "The general principle is established by an almost uniform course of decisions, that a public officer, when acting in good faith, is never to be held liable for erroneous judgment in a matter submitted to his determination."

Theories on Reasonableness of Punishment

Under the common law rule the teacher as a parent

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[245] Dritt v. Snodgrass, 66 Mo. 286, 27 Am. Rep. 343 (1877).

[246] Churchill v. Fewkes, 13 Ill. App. 520 (1883) and see Donahoe v. Richards, 38 Me. 376 (1854); Roe v. Deming, 21 Ohio St. 666 (1871); Sewell v. Board of Education et al., 29 Ohio St. 89 (1876); Stephenson v. Hall, 14 Barb N. Y. 222 (1852); Spear v. Cummings, 23 Pic, Mass. 224 (1839).

substitute may administer reasonable corporal punishment without liability. On this there has been no disagreement, but in determining what would be considered as reasonable there have been two distinct lines of authority.[247] According to one rule, the teacher acts in a judicious capacity in administering punishment and will not be liable unless permanent injury is inflicted or the teacher is actuated by malice. The others contend that the reasonableness should be determined by the jury in each case regardless of the teacher's motive. These two opposing views will be considered, followed by case holdings which entail civil and criminal liability under either view.

"Reasonableness" a Discretionary Matter for the Teacher

An early North Carolina case[248] established the precedent that,

> The law has not undertaken to prescribe stated punishments for particular offenses, but has contented itself with the general grant of the power of moderate correction, and has confided the graduation of punishments, within the limits of this grant to the discretion of the teacher.

The general rule as set forth by that court is that,

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[247]People v. Curtiss, 116 Cal. App. (sup.) 771, 300 P801 (1931); Martin v. State, 11 Ohio N.P.N.S. 183 (1911).

[248]State v. Pendergrass, 19 N.C. 365, 13 Am. Dec. 416 (1837).

"Teachers exceed the limits of their authority when they cause lasting mischief; but act within limits of it when they inflict temporary pain." The court added that the teacher stood within judicial power when authority was used to cover malice or to gratify bad passions.[249] Alabama followed this decision when the question arose in that state.[250] A teacher had chastised a boy in the school, followed him into the yard and hit him with a "limb or stick," afterwards hit him three times in the face with his fist and several times more on the head with the butt end of a switch and completed the performance by bragging that, "he could whip any man in China Grove beat." The judge advocated the use of the rod and felt the more thoroughly this was established the less it needed to be used, and explained that it was up to the teacher's discretion to determine the seriousness of the offense and mete out the proper punishment. However, the teacher here was guilty since malice was clearly in evidence.

Malice was defined by a court in 1895, as follows,[251]

> General malice is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief. . . . Particular malice is ill will, or desire to be revenged on a particular person.

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[249]Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904).

[250]Boyd v. State, 88 Ala. 169, 7 So. 268 (1890).

[251]State v. Long, 17 N. C. 791, 23 S.E. 431 (1895).

It was further explained that malice could exist without temper and may be absent even in a show of temper.[252]

In a tort action for assault and battery which resulted from a whipping administered to a pupil for addressing improper remarks to a female teacher, the lower court found in favor of the plaintiff, but the appellate court reversed and remanded the case with this advice,[253]

> That if the teacher acted with good intentions, and used a proper mode of punishment, he must be protected, unless he carried the punishment to such a degree that it was immoderate, and of itself implied malice. . . . But within these limits his judgment, and not the judgment of the jury, must control.

A 1901 case[254] is authority for the principle that punishment ". . . in any degree cannot be inflicted maliciously, namely, without provocation. There is no such thing as reasonable punishment from a malicious motive."

Nor can a teacher inflict more than a reasonable amount of punishment even though specifically requested to do so. A North Carolina court, in questioning a teacher's right to chastise replied,[255]

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[252]State v. Stafford, 113 N. C. 635, 18 S.E. 256 (1893).

[253]Green v. Peck, 9 Weekly Digest 3 (N. Y. 1879); and see Heritage v. Dodge, 64 N. H. 297, 9 A. 722 (1886).

[254]Haycraft v. Grigsby, 88 Mo. App. 354, 67 S.W. 965 (1901).

[255]State v. Thornton, 136 N. C. 610, 48 S.E. 602 (1904).

> He had a perfect right to punish his pupil for the purpose of correction; but, even if the school had not been well managed, and he had been specially requested to be more strict in compelling obedience to the rules, he had no more authority by reason thereof than he would otherwise have possessed, and his criminal liability for an excessive and malicious use of his power would be just the same.

