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Tort Liability of Teachers

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TORT LIABILITY OF TEACHERS

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The tort liability of teacher *qua* teacher encompasses a rather narrow ambit and is largely restricted to cases in which it is alleged that the right of the teacher to enforce discipline has been abused and that the teacher is therefore liable in damages for the commission of an intentional tort. The question in such a case is whether the teacher has exceeded, or acted outside the scope of, his privilege. A particular common law concept was developed very early here defining the privilege as one deriving from the fact that the teacher stood in loco parentis,[1] and the privilege still rests principally on that concept, although the content of the Latin phrase has undergone considerable change. Of course, there are many harms resulting from negligence whose setting is peculiar to schools or which happen with greater frequency in schools. If the teacher is the negligent actor whose conduct or omission to act (where he is under a duty to act)[2] has caused the harm, he can find no special rules to raise in his defense—he no longer stands in the place of the parent, who is not liable to his child for negligent harm. Under the common law, which obtains in the majority of states, the teacher in the case of either intentional or negligent tort is the only defendant against whom the injured plaintiff can proceed, since the school-governing authority for various reasons is clothed with immunity,[3] as an attribute of sovereignty[4] and as a result of the classification of public

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1. BLACKSTONE, COMMENTARIES 453 (Lewis ed. 1922); 2 KENT, COMMENTARIES 205 (14th ed. 1895); "Moderate chastisement is established by immemorial usage as the only available terror to vicious and incorrigible evil-doers, both in the homestead and the school-room . . . 'Foolishness,' said Solomon, 'is bound up in the heart of a child, but the rod of correction will drive it far from him.'" Boyd v. State, 88 Ala. 169, 7 So. 268, 270 (1890).

2. 2 RESTATEMENT, TORTS § 320 (1934); Duda v. Gaines, 12 N.J. Super. 326, 79 A.2d 695 (1951) (dictum); Briscoe v. School Dist., 32 Wash. 2d 353, 201 P.2d 697 (1949); see De Gooyer v. Harkness, 70 S.D. 26, 13 N.W.2d 815 (1944).

3. Annot., 160 A.L.R. 7; 47 AM. JUR. *Schools* § 56 (1943); Briscoe v. School Dist., 32 Wash. 2d 353, 201 P.2d 697 (1949).

4. "The State acts in its sovereign capacity, and does not submit its action to the judgment of courts, and is not liable for the torts or negligence of its agents, and a corporation created by the State as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the State itself, unless such liability is expressly provided for by the statute creating such agency." Kinnare v. Chicago, 171 Ill. 332, 49 N.E. 536, 537 (1898). The Illinois court subsequently shifted to the theory that recovery could not be had against the school unit because public funds could not be diverted to pay damage claims, Leviton v. Board of Educ., 374 Ill. 594, 30 N.E.2d 497 (1940). And in Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 567, 109 N.E.2d 636 (1952), followed in Tracy v. Davis, 123 F. Supp. 160 (E.D. Ill. 1954), recovery was allowed to

education as a governmental function,[5] because the courts will not allow the diversion of public proceeds to satisfy tort claims,[6] or because the doctrine of respondeat superior does not apply.[7] In a few states,[8] the school unit may be sued directly or the teacher

the extent of insurance coverage held by the district. The Supreme Court of Illinois has not ruled on the question.

5. Mokovich v. Independent School Dist., 177 Minn. 446, 225 N.W. 292 (1929); Rhoades v. School Dist., 115 Mont. 352, 142 P.2d 890 (1943); Perkins v. Trask, 95 Mont. 1, 23 P.2d 982 (1933); Anderson v. Board of Education, 49 N.D. 181, 190 N.W. 807 (1922).

6. Martini v. School Dist., 83 Pa. D. & C. 206, 54 Lack. Jur. 57 (1952); Leviton v. Board of Educ., *supra* note 4; Perkins v. Trask, 95 Mont. 1, 23 P.2d 982, 983 (1933): "Some authorities place [non-liability of school districts] on the ground that the relation of master and servant does not exist; others take the ground that the law provides no funds to meet such claims. Still other authorities hold that school districts in performing the duties required of them, exercise merely a public function and agency for the public good . . ."

7. Montanick v. McMillin, 225 Iowa 442, 280 N.W. 608 (1938). This was formerly the view in New York, *e.g.*, Katterschinsky v. Board of Education, 215 App. Div. 695, 212 N.Y. Supp. 424 (2d Dep't 1925).

8. Direct actions against the school unit are authorized by: CAL. EDUC. CODE § 1007 (1952), "on account of injury to person or property arising because of the negligence of the district, or its officers, or employees . . ."; N.Y. EDUC. LAW § 2560 (1953), pertaining to New York City—"negligence of any such appointed member, officer or employee, resulting in personal injury or property damage . . ."; N.Y. EDUC. LAW § 3023 (1953), pertaining to school districts of less than one million population—"negligence or other act resulting in accidental bodily injury . . ."; § 3023 states only that the school district shall "save harmless and protect all teachers, etc." and direct action against the district for the teacher's negligence is not authorized, Massimilian v. Board of Educ., 261 App. Div. 428, 25 N.Y.S.2d 978 (4th Dep't 1941); but the end-effect of § 3023 does not appear to be significantly different from that of § 2560; see Sandak v. Tuxedo Union School Dist., 308 N.Y. 226, 124 N.E.2d 295 (1954), *reversing* 283 App. Div. 732, 127 N.Y.S.2d. 631 (2d. Dep't 1954), and Miller, *Personal Injury Litigation in School Cases*, 20 LAW & CONTEMP. PROB. 60, 67 (1955); WASH. REV. CODE § 4.08.120 (1951)—"for an injury to the rights of the plaintiff from some act or omission of such county or other public corporation," but excepting under § 28.58.030 injuries resulting from use of athletic, playground, and manual training equipment and apparatus. Does the wording of § 4.08.120 provide a basis for an action based on intentional tort? See Briscoe v. School Dist., 32 Wash. 2d 353, 201 P.2d 697, 701 (1949): "The effect [of the statute] is to render a school district liable for tortious acts or omissions of its officers, agents or servants, according to the normal rules of tort law." Oregon has a statute similar to Washington's, ORE. COMP. LAWS ANN. § 8-702 (Supp. 1943), but the classification of acts as governmental or proprietary precludes its effective application on behalf of plaintiff in these cases; such classification has led to plaintiff's defeat in other states, see Note, 1958 U. ILL. L.F. 446.

"Save-harmless" statutes provide for reimbursement of the teacher in New Jersey and Connecticut. N.J. STAT. ANN. § 18:5-50.4 (Supp. 1958): "by reason of alleged negligence or other act resulting in accidental bodily injury to any person or damage to property . . ."; and CONN. GEN. STAT. § 10-235 (1958): "by reason of alleged negligence or other act resulting in accidental injury to or death of any person or in accidental damage to or destruction of property . . ." These statutes do not provide a direct action against the board, Swainbank v. Coombs, 19 Conn. Supp. 391, 115 A.2d 468 (1955); Hare v. Pennell, 37 N.J. Super. 558, 117 A.2d 637 (1955). The teacher's right against the board for indemnification does not arise unless and until he has sustained a loss, although the New Jersey statute does require provision of counsel for all employees who are defendants in tort actions. N.J. STAT. ANN. § 18:5-50.2 (Supp. 1958).

Franklin, *Tort Liability of Schools*, 1958 U. ILL. L.F. 429, suggests that the Illinois statute, ILL. REV. STAT. c. 122, § 6-35.1 (1957), authorizing school

may transfer the burden of his liability for negligent, but not intentional,[9] acts to the school-governing body if the act has been committed in the course and scope of the teacher's employment. In both common law and statutory jurisdictions the ordinary rules of negligence are said to obtain. As applied to the teacher in the classroom who negligently injures a pupil the law of negligence does not differ, at least in theory, from that applied to the teacher at home, miles from the school, when he negligently injures a neighbor's child, or fails to come to the aid of the neighbor boy whom he has employed to mow his lawn and who cuts his foot in operating the mower.