Where there has been an express delegation of authority by the parent and permission given to take whatever steps necessary to make her boy attend school and behave, the parent has no complaint as long as punishment is not administered excessively nor maliciously.[256]

Although an Ohio court[257] followed this line of reasoning and noted that mere excess did not constitute a crime unless lasting or permanent injury was inflicted, the court felt this rule was harsh and the other reasoning was more humane and in consonance with the spirit of our times.

"Reasonableness" a Question of Fact

A Massachusetts court set forth a different standard from that previously discussed.[258] The teacher was found guilty of assault and battery for striking a pupil with a

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[256]Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941).

[257]Martin v. State, 11 Ohio N.P.N.S. 183 (1911).

[258]Commonwealth v. Randall, 4 Gray 36 (Mass. 1955).

ferule on the head, back, shoulder and other parts of the body because the pupil was obstinate, told falsehoods, and was insolent. The appeal court refused to disturb the lower court's finding that the punishment was excessive and approved the instruction to the jury that teachers had a right to inflict corporal punishment upon scholars and

> . . . in so doing the teacher must exercise reasonable judgment and discretion, and must be governed, as to the mode and severity of the punishment, by the nature of the offense, by the age, size and apparent powers of endurance of the pupils.

That reasonable persons would differ as to the circumstances which would justify the infliction of punishment and the extent to which it should be administered, was recognized by a court in 1859.[259] The following criteria were suggested:

> In determining upon what is a reasonable punishment, various considerations must be regarded, the nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished. . . . Hence the teacher is not to be liable on the ground of excess of punishment unless the punishment is clearly excessive and would be held so in the general judgment of reasonable men. If the punishment is thus clearly excessive, then the master should be held liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary and not excessive. But if there is any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt.

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[259]Lander v. Seaver 32 Vt. 114, 76 Am. Dec. 156 (1859).

A Connecticut court[260] added the following points for consideration in addition to those enumerated, ". . . the mental and moral qualities of the pupil, and as indicative of these, his general behavior at school and his attitude toward the teacher. . ."

A California case[261] reviewed both lines of authority and selected that which expressed, to the court the more enlightened view, i.e., the reasonableness of, and the necessity for, the punishment to be determined by a jury under the circumstances of each case.

Disciplinary Measures Held to be Unreasonable

Over a hundred years ago a jurist deplored the use of corporal punishment in the schools, especially since its use had been discarded elsewhere.

> The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element,

admonished a judge in 1853.[262] This action of trespass was brought when the teacher beat, bruised, and cut the head of

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[260]Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1885).

[261]People v. Curtiss, 116 Cal. App. (Sup.) 771, 300 P. 801 (1931).

[262]Cooper v. McJunkins, 4 Ind. 290 (1853).

a student who had been disorderly. The court continued,

> The law having elevated the teacher to the place of the parent, if he is still to sustain that sacred relation, "it becomes him to be careful in the exercise of his authority, and not make his power a pretext for cruelty and oppression".

Punishment was found to be excessive when the teacher struck a student with a club, used fists in administering blows on the head and body, shook him, pulled him about, threw him down, kicked him and tore his clothes.[263] Almost a century later another teacher was liable when he struck a boy so hard his coccyx bone was broken.[264] Too much force was used by a principal who walked into his school auditorium, heard a disturbance which was created by one student refusing to allow another to be seated. The principal struck the miscreant on the back of the neck, severely and permanently injuring him.[265]

A Vermont teacher sent a girl to the board to do problems but the pupil failed three or four times to do them correctly. The teacher shook her, causing her to drop the eraser. As she bent to pick it up, the teacher hit her on the back. The defendant teacher contended she tapped the

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[263]Hathaway v. Rice, 19 Vt. 102 (1846).

[264]Serres v. South Santa Anita School Board, 51 P.2d 893, 10 Cal. App. 2d 152 (1935).

[265]Harris v. Galilley, 125 Pa. Super, 505, 189 A. 779 (1937).

youngster on the shoulder, but the child couldn't walk as a result of the blow, had severe pain, and had to be put in a cast to prevent twisting of the body due to muscle spasms. The punishment was improper, unwarranted, and excessive.[266]

A teacher with forty-eight years of experience attempted to punish a ten-year old boy for impudence. He refused to stand still while she used a strap on his hand, and as the principal was passing the door, the teacher called him in and gave him the strap. The principal told the boy to go to his office, but when he refused the former dragged him from the room. The boy was fighting and scratching in his attempt to escape. Finally, the principal pinned him to the floor by placing his knee on the lad's stomach and then sat on him. All the while the boy kept wriggling. The boy received only a small abrasion on his back, but osteomyelitis resulted and the court found that the restraint was excessive.[267]

Modes of punishment that have been severe enough to warrant criminal charges include, using a stick as large around as a thumb and about three feet long to administer

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[266]Melen v. McLaughlin 176 A. 297, 107 Vt. 111 (1935).

[267]Calway v. Williamson, 36 A.2d 377, 130 Conn. 575 (1944).

eight to twelve blows to a youngster who spoke out of turn on his second day at school;[268] whipping a sixteen year old girl to the extent that she was confined to bed;[269] whipping until the blood ran from cuts on a pupil's leg;[270] administering twenty-five blows with a two-inch leather strap for resisting when teacher attempted to punish with a one-inch strap for a minor disturbance;[271] whipping a boy until he was subdued when the pupil counted the blows aloud--63 blows were counted and three more added after he remained silent;[272] using a ruler or piece of yardstick to punish a student for dropping a book from the balcony to the seats below.[273]

Pupils have had to face criminal charges in three Texas cases for resisting punishment threatened by teachers. In one,[274] a teacher struck a thirteen year old with a

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[268]Anderson v. State, 40 Tenn. 314, 75 Am. Dec. 156 (1859).

[269]Holmes v. State, 39 So. 569 (1905).

[270]Kinnard v. State, 33 S.W. 234, 35 Tex. Cr. Rep. 276 (1895).

[271]Harris v. State, 203 S.W. 1089, 83 Tex. Cr. Rep. 468 (1918).

[272]Whitley v. State, 33 Tex. Cr. App. 1072, 25 S.W. 1072 (1894).

[273]People v. Mummert, 50 N.Y.S.2d 699, 183 Misc. 243 (1944).

[274]Balding v. State, 23 Tex. App. 172, 4 S.W. 579 (1887).

switch for failure to do problems assigned for homework. The boy drew a butcher knife and stabbed the teacher. The court upheld the reasonableness of the punishment and the boy was fined and jailed. Another teacher died of wounds inflicted with a pocketknife wielded by a student whom the teacher had taken out on the school grounds for purpose of punishing.[275] When a pupil turned in a composition, half in his own handwriting and half in the handwriting of a lady, the teacher criticized it. The boy said he didn't care and the teacher advanced to punish him unarmed. The teacher had previously threatened to beat the boy so even his own people wouldn't recognize him, so as the teacher approached, the boy shot him.[276]

Teachers have had to defend themselves physically against irate parents, as brought out in two Missouri cases, when they have used physical chastisement on pupils. In neither case, did the punishment justify the assault and battery on the teacher, but the court held that if cruel punishment had been administered, it could be shown in evidence in mitigating exemplary damages.[277]

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[275]Dill v. State, 87 Tex. Crim. App. 49, 219 S.W. 481 (1920).

[276]Wilsonv. State, 80 Tex. Cr. R. 468, 203 S.W. 1089 (1916).

[277]Cook v. Neeley 143 Mo. App. 632 (1910); and see State v. Loftin, 230 S.W. 338 (1921).

CHAPTER VI

TEACHER'S LIABILITY FOR DEFAMATION

Each person is entitled to his good name and reputation, and it is to prevent an invasion of these rights that a cause of action in defamation is available. Corpus Juris Secundum (27, vol. 53, p. 31) explains that "'Defamation' is an attack on the reputation of another, and includes the ideas of calumny and aspersions by lying, and the injury of another's reputation by such means." In order to give rise to a cause of action, the defamatory material must have been published, which Harper (49, p. 499) explains is, "The technical name by which the communication of the defamatory idea is known. . . ." If only the defamed person himself is told, there is no publication, hence no liability. However, if any third person is informed, the elements are complete.

Originally the term "slander" covered all forms of defamation, but in present usage it is restricted to the ". . . speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another." (27, vol. 53, p. 33) An example would be to charge a teacher ". . . with incompetency, or to charge disgraceful conduct toward his

pupils, or to call him insane in connection with his conduct of his school." (42, p. 476) Since these statements are damaging in respect to his profession, they would be actionable. However, to charge that a teacher was "careless" in her blackboard work was not libelous in the absence of a showing of special damages, as would have been a charge of unskillfullness or general incapacity.[278] Butsch (12, p. 45) contends that, "Practically any statement tending to impeach the moral character of a teacher will be held to support an action."