We are concerned here with the liability of the teacher arising out of school or school-related acts or omissions, where the teacher has direct supervision or authority over an individual as member of a group of elementary or secondary pupils in the classroom, the school building, the gymnasium, the school grounds, and to a limited extent, on the way to and from school, and in the home. It is conduct in the direct teacher-pupil relationship in which we are interested for the purpose of determining when liability may exist and when not. Both civil and criminal cases are cited in the effort to define accurately the limits of enforcing discipline by corporal punishment; while the quantum of proof required in a criminal case is greater than that required in a civil action, the substantive principles governing guilt in the one case and liability in the other are similar. Where the teacher was the negligent actor, cases are included even though the school unit, rather than the teacher, was made the defendant, where the liability in such cases was predicated upon the specific negligent conduct of the teacher. Although these cases are peculiar to those few jurisdictions which allow a direct action against the school unit, which has thus lost its immunity by statute, they may at least be suggestive of types of conduct by teachers which may ultimately be described everywhere as negligent regardless of who actually pays in the end, or, perhaps more accurately, they may demonstrate how liability is enlarged by the courts when a better risk-bearer than the hapless teacher is available as a defendant.

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boards to insure against liability of employees inferentially recognizes that tort liability of the district exists; this is true at least to the extent of insurance proceeds. Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 567, 109 N.E.2d 636 (1952).

Statutes which state that school units "may sue and be sued" are generally held not to make the units liable in tort. Wallace v. Laurel County Board of Educ., 287 Ky. 454, 153 S.W.2d 915 (1941); Mokovich v. Independent School Dist., 177 Minn. 446, 225 N.W. 292 (1929); Perkins v. Trask, 95 Mont. 1, 23 P.2d 982 (1933).

9. *E.g.*, Ridge v. Boulder Creek Union H.S. Dist., 60 Cal. App. 2d 453, 140 P.2d 990 (1943).

THE TEACHER'S AUTHORITY: SOURCE AND NATURE

The task of the teacher has been likened to that of "herding fleas in a sieve."[10] It has ever been thus; maintaining discipline in schoolrooms is not a problem peculiar to our day. In an age when heads could still roll because of impertinent words addressed to the sovereign, a schoolmaster importuned Charles II, "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."[11] The task is no easier than that of the parents; in many respects it is more difficult. The need for authority in the schoolmaster was met at an early date by assimilating his role of that of the parents; so, too, the master in relation to his underage apprentice.[12] Such authority has rested for centuries on the concept of in loco parentis, a status arrived at, so it has often been put, by the parent delegating to the teacher his authority over the child for the purposes of the child's education.[13] If the parent is the source of the teacher's authority, however, it raises problems concerning the withdrawal of such delegation,[14] and the parents' wishes and whims overriding the school-related authority of the teacher.[15] This hardly fits a system of compulsory public education, when neither parent nor child has any choice in the matter,[16] and where, if order is to be maintained, an

10. "He is placed in charge sometimes of large numbers of children, perhaps of both sexes, of various ages, temperaments, dispositions, and of various degrees of docility and intelligence. He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn." Patterson v. Nutter, 78 Me. 509, 7 Atl. 273, 274 (1886).

11. Quoted in People v. Petrie, 198 N.Y. Supp. 81, 83, 120 Misc. 221 (1923).

12. McKnight v. Hogg, 3 S.C. 44 (1812); 1 BLACKSTONE, COMMENTARIES 428 n.20 (Lewis ed. 1922); 6 C.J.S. *Apprentices* § 17 (1937); Annot., 43 A.L.R. 511 (1926).

13. 1 BLACKSTONE, COMMENTARIES 453 (Lewis ed. 1922); 12 HALSBURY, LAWS OF ENGLAND 140 (2d ed. 1934); Reg. v. Hopley, 2 F. & F. 202, 174 Eng. Rep. 1025 (1860); Cleary v. Booth, 1 Q.B. 465 (1893); Fitzgerald v. Northcote, 4 F. & F. 656, 176 Eng. Rep. 734 (1865); Stevens v. Fassett, 27 Me. 266 (1847) (dictum); Quinn v. Nolan, 7 Ohio Dec. Rep. 585 (1878). This continues to be the British view, WINFIELD, TORTS 134 (6th ed. 1954): "The control of a schoolmaster over his pupil is really delegated to him by the parent." See Ryan v. Fildes, [1938] 3 All E.R. 517, and Note, 24 L.T. 32 (1952). *But see* Note, 21 Sol. 298 (1954): "However, in these days of compulsory education the parent has little or no choice in the matter, and the so-called delegation is really fictitious."

14. That the delegation is revocable, see 12 HALSBURY, LAWS OF ENGLAND 138, para. 297, n. (*n*) (2d ed. 1934).

15. Winfield acknowledges this dilemma in the British theory of delegation, but finds his consolation in Horace: "Quidquid delirant reges, plectuntur Achivi." See R. v. Newport (Salop) Justices, 2 K.B. 416 (1929). See also Note, 214 L.T. 32 (1952). The law is otherwise in Scotland, M'Shane v. Paton, 1922 S.C.J. 26 (1922).

16. "The relationship here in question is that of school district and school child. It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. [Citing statutes]. The result is that the protective custody of teachers is mandatorily substituted for that of the parent." McLeod v. Grant Co. School Dist., 42 Wash. 2d 316, 255 P.2d 360, 362 (1953).

implied and irrevocable delegation of authority would have to be wrested from the parents by some legal fiction.

In resolving this dilemma, the *Restatement of Torts*[17] distinguishes between private schools and public schools. In the former, the relationship is one of contract, the teacher has only the authority specifically delegated to him, and the teacher's orders must give way to the parent's command or prohibition. In the public school, "the will of the parent cannot defeat the policy of the State." At least one early American case held that the delegation was one by law[18] (contrary to the then prevalent view of delegation by the parent). This is the general rule today[19] and the leading writers on torts[20] agree on its logic: The public school teacher stands in authority over the child by virtue of a confirmation of that authority by law, and the parent is powerless to restrict the common law, school-related authority of the teacher over the child.

Even though the source of authority of the teacher over his pupil be ascribed to the law or to the state and not to the parent, it still is most often described in terms of its scope by the Latin phrase in loco parentis.[21] It is said that the teacher has the right to discipline a child at school as a parent would at home.[22]

But his authority is not coextensive with that of the parent.[23] The teacher's authority is generally limited to situations under the teacher's control which are related to the purposes of education and training.[24] These relate chiefly, in the cases which have arisen, to matters of work performance, conduct, and discipline, but they can comprehend matters involving the child's immediate welfare in an

17. 1 RESTATEMENT, TORTS § 153(2), comment 2 (1934).

18. Stevens v. Fassett, 27 Me. 266 (1847), pupil over 21, but delegation theory was reiterated as to minors.

19. Well stated in McLeod v. Grant Co. School Dist., 42 Wash. 2d 316, 255 P.2d 360, 362 (1953): "[T]he protective custody of teachers is mandatorily substituted for that of the parent." See Sumption, *The Control of Pupil Conduct by the School*, 20 LAW & CONTEMP. PROB. 80 (1955): "The school being an agency of the state, it follows that in the final analysis the power to control the pupil possessed by the school is part and parcel of the power of the state to control the acts of individuals."

20. FLEMING, TORTS, 112 (1957); 1 HARPER & JAMES, TORTS 292 (1956); PROSSER, TORTS 113 (2d ed. 1955).

21. Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958); Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954).

22. 1 HARPER & JAMES, TORTS 291 (1956), and cases cited there.

23. "At least in a limited sense the relation of a teacher to a pupil is that of one in loco parentis." Gaincott v. Davis, 281 Mich. 515, 275 N.W. 229, 231 (1937).

24. Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888). Whether a command given by the teacher to a pupil to perform a personal errand for the teacher is within the scope of employment is an important question where direct suit is possible against the school unit or a "save-harmless" statute obtains. Smith v. Martin, [1911] 2 K.B. 775. Similarly, where the teacher gives permission to use school equipment for non-school use, as in Woodman v. Hemet Union H.S. Dist., 136 Cal. App. 544, 29 P.2d 257 (1934).

emergency,[25] and may thus even raise a duty to act.[26] It is generally agreed that a teacher is liable for nonfeasance as well as misfeasance.[27]

A 1942 Pennsylvania case states the scope of duty in the teacher-pupil relationship. In *Guerrieri v. Tyson,* the defendant teacher sought to treat a pupil's infected finger by forcibly immersing it in scalding water for ten minutes. A twenty-eight-day stay in the hospital and a scarred and disfigured hand were the consequences. In affirming a verdict for the plaintiff, the court said:

> These teachers stood in loco parentis to the child, but there is nothing in that relationship which will justify defendants' acts. Under the delegated parental authority implied from the relationship of teacher and pupil, a teacher may inflict reasonable corporal punishment on a pupil to enforce discipline [citing authority] but there is no implied delegation of authority to exercise her lay judgment, as a parent may, in a matter of the treatment of injury or disease suffered by a pupil. Treatment of the minor plaintiff's hand was not necessary in this case; defendants were not acting in an emergency. . . . The status of a parent, with some of the parent's privileges, is given a school teacher by law in aid of the education and training of the child [citing statute] and ordinarily does not extend beyond matters of conduct and discipline.[28]

The rule can therefore be stated that in school-, class-, and pupil-related matters, the teacher stands in loco parentis only with respect to the enforcement of authority, an area where parent and teacher are subject to the same limitations.[29] Thus, parents[30] and teachers[31] both become liable if they administer punishment which is immoderate and unreasonable, but the parent is liable only in a criminal action, for the child cannot generally sue the parent in a civil action,[32] while the teacher is liable both civilly and criminally. As a practical matter, therefore, the parent has greater latitude, for there are impediments in the way of vindicating the child's rights in personality

25. Sumption, *The Control of Pupil Conduct by the School,* 20 LAW & CONTEMP. PROB. 80 (1955).

26. Duda v. Gaines, 12 N.J. Super. 326 A.2d 695 (1951).

27. Brooks v. Jacobs, 139 Me. 371, 31 A.2d 414 (1943); Guyten v. Rhodes, 65 Ohio App. 163, 29 N.E.2d 444, 445 (1940): "If the 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."

28. 147 Pa. Super. 239, 24 A.2d 468, 469 (1942).

29. 1 HARPER & JAMES, TORTS 291 (1956).

30. State v. Black, 360 Mo. 461, 227 S.W.2d 1006 (1950); State v. Koonse, 123 Mo. App. 655, 101 S.W. 139 (1907); Fisher v. State, 154 Neb. 166, 47 N.W.2d 349 (1951); Carpenter v. Commonwealth, 186 Va. 851, 44 S.E.2d 419 (1947).

31. Serres v. South Anita School Board, 10 Cal. App. 2d 152, 51 P.2d 893 (1935); State v. Mizner, 50 Iowa 145, 32 Am. Rep. 128 (1878); Commonwealth v. Randall, 70 Mass. 36 (1855); Patterson v. Nutter, 78 Me. 509, 7 Atl. 273 (1886); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Melen v. McLaughlin, 107 Vt. 111, 176 Atl. 297 (1935); Reg. v. Hopley, 2 Fost. & F. 202, 174 Eng. Rep. 1025 (1860).

32. Hewlett v. George, 68 Miss. 703, 9 So. 885, 13 L.R.A. 682 (1891). PROSSER, TORTS 675-76 (2d ed. 1955).

by way of a criminal action which do not hinder the child as plaintiff or as a real party in interest in a civil action. The two are distinguished by a number of factors: the greater quantum of proof required in the criminal action; the reluctance of strangers to institute criminal action against a parent and thus invade the family unit except in the most extreme cases of cruelty;[33] the private nature of the parent-child-family relationship, which usually hides from public scrutiny parental administration of punishment and ofttimes puts difficulties in the way of securing friendly witnesses for the prosecution; and juries predisposed not to substitute their judgment for that of the parent except in cases of clear outrage.[34] With respect to negligent acts, the teacher does not stand in loco parentis, for the teacher is liable for negligent injury of the child, while the parent is not. The fact that the standard of care which the teacher must observe toward his pupil is often described as that of a careful father or a reasonable and prudent parent[35] does not place the teacher in loco parentis with respect to negligent acts. The analogy used to define the standard of care should not be confused with the status of in loco parentis granted by law to maintain discipline.

Authority Outside the School

What happens to the teacher's authority over school-, class-, and pupil-related matters when the school day is over and the pupil leaves the school grounds? On the way home little girls are teased and taunted by little boys,[36] fights sometimes break out and profane language is used,[37] pupils break regulations by smoking,[38] brash students ridicule teachers,[39] and children omit to do required home-

33. State v. Koonse, *supra* note 30, 101 S.W. at 141: "Courts do not, and should not, constitute themselves the arbiters of the household. There the authority of the parents, within the limits we shall presently define, is supreme, and from their judgment there is no appeal. But these domestic tribunals have limits to their jurisdiction, beyond which they may not go with impunity."

34. Additionally, the parent may be favored by a presumption that in administering discipline, he is restrained by "natural love and affection" which the schoolmaster does not feel. Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859). Is there an adequate substitute in "the high character of a teacher's calling and the station in life of those following it"? 65 L.R.A. 890, 894 (1904).

35. Olman v. Board of Educ., 300 N.Y. 306, 90 N.E.2d 474 (1949); Lee v. Board of Educ., 263 App. Div. 23, 31 N.Y.S.2d 113 (1st Dep't 1941); Hoose v. Drumm, 281 N.Y. 54, 22 N.E.2d 233 (1939); Ralph v. London County Council, 111 J.P. 548, 63 T.L.R. 546, (C.A. 1947); Gard v. Duncan Board of School Trustees, 1 W.W.R. 305 (1946); Williams v. Eady, 10 T.L.R. 41, (C.A. 1893).

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

37. Deskins v. Gose, 85 Mo. 485 (1885); Hutton v. State, 23 Tex. App. 386 (1887); Cleary v. Booth, 1 Q.B., 465 (1893).

38. Mansell v. Griffin, 1 K.B. 160, 947 (1908).

39. Morrison v. Lawrence, 186 Mass. 456, 72 N.E. 91 (1904); Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 176 (1859); People v. School Board, 135 Wis. 619, 116 N.W. 232 (1908).

work.[40] These situations have all been found to be clearly school-related, even though they take place off school grounds. There is no doubt but that the teacher's authority extends beyond the school day and beyond the school grounds,[41] and may, in certain situations, extend into the very home,[42] although the last presents great difficulties in resolving the teacher-parent conflict.

In *Lander v. Seaver*,[43] the pupil, after his return home and while performing chores for his father, ridiculed his teacher in the presence of the teacher and fellow-pupils. The teacher whipped the boy at school the next day. In the subsequent action for battery, the court on appeal said:

> When the child has returned home or to his parents' control, then the parental authority is resumed and the control of the teacher ceases, and then for all ordinary acts of misbehavior the parent alone has the power to punish....
>
> But where the offense 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.[44]

This view has perhaps been carried the farthest in *O'Rourke v. Walker*.[45] There the plaintiff terrorized homeward-bound little girls while he stood on his parents' premises after his own return from school. When confronted with the charge on the following day, the boy admitted annoying the girls, and the teacher administered light corporal punishment. In an action for damages for battery, the

40. Bolding v. State, 23 Tex. App. 172, 4 S.W. 580 (1887). *But see* note 47 *infra*, in case of conflict with parent's command. *Contra*, Hunter v. Johnson, 13 Q.B.D. 225 (1884), to effect that school board had no power to compel study at home.

41. HAMILTON & REUTTER, LEGAL ASPECTS OF SCHOOL BOARD OPERATION 22 (1958), and cases cited there; Cleary v. Booth, 1 Q.B. 465 (1893); and for a recent restatement, State v. Lutz, 113 N.E.2d 757, 758 (Ohio C.P. 1953): "[T]he teacher's responsibility attaches home to home (i.e., while the pupil is on the way to and from school)."

See the thorough discussion in Note, 11 CORNELL L.Q. 266 (1926). Except for the *Wilson* case, *infra*, nothing appears to have been contributed to this aspect of the law since the *O'Rourke* case, *supra* note 36. See also Sumption, *The Control of Pupil Conduct by the School*, 20 LAW & CONTEMP. PROB. 80, 85 (1955). In a questionable holding, school discipline was allowed to be exercised with respect to conduct during Christmas vacation in Douglass v. Campbell, 89 Ark. 254, 116 S.W. 211 (1909). In Wilson v. School Dist., 190 S.W.2d 406 (Tex. Cir. App. 1945) the court said that the school board's authority did not subsist during summer vacation periods.