Libel is presently defined as

> . . . a malicious publication expressed either in printing or writing, or by signs and pictures, tending to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. (27, vol. 53, p. 32)

The duty to abstain from creating ill feelings toward another applies to all people, and the teacher's position is noteworthy only because of the opportunity to secure information and the necessity at times to relay such matters to proper authorities. The relationship between the teacher and pupil affords the possibilities through discussion, observation and tests for the teacher to acquire much confidential information about his pupils; but the knowledge

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[278]Walker v. Best, 107 App. Div. 304, 95 N.Y.S. 151 (1905).

thus secured may be used only in relation to the purposes intended. (22, p. 39) At times it is necessary for defamatory information to be communicated, but the courts recognize that certain situations need the protection of a privileged situation and the publication is not actionable. This may arise by consent or without consent where it is necessary for the protection of an interest, or of the public, or where freedom of action is essential, such as in a judicial proceeding. (4, vol. 1, p. 19)

Privilege may be absolute or qualified. A former librarian at the University of Oklahoma, accused the President of the college and the Dean of the medical school of conspiring to cause her dismissal by making false accusations about her to the Board of Trustees. The court realized that it was necessary for the board to rely on deans and department heads for information as to the fitness and qualifications of the employees, and if an absolute privilege were not extended there would be lack of candor and full disclosure.

> . . . The rule of absolute privilege in such a case is for the protection of the public and not for the protection of the officers.
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> The statements being absolutely privileged, it is immaterial as to whether they were made with improper motives or whether they were false.[279]

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[279]Hughes v. Bizzell, 117 P2d 763, 189 Okla. 472, (1941).

Generally the teacher is protected by a qualified privilege which extends to statements made in good faith and to persons having a recognized common interest. According to one annotation (5, vol. 12, p. 147), it apparently extends ". . . to any necessary statement in line of the teacher's duty." One of the determining factors of this qualified privilege is the relationship between the person defamed and the one to whom the communication is made. The closer the relationship, the less the inference of malice which might otherwise arise.

A judge in a dissenting opinion in a Utah case offered this example, "A fact situation wherein qualified privilege arises is that wherein school authorities make communication to the parent of a child who has been dismissed, stating the reasons therefor."[280] It must be emphasized that this is a qualified, not a complete privilege, and does not protect one against "an improper or excessive publication, or a publication from malicious motives." (3, vol. 33, pp. 130-131) The importance of the motive was expressed by a court as follows:[281]

> The cases are few in which the motive make the tort--chiefly those where slander or libel

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[280]Hales v. Commercial Bank, 197 P2d 910, 114 Utah 186 (1948).

[281]Haycroft v. Grisby, 88 Mo. App. 354, 67 S.W. 965 (1901).

> is predicated concerning words or publications which are privileged and only become actionable when maliciously uttered.

Information relayed through proper channels to administrators or parents would be privileged, but if defamatory material were given to strangers, or related to others the privilege would be lost. A deliberate misstatement or false words, of course, would be outside the pale of privilege.

Libel

In Oklahoma a teacher entered the following remarks about a pupil in the class register, "Drag all the time. . . . Ruined by tobacco and whiskey." The register was required to be filed with the district court and was open to examination by school board members and others. The court, in explaining that the statements were not privileged, said,

> It is clearly the duty of the teacher to enter into this register a full, fair, complete, and true report of the attendance and grades of the pupils, but he has no right to enter therein any defamatory matter concerning any of his pupils, and if he does so, he is not protected by the statute.[282]

According to this decision a teacher should enter only the factual information required and guard against using defamatory opinions in his records (5, vol. 12, p.147), particularly where the records are open to scrutiny by

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[282]Dawkins v. Billingsley, 172 P. 69, 69 Okla. 259 (1918).

other people.

A California teacher in a school that prepared people for teaching, had published in a newspaper the following comments about a pupil,

> . . . by her conduct in class, by her behavior in and around the building, and by her spirit as exhibited in numberless personal interviews, she has shown herself tricky and unreliable, and almost destitute of those womanly and honorable characteristics that should be the first prerequisite in a teacher.

The teacher defended on the grounds that it was a privileged communication since it was of concern to all people in the state who were interested in the school. The courts failed to agree, and the teacher was held liable for libel.[283]

Letters written by administrators to parents of college students, explaining why the student had been sent home, have been the basis for two suits in libel. One student was accused of exposing his nude body and in the other case, a girl's illness was mistakenly diagnosed as a venereal disease. In both instances the courts recognized the duty of the school to inform the parents and upheld the privileged nature of the communication.