42. Bolding v. State, 23 Tex. App. 172, 4 S.W. 579, 580 (1887): "This authority of a teacher over his pupils is not, in our opinion, necessarily limited to the time when the pupils are at the school room, or under the actual control of the teacher. Such authority extends, we think, to the prescribing and enforcement of reasonable rules and requirements, even while the pupils are at their homes."

43. 32 Vt. 114, 76 Am. Dec. 156 (1859).

44. *Id.* at 120, 76 Am. Dec. at 160.

45. 102 Conn. 130, 128 Atl. 25 (1925).

teacher's authority to punish the boy was upheld on the ground that its exercise was related to the morale and efficiency of the school. Home base is thus not "safe" for the bully. If the parents fail in their duty to discipline, the teacher should be allowed to fulfill his. But although the instant case is clearly correct, what is to be done when the teacher's school-related mandate, which is to be carried out at home, runs up against the parents' wish or command?[46] Will the teacher be liable in tort if he punishes the pupil for defying his authority in complying with the father's? The teacher's authority in such an instance has been described as prohibitory in nature, extending only to acts "which may be reasonably shown to interfere with school work, impair discipline, or bring into disrepute the school, its officials, or its teachers,"[47] and not to "positive acts requiring pupils to perform tasks at home."[48] In *Mangum v. Keith*,[49] a rule of the school that prohibited pupils from attending social or entertainment functions on school nights was upheld as overriding the parents' consent. A better view is to be found in two earlier cases. In *Dritt v. Snodgrass*,[50] a rule that pupils should not attend social functions during the school term was struck down, and in *Hobbs v. Germany*,[51] where a boy was given the choice of corporal punishment or expulsion for attending a religious service with his father between seven and nine o'clock on a school night, whereas a school rule required he remain home and study, and the pupil chose expulsion, the rule was declared a nullity. Although none of these last-mentioned cases involved a teacher's liability in tort, but were actions pending or following expulsion from school, they raise the question of the teacher's liability if he had punished the infraction of such rules by disciplining the child upon his return to school.

Enforcement of Rules and Regulations

Obviously, the teacher cannot compel what a statute forbids, and if he invades the interest and personality of a pupil to enforce compliance of such an instruction, he is liable in tort. If the teacher in good faith enforces by disciplinary action a school regulation which is subsequently determined to be beyond the power conferred by law

46. See Morrow v. Wood, 35 Wis. 59, 64 (1874): "The situation of the child is truly lamentable, if the condition of the law is that he is liable to be punished by the parent for disobeying his orders in regard to his studies, and the teacher may lawfully chastise him for not disobeying his parent in that particular."

47. Sumption, *The Control of Pupil Conduct by the School*, 20 Law & Contemp. Prob. 80 (1955).

48. *Ibid.*

49. 147 Ga. 603, 95 S.E. 1 (1918).

50. 66 Mo. 286 (1877).

51. 94 Miss. 469, 49 So. 515 (1909).

on the school-governing body, and is therefore void, tort liability of the teacher could theoretically ensue under the older holdings, although the better view today would be that privilege attaches where the teacher "has acted with proper motives and with due care and diligence," or without malice or negligence.[52] It is doubtful whether mere school regulations forbidding or specifying punishment can alter the teacher's common law status of in loco parentis or his authority under statute to inflict corporal punishment, although to violate the regulation might subject the teacher himself to discipline.[53] As to civil or criminal proceedings brought against the teacher, it would seem that the common law or the statute permitting punishment would control.[54]

It has been held that "any rule or regulation which has for its object anything outside of the instruction of the pupil—the order requisite for instruction—is beyond the province of the board of education to adopt,"[55] and therefore would be beyond a teacher's authority to establish and enforce. And even if related to instruction, the rule must be reasonable.[56] However, a wide scope of discretionary power is demonstrated in the regulations of school boards which have been held reasonable[57] and which therefore (absent prohibition by superiors) a teacher might establish of his own volition and enforce by reasonable disciplinary measures.[58] A standard set a good many years ago in a Wisconsin[59] case is still valid: "The rules and regula-

52. See Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 222-27 (1956); PROSSER, TORTS 784 (2d ed. 1955).

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

54. This is the result in Britain under the parental delegation theory. Mansell v. Griffin, [1908] 1 K.B. 160, where the prohibitions of the City of Gloucester Education Committee were listed in detail. The teacher was nevertheless not liable to the pupil for assault since, although the punishment violated the committee's rules, he held the parental delegation to administer such moderate punishment as a parent would. Neither the teacher nor the parent knew of the Committee's rules.

That the statute would control in the United States is suggested in Miller, *Resort to Corporal Punishment in Enforcing School Discipline*, 1 SYRACUSE L. REV. 247 (1949). *But cf.* Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958), where it was claimed that the defendant teacher violated a rule of the board of education that corporal punishment could be inflicted only by the principal in the presence of the teacher. Held, that the teacher was not liable since in slapping plaintiff immediately after plaintiff uttered a vulgar remark to the defendant, "The defendant acted, not for the purpose of inflicting punishment, but to restore order and discipline." 141 A.2d at 641.

55. State v. Board of Educ., 63 Wis. 234, 23 N.W. 102, 103 (1885).

56. State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888).

57. Wilson v. School Dist., 190 S.W.2d 406 (Tex. Civ. App. 1945). For a discussion of various kinds of school rules and regulations which have been upheld, see Sumption, *The Control of Pupil Conduct by the School*, 20 LAW & CONTEMP. PROB. 80, 82-87 (1955).

58. Berry v. Arnold School Dist., 199 Ark. 1118, 137 S.W. 2d 256, 259 (1940): "A teacher has the right to inflict reasonable corporal punishment upon a pupil for insubordination, disobedience, or other misconduct, but he has no right to inflict punishment to enforce an unreasonable rule . . ."

59. State *ex rel.* Powe v. Board of Education, 63 Wis. 234, 23 N.W. 102, 104 (1885).

tions made must be reasonable and proper, or, . . . *'needful,'* for the government, good order, and efficiency of the schools—such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare."

With the virtual disappearance of the one-room schoolhouse through the consolidation of schools, and the improvement and refinement of administrative technique, rules and regulations governing many phases of school conduct are made by school-governing units or school administrators rather than by individual teachers. Of course, not every breach of discipline can be anticipated with an established rule.[60] Reasonable standards of conduct, unwritten and perhaps unspoken, and very often articulated only after the fact, constitute the basic rules of conduct in most school situations. But there must be some uniformity, and a peculiar rule of one teacher which others have not found necessary would probably be held unreasonable. Thus, the teacher who seeks to impose, on his own initiative, rules regarding outside activities, dress, and other matters which in fact may bear on "order and decorum" of the school generally, but are not the individual teacher's peculiar problems, is asking for trouble in so doing. He probably risks repudiation by his superiors even before he exposes himself to tort liability.

It is well to emphasize that the child must at all times be made to understand the reason for the exercise of the teacher's authority. That is, disciplining for defiance of the teacher's authority must be predicated upon an understanding by the child of why he is being punished.[61] Otherwise the teacher may be accused of acting capriciously or maliciously, or the disciplinary action will be held unreasonable since it was not purposeful.

Finally, care should be exercised in enforcing rules to distinguish between willful acts of pupils in defiance of rules, regulations, or authority, and acts which are merely accidental or negligent.[62] Assume that a child inadvertently or carelessly breaks a piece of equipment or tears a page in a book. Punishment of any kind would probably be held unreasonable if the damage were clearly the result of accident and possibly even if the result of negligence, although in the latter case an admonition followed by reasonable punishment would probably be privileged as serving the purpose of instilling greater habits of care and respect for the property of others.[63]

60. State *ex rel.* Dresser v. District Board, 135 Wis. 619, 116 N.W. 232 (1908); HAMILTON & REUTTER, LEGAL ASPECTS OF SCHOOL BOARD OPERATION 23 (1958).

61. State v. Mizner, 50 Iowa 145, 32 Am. Rep. 128 (1878).

62. Perkins v. Independent School Dist., 56 Iowa 476, 9 N.W. 356 (1880).

63. But a rule that the child should pay "for the wanton and careless destruction of school property" was held to be unreasonable because "in simple carelessness there is no purpose to do wrong" and because the rule was

CORPORAL PUNISHMENT: LIABILITY FOR ASSAULT AND BATTERY

Examination of the corporal punishment cases, both civil and criminal, show two clear lines of authority as to the teacher's role in administering corporal punishment.[64] As might be expected, the discretionary role of the teacher in determining the necessity for and the nature and quantum of punishment is the heart of the older rule, as stated in the case of *State v. Pendergrass*.[65] The newer rule denies the teacher any "quasi-judicial" authority and makes the reasonableness of the punishment—its necessity, its mode, and its measure—a question of fact.[66]

According to the *Pendergrass* case, the teacher is the arbiter. He judges when punishment for infraction of school discipline is justified and how much is justified, and he remains free of liability so long as he inflicts the punishment without malice, or does not inflict it to gratify his passions, as some cases stated it, and so long as he does not disfigure or permanently injure the child. The reasons for this latitude were stated thus:

> His [the teacher's] judgment must be *presumed* correct, because he is *the judge,* and also because of the difficulty of proving the offense, or accumulation of offenses, that called for correction; of showing the peculiar temperament, disposition, and habits, of the individual corrected; and of exhibiting the various milder means, that may have been ineffectually used, before correction was resorted to.[67]

This view, with qualifications, obtained rather generally throughout the 19th century[68] as the relic of an earlier and stricter day. Although this court drew the line between causing "temporary pain," which was legal, and "permanent ill," which was not, some cases purporting to follow the *Pendergrass* decision adopted less certain but seemingly more strict criteria, tending toward the modern view of reasonableness as a question for the jury, without, however, abandoning the strong presumption in favor of the teacher which rested on his discretionary power. Thus, in *Boyd v. State*,[69] it was said that "the teacher is within reasonable bounds, substitute for the parent . . . vested with the power to administer moderate correction, with a proper instrument, . . . which ought to have some reference to the character of the offense, the sex, age, size, and physical strength of the

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beyond the power of the pupil to comply with. State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266, 267 (1888).

64. See the discussion in People v. Curtiss, 116 Cal. App. 771, 300 Pac. 801 (1931), in Note, 26 ILL. L. REV. 815 (1932), and in 65 L.R.A. 890 (1904).

65. 19 N.C. 365, 31 Am. Dec. 416 (1837).

66. See note 82 *infra.*

67. State v. Pendergrass, *supra* note 65 at 367, 31 Am. Dec. at 417.

68. See the cases collected in Note, 26 ILL. L. REV. 815 (1932).

69. 88 Ala. 169, 7 So. 268 (1890).

pupil." Whether an arm was broken or welts disappeared after a day or two, or whether malice was or was not present, was no longer determinative. Certainly such is generally the case today,[70] although some rather recent cases in Alabama,[71] Illinois,[72] and Ohio[73] have restated the *Pendergrass* criteria of lasting injury and of malice or passion.

The court in the *Boyd* case acknowledged that "some well-considered authorities" held that criminal liability of parents and teachers for the infliction of corporal punishment was to be decided by "the general judgment of reasonable men," but held that this was limited to the inference of malice from the mode or degree of punishment employed, which put the case back under the *Pendergrass* formula.[74] In this way, the court believed, the child was protected against brutality, but the teacher was not exposed to liability for "errors in judgment," which were a prerogative of his "judicial capacity."[75] A

70. Carpenter v. Commonwealth, 186 Va. 851, 44 S.E.2d 419 (1947) and cases cited therein.

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

72. Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889, 891 (1941): "[T]he presumption is in favor of the correctness of the teacher's action in inflicting corporal punishment upon the pupil. The teacher must not have been actuated by malice, nor have inflicted the punishment wantonly. For an error in judgment, although the punishment is unnecessarily excessive, if it is not of a nature to cause lasting injury, and he acts in good faith, the teacher is not liable."

73. State v. Lutz, 113 N.E.2d 757 (Ohio C.P. 1953).

74. Similarly, Vanvactor v. State, 113 Ind. 276, 15 N.E. 341, 342-43 (1888), that "the calm and honest judgment of the teacher as to what the situation required should have weight. . . ." Here, if the teacher "really gave harder blows than ought to have been given, the error was one of judgment only, and hence not one of improper or unlawful motive."

75. In England, where the relation of the teacher to the education authority is that of servant to master, vicarious liability of the authority extends not only to the negligent acts of the teacher but also to the intentional torts committed by the teacher in the scope of employment in the absence of personal spite or malice. Thus, no difficulty is encountered by the plaintiff, who has been corporally punished "in excess of moderation and reason" if he sues the education authority, even if the injury resulted from an "error in judgment" or what might be described as the negligent exceeding of privilege. The teacher may have to indemnify, but the plaintiff is compensated if he proves his case. The American statutes which provide either a direct action against the school-governing authority or for indemnification of the teacher do so only in cases where the teacher has been negligent, with the possible exception of Washington, *supra* note 8. Except possibly in Connecticut, *infra,* corporal punishment which exceeds what is reasonable and moderate even if the excess is negligently inflicted is treated as an intentional tort; the direct action against the school-governing authority in such a case would appear not to be available and the teacher, if held liable, would not be indemnified under a save-harmless statute. There is a misconception here, and an injustice results in that the victim of negligent conduct which causes permanent injury may have a remedy only against the teacher even in jurisdictions which have abandoned common-law immunity of school units.

An injury that results from the application of corporal punishment intended to be reasonable and moderate but exceeding the bounds of privilege because it is carelessly administered is the result of negligence, not intent. In Ryan v. Fildes, [1938] 3 All. E.R. 517, where a teacher boxed a boy's ears, causing deafness, the action for damages was described by the English judge as one

1944 New York decision in a prosecution for assault similarly placed great emphasis on the presence or absence of malice, holding that the discretion vested in the teacher gave him considerable allowance in determining reasonable punishment, so long as he did not act from malice,[76] and a 1957 decision in a municipal court followed the same reasoning.[77]

The earliest case expressing what may be termed the "modern rule" is *Commonwealth v. Randall*,[78] a prosecution for assault where a judge refused to give the instruction requested by the defendant, "that a school teacher is amenable to the laws . . . for punishing a scholar, only when he acts *malo animo*, from vindictive feelings, or under the violent impulses of passion of malevolence; he is not liable for errors of opinion or mistakes of judgment merely. . . ." The judge instead laid down the rule that "a 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 offence [*sic*], by the age, size and apparent powers of endurance of the pupil . . . ." and left it to the jury to decide whether the punishment was excessive. A few years later, in *Lander v. Seaver*,[79] the Vermont court said that "the school master does not belong to the class of public officers vested with . . . judicial and discretionary powers" relieving him from liability for errors in judgment. The Supreme Court of Tennessee

for assault, but the characterization was justified by a remark that hitting a child on or about the head was of itself not reasonable punishment. But where a teacher, to get the attention of a pupil whose head was turned, threw a pencil and hit the pupil in the eye as the pupil turned his head, the action was brought on a negligence theory. Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904). The court held that the jury should decide whether permanent injury was foreseeable. There, however, it would seem that the punishment could be described as inherently unreasonable and therefore initially constituted an assault. See also Serres v. Santa Anita School Board, 10 Cal. App. 2d 152, 51 P.2d 893 (1935). Yet, it is not difficult to imagine cases where punishment, moderate and reasonable in its nature and severity, might result in a permanent injury because of carelessness—a nail in a stick, a loose ring on a hand, or an inexpertly delivered blow which would have been privileged if it had squarely hit the buttocks. In the common-law jurisdictions the teacher would be saved only by allowing him discretion so long as he acted in good faith, a view largely repudiated; in the statutory jurisdictions, he would escape personal liability if such good-faith excesses of privilege, if not discretionary, were treated as negligent rather than intentional torts. The latter is suggested under the Connecticut "save-harmless" statute, CONN. GEN. STAT. § 10-235 (Supp. 1958), in Swainbank v. Coombs, 19 Conn. Supp. 391, 115 A.2d 468, 471 (1955) (dictum): "Here the complaint is broad enough to permit proof of a negligent striking, which would bring the case squarely within the actions to which the [indemnification] statute, by its express terms, applies."