> When a student's relation to the institution is severed by direction of its authorities, it is not only natural, but justly to be expected as a part of that duty, that the parent or guardian of the dismissed student should be advised of the cause of dismissal; and this is especially true

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[283]Dixon v. Allen, 11 Pac. 179, 69 Cal. 527 (1886).

> with respect to a school of a public character, schools to the maintenance of which governmental funds are devoted. The communication, by personal, authoritative letter addressed and sent to the parent or guardian of a dismissed student of the cause or reason for the student's dismissal or for the denial of readmission is a privileged occasion.[284]

Although there are no cases on the subject, Remmlein (78, p. 170) makes this suggestion for teachers who are asked to give an honest appraisal of a student in a requested letter of recommendation:

> If the letter expresses the teacher's honest opinion, reasonably based upon evidence which convinced the teacher of the truth of his estimate of the pupil and is not written with malicious intent to injure him, the communication under these circumstances is privileged; provided, of course, that the teacher does not show the letter to any other person, mails it to the prospective employer, and has no reason to know that any but the prospective employer will read it upon receipt.

The information about students may be given only to one authorized. Cohler explains that the legal theory underlying requests for school records by other schools, or employers is based on the presumption that he is so empowered by the pupil. (22, p. 40)

Slander

Gossip, or idle passing on of information, would be

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[284]Kenney et al. v. Gurley, 95 So. 34, 208 Ala. 623 (1923); and see Baskett v. Crossfield, 228 S.W. 673, 190 Ken. 751 (1920).

slander if the expression used fell within the general terminology as defined in Chapter II. Recently, an exasperated teacher in a large high school upbraided a student for repeated absences and tardiness with a sarcastic remark that he had probably been out smoking marijuana. It took real persuasion on the part of school personnel to prevent a suit against the teacher for her statement. The accusation of a criminal offense was slander per se.

George Rice, in an article on Defamation by Slander, (79, p. 75) expressed this concern for the teachers,

> It is altogether possible for a teacher to find himself defendant in a suit for slander resulting from the ordinary discharge of professional functions; perhaps because of an injudicious utterance in the classroom, or while fulfilling the role of Antiphon as a ghost writer for some aspirant to political office; or when speaking from the rostrum in his own right.

A president of a state normal school, after receiving many complaints, warned a student's landlady that the student was crazy and that the other students would move if she allowed that particular one to remain in her house. When the student instituted a suit for damages for slander, the court recognized that the president was duty bound to look after the welfare of all students, and that he would have been derelict had he not informed the landlady of the conditions. This was a privileged communication and no liability attached.[285]

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[285]Everest v. McKenny, 195 Mich. 469(1917).

Although there are very few cases in which teachers have had to defend themselves against charges of defamation, the possibility of defaming a pupil is very real and the opportunity ever present. "Perhaps one explanation is that statements have to a large extent been justified; or the question of justification has been so doubtful that suits were not deemed advisable under the circumstances." (5, vol. 12, p. 147) Nevertheless, it is a wise and cautious teacher who knows when to keep his own counsel.

CHAPTER VII

BASIC LEGAL PRINCIPLES AND RECOMMENDATIONS

Principles

A study of the judicial decisions in which teachers were involved as defendants in tort actions reveal the following basic legal principles:

1. The teacher is recognized for his important contributions to our society and is accorded the position of parent-substitute. The legal term, in loco parentis, meaning in place of the parent, applies to the teacher.

2. The teacher's authority is considered as delegated by the parent -- even in view of present day compulsory education laws.

3. This authority is not as inclusive as that of the parents and is limited to purposes of education.

4. The teacher-pupil relationship involves greater responsibilities than the law expects of a person toward a stranger.

5. Teachers are expected to maintain the same degree of care over their pupils as would a reasonably prudent parent under the circumstances.

6. These responsibilities also apply to administrators but may vary according to the different jobs.

7. The responsibility and corresponding liability remain on the supervising teacher even though a qualified student-teacher is in control of the class.

8. The degree of care expected varies with the maturity of the pupils and the type of action in which they are engaged. Liability is less likely to attach where injury results from strictly educational pursuits.

9. The duty to supervise the pupils applies not only to the classroom but also to other areas of the school building, and the school yard during recess and before and after school.