76. People v. Mummert, 183 Misc. 243, 50 N.Y.S.2d 699 (1944). Conviction of principal for assault in 3d degree reversed on ground that discretion vested in teacher gives him considerable allowance in determining punishment, absent malice. *Proverbs* 13:24, 23:13, 14, and 29:15 were quoted to reinforce the decision; so, too, in the *Baldini* case, *infra* note 77.

77. People *ex rel.* Ebert v. Baldini, 159 N.Y.S.2d 802 (Mt. Vernon Ct. 1957).

78. 70 Mass. 36, 37 (1855).

79. 32 Vt. 114, 76 Am. Dec. 156 (1859).

in 1859[80] likewise pointing to moderation and reasonableness as criteria, suggested that chastisement be proportioned to the offense, but its emphasis on "wanton abuse" suggested presence or absence of malice was nevertheless determinative.

Sheehan v. Sturges[81] in 1885 firmly set forth the modern rule by stating that "the extent and reasonableness of the punishment administered by a teacher to his pupil is purely a question of fact." This is clearly the general rule today—the right of the teacher to administer punishment for the preservation of order and discipline in the school is undoubted under the common law, but whether the necessity for the punishment existed and whether the mode and degree of punishment were reasonable, are questions for the trier of facts to decide.[82] It should be noted that evidence of prior acts of misconduct is admissible to aid the jury in determining the question of reasonableness.[83]

In New Jersey, corporal punishment is specifically prohibited by statute;[84] where it is not contained in the statutory list of permitted forms of punishment it would seem to be illegal.[85] The rules and regulations of some school boards prohibit it; others specify that it is to be administered by the principal or in the presence of the principal or another teacher. As a practical matter, it is little administered today.[86] Horace Mann is quoted as having said of corporal punishment, "it should be reserved for baser faults. It is a coarse remedy, and should be employed upon the coarse sins of our animal nature,

80. Anderson v. State, 40 Tenn. 454 (1859). *But see* Philips v. Johns, 12 Tenn. App. 354, 360 (1930): The teacher cannot "exercise by virtue of his office discretionary quasi-judicial powers."

81. 53 Conn. 481, 2 Atl. 841 (1885).

82. People v. Curtiss, 116 Cal. App. 771, 300 Pac. 801 (1931); Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958); Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Melen v. McLaughlin, 107 Vt. 111, 176 Atl. 297 (1935); Rex v. Gaul, 36 N.S.R. 504, 8 Can. Cr. Cas. 178 (1904); Seldon v. Aivey, 88 Sol. L.J. 169 (Wimborne County Ct. 1944); Hiltonian Society v. Crofton, 3 So. Afr. L.R. 130 (1952) (degree of punishment only; necessity for, in teacher's discretion).

83. People *ex rel.* Hozan v. Newton, 56 N.Y.S.2d 779, 185 Misc. 405 (White Plains Ct. 1945); People v. Mummert, 183 Misc. 243, 50 N.Y.S.2d 699 (1944), also to the effect that the principal can use reports of conduct off and on school premises in determining the punishment; Sheehan v. Sturges, 53 Conn. 481, 2 Atl. 841 (1885).

84. N.J. STAT. ANN. § 18:19-1 (1940).

85. Bishop v. Houston Independent School Dist., 35 S.W.2d 465 (Tex. Civ. App. 1931).

86. No sooner is a brash generalization set down on paper than an exception arises to confute the author: See the Associated Press dispatch out of Memphis which appeared on p. 1 of the Chicago *Daily Tribune*, Feb. 25, 1959: "Angry parents were rebuffed today when they demanded assault warrants against a high school principal who paddled 14 students and has three more to go. . . . Sessions Judge Willard Dixon said . . . the principal was within his legal rights . . . [and] cited a 1944 ruling by the state Supreme Court which said school teachers have—to a reasonable degree—the disciplinary rights of parents while the child is in their care." See Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944).

and, when employed at all, should be administered in strong doses." The "strong dose" of physical pain has become repugnant to us, and we no longer are convinced of its effectiveness. The focus is now on the well-being of the class and protection of the group from disruptive elements. The student in whose case severe punishment may still be legally justified is more often suspended or expelled as a troublemaker, or may even be declared a delinquent in a court proceeding.[87]

LIABILITY FOR OTHER INTENTIONAL TORTS

It is well recognized, of course, that discipline may be enforced by detention,[88] but liability for false imprisonment could ensue if the detention were imposed to enforce an unreasonable or unlawful rule,[89] or were the result of malice or caprice. Liability of a teacher for defamation is possible unless the false statement is made for the purpose of conveying information of administrative importance to superiors or officials in the school or school system or to the parent of the child, in which case it is to be considered conditionally or qualifiedly privileged.[90] If the statement is not made, orally or in writing, within recognized administrative channels, but is conveyed as gossip, or is spoken to the person defamed in the presence of fellow pupils or others, the law of defamation would exact redress if the other necessary common law elements of the tort are present. Exposure of a pupil to derision for the purpose of furthering classroom discipline—the dunce in the corner, for example—would not constitute defamation, but would probably be privileged as moderate and reasonable punishment.

The intentional infliction of severe mental distress on a pupil—more than a hurting of feelings—may give rise to liability. In *Johnson v. Sampson*,[91] school authorities accused the plaintiff of being licentious, with the result that she suffered great mental anguish and nervous shock which impaired her health. The court allowed recovery, saying that "if the accusation was false and without justification, there was

87. *E.g., In re* Neal, 164 N.Y.S.2d 549 (1957).

88. Fertich v. Michener, 111 Ind. 472, 11 N.E. 605 (1887); Fitzgerald v. Northcote, 4 F. & F. 656, 176 Eng. Rep. 734 (Q.B. 1865).

89. Hunter v. Johnson, 13 Q.B.D. 225 (1884). Teacher guilty of assault for detaining child in school for failure to do homework, since school board had no authority to compel study at home. The mother had forbidden the plaintiff-pupil to do homework and had given defendant notice thereof.

90. Kenney v. Gurley, 208 Ala. 623, 95 So. 34, 38 (1923): "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." *Accord,* Basket v. Crossfield, 190 Ky. 751, 228 S.W. 763 (1920). *Cf.* Pratt, J., dissenting in Hales v. Commercial Bank of Spanish Fork, 114 Utah 186, 197 P.2d 910 (1948), and Annot., 12 A.L.R. 144 (1921).

91. 167 Minn. 203, 208 N.W. 814, 816 (1926).

an invasion of plaintiff's legal right to be secure in her reputation for virtue . . . ." Generally, the mental distress must be followed by tangible physical illness or harm for the plaintiff to recover, although there is a tendency to recognize the infliction of severe mental disturbance alone, resulting from outrageous and flagrantly abusive words or conduct, as actionable.[92]

An interesting variant of assault and battery has occurred in two Tennessee cases in which teachers were sued by pupils for illegal search of the person. In the earlier case,[93] one teacher missed $21 of her personal funds and the plaintiff was searched by another teacher. The trial court found for defendant, but the appellate court reversed and remanded, saying:

> A teacher cannot claim justification on the ground that he or she is acting in loco parentis, if they [*sic*] search a child for the benefit of a third person. The relationship of teacher and pupil does not exist if the act is done for a third person. A teacher is given the powers of a parent over the child to the extent that is necessary to educate him or her and to preserve order. . .; but if the teacher undertakes to recover money for a third person, this is not within the scope of the teacher's authority and employment. . . .
>
> The question whether this search was made for the benefit of [the teacher] to recover her money, or whether it was made for the ethical training of the child, was for the jury.[94]

In the later case,[95] the Supreme Court of Tennessee affirmed the dismissal below, holding that the teacher had acted "with reasonable judgment and upon reasonable cause, without malice for the good of the child, as well as the school." The ownership of the dime involved in this case was not clear, and it was distinguished from the earlier one by the teacher's testimony that recovery of the dime was incidental, the main purpose of her search being "to clear from suspicion and thus benefit the pupil." The ethical goal was further emphasized by "slight punishment with a ruler."

Liability for Negligent Acts

The teacher's liability for damages resulting from his negligent act in and about the school rests on the same principles as his liability as a private person, removed from the school. The same standard of care applies, that of a reasonable and prudent person acting under like circumstances, sometimes stated as that of a prudent and careful

92. Prosser, Torts 46 (2d ed. 1955). See State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952).

93. Philips v. Johns, 12 Tenn. App. 354 (1930).

94. *Id.* at 357. The court felt constrained to point out that "a child in the public schools is entitled to as much protection as a bootlegger."

95. Marlar v. Bell, 181 Tenn. 100, 178 S.W.2d 634 (1944).

father or parent.[96] The same rules with respect to actual causation, foreseeability, and proximate cause govern the case, and the defenses available to the teacher are no more or less extensive than those available to any other defendant.

Except where the common law has been altered by statute, the plaintiff can look for compensation only to the teacher whose negligent acts caused the injury.[97] The doctrine of respondeat superior is not applicable to school-governing units since they are, under American common law, clothed with governmental immunity[98] and thus cannot be subjected to vicarious liability. This immunity likewise extends to school board members or trustees acting in their official capacities.[99] However, immunity cannot be claimed by a teacher to protect himself from the results of his carelessness, even where the negligent act was committed in the course of employment. That the negligence took place in the performance of an authorized or mandatory act is no defense, for negligence is never authorized, and certainly never commanded!

This is as hard on the injured plaintiff-pupil as it is on the penniless teacher, for while the latter may be subjected to the harrassment of a law suit and indeed be made to pay to the extent he is able, as a practical matter little is generally served by proceeding against a teacher when a serious injury, involving damages running into thousands, has been caused. The teacher is for all intents and purposes judgment-proof, and the victim of his negligence, whose medical bills may be large and who may have been permanently injured, must bear his own loss, or the major part of it. The availability of liability insurance to school units has largely obviated the argument that the exposure to liability would be ruinous to public school systems[100] and there is growing recognition that harms occur-

96. What does the analogy to the parent contribute to analysis in negligence cases? Would it be more satisfactory to use Hohfeldian terminology and say that correlative to the statutory right to control conduct is the duty to act for the protection of pupils from dangers reasonably to be anticipated, the standard being "such care as an ordinary reasonable and prudent person would exercise under the same or similar circumstances."? *Compare* Briscoe v. School Dist., 32 Wash. 2d 353, 201 P.2d 697 (1949), *with* Gaincott v. Davis, 281 Mich. 515, 275 N.W. 229, 231 (1937): "At least in a limited sense the relation of a teacher to a pupil is that of one in loco parentis. We are not here concerned with the law applicable to punishment of a pupil by a teacher; but rather with the law applicable to the duties of a teacher in the care and custody of a pupil. In the faithful discharge of such duties the teacher is bound to use reasonable care, tested in the light of the existing relationship. If, through negligence, the teacher is guilty of a breach of such duty and in consequence thereof a pupil suffers injury, liability results. It is not essential to such liability that the teacher's neglect should be so extreme as to be wanton or willful."

97. See note 8 *supra*.

98. See note 3 *supra*.

99. Bullock v. School Dist., 75 Idaho 304, 272 P.2d 292 (1954); Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952).

100. Tracy v. Davis, 123 F. Supp. 160 (E.D. Ill. 1954) (immunity of school

ing in school should be compensated, and the loss distributed either by insurance or taxation.

The British[101] and Canadians[102] have denied educational authorities the cloak of immunity, and the relationship between the school unit and teacher is held to be that of master and servant, so that where negligence occurs in the course of employment an action may be brought against both and the former held vicariously liable. The plaintiff is thus assured of a recovery, and since indemnity is not sought, as a practical matter, against the teacher, the burden is lifted from his shoulders.[103]

A small number of American states have resolved this problem by statute, either by providing for a direct action against the school unit for the teacher's negligence or by providing for indemnification of the teacher for what he is out of pocket as the result of being held liable for negligence committed in the course of his employment.[104] State tort claims acts may provide remedies in other states.[105]

Significantly, the great majority of reported cases involving teachers' negligence come out of those jurisdictions whose statutes give the plaintiff a direct action against the school-governing unit: California, New York, and Washington. Only a very few cases go to the appellate level in other states, including those which provide for indemnification of the teacher, indicating a reluctance, born no

district no longer exists, so that it is unnecessary to aver that liability insurance existed to state cause of action, judgment being collectible only from insurance proceeds); Thomas v. Broadlands Community Consol. School Dist., 348 Ill. App. 567, 109 N.E.2d 636 (1952) (availability of liability insurance, to the extent it protects public funds, removes the reason for absolute immunity); Williams v. Town of Morristown, 32 Tenn. App. 274, 222 S.W.2d 607 (1949), *modified only as to entry of judgment*, 189 Tenn. 124, 222 S.W.2d 615 (1949) (municipal corporation liable in damages for negligence even where governmental function concerned, but judgment collectible only from insurance proceeds). *Contra*, Livingston v. Regents of New Mexico Col. of A. & M. A., 64 N.M. 306, 328 P.2d 78 (1958); Kesman v. School Dist. of Fallowfield Township, 345 Pa. 457, 29 A.2d 17 (1942). Under ARK. STAT. ANN. § 66-517 (1947), (direct suit is authorized against the liability insurer of a non-profit organization or public agency).

101. "[T]he teachers . . . are the servants of the managers, and, as such, they, like other servants or agents, render their masters liable for the acts which they do, even if the acts are wrongful, if they are done within the scope of their employment—not within the scope of their authority, but within the scope of their employment as teachers." Ryan v. Fildes, [1938] 3 All. E.R. 517, 521.

102. "The relationship of master and servant exists between school trustees and a teacher, and the former may be held liable for the negligence of a teacher acting within the scope of her employment." Gray v. McGonegal, [1949] O.R. 749, [1950] 4 D.L.R. 395 (1949).

103. But not always. In Ryan v. Fildes, *supra*, note 101 the school managers were held entitled to "100% contribution" under Law Reform Act, 1935, § 6(1)(2), the court remarking that "it is not often that the servant is in fact joined in an action where there is at any rate a substantial master from whom damages can be claimed."

104. See note 8 *supra*.

105. *E.g.*, N.C. GEN. STAT. § 143-291 (1958), as applied in Stephens v. Board of Educ., 244 N.C. 481, 94 S.E.2d 372 (1956).

doubt of hopelessness rather than sympathy, to proceed against teachers.[106] It may be, on the other hand, that this imbalance results from a less rigorous application of the fault principle in jurisdictions whose statutes allow suit against the school, and a tendency by their courts to treat the statute as one making the school the insurer.[107] There are cases which point in this direction, despite statements therein to the contrary,[108] and verdicts favorable to the plaintiff are more frequent in these jurisdictions.

The school-related injury cases are principally based on allegations that lack of proper supervision or instruction caused the injury, and they fall generally into four categories, described by where the injury took place: (1) classrooms and hallways, (2) playgrounds, (3) physical education classes and recreational programs, and (4) classes involving hazardous activities, such as vocational training and science classes.[109]

Supervision in Classroom and School Building

Broadly speaking, what is reasonable and what is foreseeable are the criteria in supervising classes. The standard is again one of

106. *E.g.*, see the recent case of Keel v. Hainline, 331 P.2d 397 (Okla. 1958), where the teacher was not even joined as a defendant for injuries received by plaintiff-pupil when hit by blackboard eraser in horseplay during teacher's 30-40 minute absence; plaintiff sued only six minor fellow-pupils.

107. "If boards of education are to be subjected to absolute liability in the case of injuries to children sustained in performing classroom chores, it will need to be done by statute rather than by stretching the law of negligence to cover the situation. School boards and districts have not yet become insurers of safety in the fulfillment by a pupil of a mission so apparently harmless in nature as the opening of a window in good repair. . ." Van Voorhis, J., dissenting in Applebaum v. Board of Educ., 272 App. Div. 875, 71 N.Y.S.2d 140, 141 (1st Dep't 1947), *aff'd* 297 N.Y. 762, 77 N.E.2d 785 (1948). Compare Carter, J., dissenting in Pirkle v. Oakdale Union Grammar School Dist., 40 Cal. 2d 207, 253 P.2d 1 (1953).