10. Some pursuits have a higher potential danger and require a greater degree of care; such as chemistry laboratory, industrial arts classes, physical education and athletics.

11. A note from a parent granting permission for his child to participate on a field trip does not free the teacher from liability if through his negligence a pupil is injured.

12. Teachers have a duty to maintain order so the work of the school may progress. In the absence of board action, the teacher is empowered to make reasonable rules for the conduct of the school.

13. Teachers have common law authority to use physical chastisement where necessary to enforce reasonable rules, except where such is prohibited by statute.

14. The right to use chastisement applies to all pupils whether or not they have reached their majority or are married.

15. A teacher is not liable for assault and battery if physical punishment is administered without anger or malice and if the amount and kind are reasonable in light of the offense, instrument used, age and sex of the offender.

16. If the teacher exceeds the above limitations, his actions will be considered an infringement of the legal rights of the student and he may be liable in assault and battery.

17. The right to control behavior extends beyond the school hours in certain instances that affect the moral tone of the school or tend to subvert the administration.

18. The confidence established through the high relationship of the teacher and the pupil exists at all times if through that relation the teacher seeks to take advantage of a pupil.

19. Communications by a teacher in line of duty of defamatory information to a qualified recipient, is privileged and not actionable unless malice or excessive publication is shown.

20. The teacher's liability for tort is not shared by school districts since districts fall within the scope of the governmental immunity theory.

21. School districts may assume liability for tort only through statutory enactment.

22. Appropriate statutes may enable school districts to insure against injury to students and personnel.

23. Legislation may be enacted to allow school districts to indemnify or protect teachers from liability if they are involved in tort actions by reason of school activities.

Recommendations

In view of the above principles, it is the general opinion that society has placed an unusually heavy burden of responsibility and legal liability on members of the teaching profession. In order to lessen the risk of law suits and possible financial ruin for injuries which result through the normal teaching activities, the following recommendations are made:

1. That teachers be fully appraised of the legal responsibilities and liabilities that are an adjunct to their profession. This may be attained through course work, institutes, brochures or teachers' meetings.

2. That administrators, supervisors and board members take precautionary measures to protect the teacher where ever possible from actions which may become the basis of a suit for damages. Specific rules should be enacted and

enforced concerning such matters as passing to and from class, first aid and emergency care, field trips, use of dangerous equipment, disciplinary measures and reporting unsafe conditions of the premises.

3. That legislatures enable school districts to assume the legal responsibility for injuries which occur in the line of duty of the school's activities.

4. That if the school districts are not given legal authority to assume the responsibility for tort actions directly, they should be permitted to protect or insure the teacher from suits or judgments which arise from actions performed in the discharge of the teacher's duty and in the scope of his employment.

5. That until school districts are legally authorized to assume the legal responsibility directly or insure or protect teachers against suits, teachers be encouraged to carry their own liability insurance against suits for damages.

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APPENDIX A

GLOSSARY OF SELECTED LEGAL TERMS

GLOSSARY OF SELECTED LEGAL TERMS

The definitions of the following terms were selected from qualified legal dictionaries and encyclopedias.

Action. The legal and formal demand of one's rights from another person or party made and insisted upon in a court of justice.

Appellate court. A court having power to review the decisions of a lower court.

Assault. The threat of violence or unlawful touching that causes an apprehension of immediate bodily harm or contact.

Assumption of Risk. If a person voluntarily engages in an activity, fully cognizant of the attending dangers, he assumes the risk and there is no duty on another to protect him.

Battery. Any unlawful touching or striking of a person without consent.

Civil Action. A personal action instituted to recover from a wrong. It is founded on private rights arising from contract or tort.

Common Law. The body of principles and rules of action which derive their authority solely from usage and customs or from judgment and decrees of courts recognizing, affirming and enforcing such usages and custom.

Contributory Negligence. The lack of care on the part of a person who is injured, concurring or combining with the negligence of the person causing the injury.

Corporation. A legal entity created by or under the authority of law.

Crime. An offense against the state. It is considered of a public character because it possesses elements of evil which affect the public as a whole and not merely the person whose rights of property or person have been invaded.

Damages. A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another.

De facto. One in actual possession or power but without lawful title.

Defamation. Malicious statements that cause injury to a person's good name, character or reputation.

De jure. Full compliance with the law; valid in law.

Defendant. Person against whom suit is instituted.

Demurrer. A form of pleading which disputes the sufficiency in law of the pleading of the other side.

Exemplary damages. Damages above the amount which actually compensates which may be awarded as punishment when

malice or evil intent are shown. The term punitive damages also applies.

False imprisonment. Illegal restraint of a person or confinement within a specific area, thereby depriving him of his personal liberty.

In loco parentis. In place of the parent.

Invitee. One who comes upon premises by the express or implied invitation of the proprietor.

Judgment. The official decision of a court of justice upon the respective rights and claims of the parties to an action and submitted to its determination.

Libel. A malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.

Liability. The state of being bound or obliged in law or justice to do, pay or make good something.

Licensee. A person who is permitted to enter the land of another for his own interest or convenience.

Malfeasance. The wrongful or unjust doing of some act which the doer has no right to perform, or which he has stipulated by contract not to do.

Mandamus. A command issued by a court requiring the performance of a particular duty which duty results from

the official station of the party to whom the order is directed, or from the operation of law.

Misfeasance. The improper performance of an act which is itself lawful.

Malice. The doing of a wrongful act intentionally, without just cause or excuse.

Negligence. Conduct which falls below the standard that is expected of a reasonably prudent person under the circumstances.

Nonfeasance. The neglect or failure of a person to do some act which he ought to do.

Nonsuit. A judgment given against a plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of a cause after it has been put at issue.

Nuisance, public. Creation or maintenance of a condition that is offensive to the general public either because it is dangerous, unhealthful, or indecent to the senses.

Per se. By himself or itself; in itself.

Plaintiff. The person who institutes a suit against another.

Presumption. A term used to signify that which may be assumed without proof, or taken for granted. It is asserted as a self-evident result of human reason and experience.

Proximate cause. That which, in a natural and continuous sequence, unbroken by an efficient intervening cause,

produces the injury, and without which the result would not have occurred.

Quasi judicial. The acts of an officer which are executive or administrative in their character and which call for the exercise of that officer's judgment and discretion; are not ministerial and his authority to perform such acts is quasi judicial.

Remanded. To send a case back to a court from which it came so that further proceedings if any, may be taken there.

Respondeat superior. Maxim which means that a master is liable in certain cases for the acts of his servant, and a principal for those of his agent.

Slander. The speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another.

Statute. A particular law enacted by the legislative department of government.

Tort. A legal wrong, exclusive of contract for which a civil action will lie.

Tortious. Wrongful; of the nature of tort.

Trespass. An unlawful act committed with violence, actual or implied, causing injury to the person, property, or relative rights of another. It is also used as the name of a common law action, which is the remedy ordinarily employed where the plaintiff seeks to

recover damages for the commission of a trespass.

Trespass on the case. The name of the action which lies for an injury which is not directly or immediately occasioned by, but is merely a consequence resulting from the act complained of. The action is also called "case" or "action on the case."

Verdict. The formal and unanimous decision or finding made by a jury and accepted by the court on questions submitted to them.

APPENDIX B

TABLE OF CASES

TABLE OF CASES

13. Bartell v. School District No. 28, Lake County, 114 Mont. 451, 137 P.2d. 422 (1943).

14. Baskett et al. v. Crossfield et al., 190 Ken. 751, 228 S.W. 673 (1920).

15. Bates v. Escondido Union High School District, 133 Cal. App. 725, 24 P.2d. 885 (1933).

16. Bauer v. Board of Education of the City of N.Y., 140 N.Y.S.2d. 167, 285 App. Div. 1148 (1955).

17. Beaty v. Randall et al., 79 Mo. App. 226, 50 L.R.A.N.S. 269 (1899).

18. Bellman v. San Francisco High School District, 11 Cal. 2d. 576, 81 P.2d. 894 (1938).

19. Benson v. Baltimore Traction Company, 77 Md. 535, 26 Atl. 973 (1893).

20. Berry v. Arnold School District, 199 Ark. 1118, 137 S.W.2d. 256 (1940).

21. Bigelow v. Inhabitants of Randolph, 14 Gray 541, 80 Mass. 541 (1860).

22. Bingham v. Board of Education of Ogden City, 118 Utah 582, 223 P.2d. 432 (1950).

23. Blue v. City of Union, 159 Ore. 5, 75 P.2d. 977(1938).

24. Board of Education v. Helston, 32 Ill. App. 300(1889).

25. Board of Education et al. v. Purse et al., 101 Ga. 422, 28 S.E. 396 (1897).

26. Bowman v. Union High School District No. 1, Kitsap County, 173 Wash. 299, 22 P.2d. 991 (1933).

27. Boyce v. San Diego High School District, 215 Cal. 293, 10 P.2d. 62 (1932).

28. Boyd v. State, 88 Ala. 169, 7 So. 268 (1890).

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30. Briscoe v. School District No. 123, Grays Harbor County, 32 Wash.2d. 353, 201 P.2d. 697 (1949).

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34. Bruenn v. North Yakima School District No. 7, 101 Wash. 374, 172 Pac. 569 (1914).

35. Burdick v. Babcock et al., 31 Iowa 562 (1871).

36. Bush v. City of Norwalk, 122 Conn. 426, 189 Atl. 608 (1937).

37. Buzzard v. East Lake School District, 43 Cal. App.2d. 316, 93 P.2d. 233 (1939).

38. Byrd v. Begley, 262 Ky. 422, 90 S.W.2d. 370 (1936).

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41. Churchill v. Fewkes, 13 Ill. App. 520 (1883).

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45. Cook v. Neeley et al., 143 Mo. App. 632, 128 S.W. 233 (1910).

46. Cooper v. McJunkin, 4 Ind. 290 (1853).

47. Crownover v. Alread School District No. 7, 211 Ark. 449, 200 S.W.2d. 809 (1947).

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64. Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d. 889 (1941).

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76. Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926).

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83. Gattavara v. Lundin et al., 166 Wash. 548, 7 P.2d. 958 (1932).

84. Gilliland v. Bondurant, 332 Mo. 881, 59 S.W.2d. 679 (1933).

85. Golish v. School District of the Borough of Windber, 15 Som. 125 (Penn. 1950).

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92. Guernsey v. Pitkins, 32 Vt. 224, 76 Am. Dec. 171 (1859).

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100. Hardwick v. Fruitridge School District, 54 Cal. App. 696, 235 Pac. 49 (1921).

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110. Hodge, Matter of, 6 State Dep't. Rep. 609, 86 Misc. Rep. 367 (N.Y. 1915).

111. Hodgkins v. Inhabitants of Rockport, 105 Mass. 475 (1870).

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114. Hoose v. Drum, 281 N.Y. 54, 22 N.E.2d. 233 (1939).

115. Houeye v. St. Helena Parish School Board, 223 La. 966, 67 So.2d. 553 (1953).

116. Howard v. Tacoma School District No. 10 of Pierce County, 88 Wash. 167, 152, Pac. 1004 (1915).

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118. Hughes v. Bizzell et al., 189 Okla. 472, 117 P.2d. 763 (1941).

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126. Katterschinsky v. Board of Education of the City of New York, 215 N.Y. App. Div. 695, 212 N.Y.S. 424 (1925).

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128. Kennedy et al. v. County Board of Education, 214 Ala. 349, 107 So. 907 (1926).

129. Kenney v. Antioch Live Oak School District, 18 Cal. App.2d. 226, 63 P.2d. 1143 (1936).

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136. Kirchoff v. City of Janesville, 255 Wis. 202, 38 N.W.2d. 698 (1949).

137. Klezendorf et al. v. Shasta Union High School District et al., 4 Cal. App.2d. 164, 40 P.2d. 878 (1935).

138. Kline v. San Francisco Unified School District, 40 Cal.2d. 178, 105 P.2d. 362 (1940).

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141. Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

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143. Lawver v. Joint District, 232 Wis. 608, 288 N.W. 192 (1939).

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150. Lupke v. School District No. 1 of Multnomah County, 130 Ore. 409, 275 Pac. 686 (1929).

151. McCloy et al. v. Huntington Park Union High School District of Los Angeles County, 139 Cal. App. 237, 33 P.2d. 882 (1934).

152. McCormick v. Burt et al., 95 Ill. 263, 35 Am. Rep. 163 (1880).

153. McCullough v. City of Philadelphia, 32 Pa. Super. 109 (1906).

154. McDonell v. Brozo, 285 Mich. 38, 280 N.W. 100(1938).

155. McGraw v. Rural High School District No. 1 of Linn County, 120 Kan. 413, 243 Pac. 1038 (1926).

156. McLeod v. Grant County School District No. 128, 42 Wash. 316, 255 P.2d. 360 (1953).

157. McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

158. Mack v. Kelsey et al., 61 Vt. 399, 17 Atl. 780 (1889).

159. Maede v. Oakland High School District of Alameda County, 212 Cal. 419, 298 Pac. 987 (1931).

160. Mando v. Wesleyville School Board, 35 Erie 74, 81 D. & C. 125 (Penn. 1952).

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