108. *E.g.*, McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360, 362 (1953): "[T]he liability of respondent school district for the alleged tortious acts or omissions of its officers, agents or servants is to be determined according to the normal rules of tort law." The court held, where a teacher omitted to supervise lunch period in gymnasium, that it was a question for the jury whether or not it should reasonably have been foreseen that a darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency and if liability should therefore ensue for the rape of a 12-year old girl by two 15-year old boys. Since the plaintiff resisted and called for help when being forcibly carried into the room by several boys, the question really seems to be whether unsupervised children (regardless of the availability of darkened rooms) are likely to commit acts of indecency with force and violence, as the plaintiff alleged they were. This test of foreseeability might apply to a supervisor in a coeducational reform school, but not in a public high school. "[V]iewing events in retrospect," the court said, "we are unable to say that it is highly extraordinary that the room was actually used for such acts." *Id.* at 364.

109. See Annot., 32 A.L.R.2d 1163 (1953); Note, 1956 WIS. L. REV. 130 (1956). We are not here concerned with cases of underpaid teachers or principals who hire out to their school boards as plumbers and who cause injury to a child as the result of connecting a steam pipe to a water fountain line, *e.g.*, Whitt v. Reed, 239 S.W.2d 489 (Ky. 1951).

"ordinary prudence." The impossible will not be required, although, as teachers know, it is often asked. Where supervision could not have been prevented the injury, its lack will of course not be held the cause of the injury.[110] What is foreseeable as likely to happen in the classroom if the teacher steps out for a moment is a matter of the wildest conjecture, and it is perhaps not unreasonable to say that a teacher who thus omits her duty of supervision might foresee physical injury as a consequence. The injury through horseplay of one pupil by another in the teacher's brief absence may perhaps be treated as the unforeseen act of a third party,[111] but where the absence was prolonged and the omission was gross, however, as in the failure entirely to supervise a lunchroom where such supervision was required not only by prudence but by statute, the plaintiff recovered for a broken arm received in a scuffle.[112]

Occasionally, the duty of supervision of a pupil in the performance of a classroom chore is laid down so stringently as to deny both the intelligence of the child and any degree of prudence on the part of the teacher, in effect, unless she performs the chore herself.[113] That these cases come from jurisdictions holding the school-governing unit liable appears to confirm the belief that the principles of ordinary negligence have been diluted. In the one similar case in a jurisdiction allowing only an action against the teacher, where a child was in-

110. Wilber v. City of Binghamton, 271 App. Div. 402, 66 N.Y.S.2d 250 (3d Dep't 1946) (teachers could not be expected to watch all movements of pupils, hence, teacher's absenting herself to answer telephone was not proximate cause of injury received by child by stone batted by another during recess). Compare Decker v. Dundee Central School Dist., 4 N.Y.2d 462, 151 N.E.2d 866 (1958) (similar situation held question for the jury).

111. *But see* Wiener v. Board of Educ., 277 App. Div. 934, 98 N.Y.S.2d 608 (2d Dep't 1950).

112. Forgnone v. Salvadore Union Elementary School Dist., 41 Cal. App. 2d 423, 106 P.2d 932 (1940); McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953) (rape during unsupervised lunch period). *Contra,* Ohman v. Board of Education, 300 N.Y. 306, 90 N.E.2d 474 (1949). "The testimony as to the length of time the teacher was out of the room is conflicting (which is not at all surprising as nine years elapsed between the date of the accident and the trial) but whether for 'more than an hour' as contended by the plaintiff or 'less than a minute' as shown by defendant's witnesses is wholly immaterial. The most favorable inference in any event is that the teacher was not in the room when the accident occurred. Nonetheless, it does not follow that such absence was the proximate producing cause of the injury. . . ." *Id.* at 474-75. The dissenting judge found the evidence clearly showing an absence of 75 minutes. For the use of small children as witnesses in a supervision case, see Hare v. Pennell, 37 N.J. Super. 558, 117 A.2d 637 (1955).

113. Applebaum v. Board of Educ., 297 N.Y. 762, 77 N.E.2d 785 (1948) (11 year old girl injured carrying window pole), see also note 107 *supra;* Smith v. Martin, 2 K.B. 775 (1911) (14 year old girl's dress caught fire when she was sent to tend fire in teacher's room). *But see* Hack v. Sacramento City Junior College Dist., 131 Cal. App. 444, 21 P.2d 477 (1933) (school district not liable for negligent acts of students of 17-18 years carrying out instructor's directions). See also Gray v. McGonegal, [1949] O.R. 749, [1950] 4 D.L.R. 344 (1949) (school teacher who failed to instruct or supervise a boy she told to light a gasoline stove was held to have been negligent).

jured while watering plants in the school, there was held to be no negligence.[114]

The need for close supervision of groups of children, especially younger children, passing through corridors, down stairs or fire escapes, and through doors is obvious, but the degree of supervision required to prevent most harms occurring in such situations, in the absence of some special circumstances, is too high to be imposed.[115] Serious accidents, it cannot be denied, often bring hindsight into play which will prescribe what should have been foreseeable,[116] but doing what is reasonable under the circumstances will ordinarily suffice:[117] the teacher's remaining absent only briefiy, if at all, in a case of demonstrable need and, when present, asserting his authority to prevent unruliness.

Playground and Recess Supervision

"Teachers have watched over the play of their pupils time out of mind. 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."[118]

Playground and recess activities present the two-fold problem of increased hazards and greater obstacles to effective supervision. However, this is not a fruitful source of liability. The only cases found in which the claim was based on negligent supervision by the teacher or playground supervisor have again come out of California, New York, and Washington. Even so the cases clearly establishing negligent supervision as the cause of the injury were in the minority, and involved rather palpable omissions to exercise reasonable and prudent care: "supervision" of students at recess from a hall window;[119] an injury resulting when children placed a teeter-board

114. Gaincott v. Davis, 281 Mich. 515, 275 N.W. 229 (1937).

115. Conway v. Board of Educ., 11 Misc. 2d 162, 171 N.Y.S.2d 533 (Sup. Ct. 1958). "[N]egligence is a breach of duty and is 'relative to time, place and circumstances' . . . Yet the neglect here claimed to constitute a breach of duty of adequate general supervision, related to the time, place and circumstance disclosed by the evidence, do not spell out a foreseeable danger when considered in the light of established authority that *all* movements of pupils need not be under *constant* scrutiny." *Id.* at 535. *Accord,* Bertola v. Board of Educ., 1 App. Div. 2d 973, 150 N.Y.S.2d 831 (2d Dep't 1956); Ohman v. Board of Educ., 300 N.Y. 306, 90 N.E.2d 474 (1949); Thompson v. Board of Educ., 280 N.Y. 92, 19 N.E.2d 796 (1939). *Contra,* Ryan v. Madden, [1944] Ir. R. 154 (1944) (teacher knew that on occasion children slid down bannister); Lewis v. Carnarthenshire County Council, [1953] 1 All. E.R. 1025 (child of four wandered out of school and onto street, causing truck crash which killed plaintiff's decedent).

116. McLeod v. Grant County School Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953), discussed in note 108 *supra.*

117. In Ohman v. Board of Educ., 300 N.Y. 306, 90 N.E.2d 474 (1949), discussed in note 112 *supra,* the teacher apparently absented herself to sort out supplies in a closet.

118. Hoose v. Drumm, 281 N.Y. 54, 22 N.E.2d 233, 234 (1939).

119. Miller v. Board of Educ., 291 N.Y. 25, 50 N.E.2d 529 (1943); Lee v.

across a swing seat, which the teacher either did not prevent or did not observe;[120] the death of a child resulting from playing "blackout" (one child takes a deep breath and holds it while another child squeezes him tightly around the chest; object of game—unconsciousness);[121] an injury resulting from a teacher failing to prevent boys from riding bicycles in a schoolyard where small children were at play.[122] Where omission of supervision is less obvious as a cause[123] and the activity is not inherently dangerous the teacher will usually be protected by a finding that the child was contributorily negligent or had assumed the risk,[124] by a recognition that the kind of supervision required to prevent ordinary playground injuries cannot be demanded or is in fact impossible,[125] or by admitting that injuries do occur at play without negligence on the part of anyone.[126] Where competitive games are played at recess, instructions as to how the game is to be played and the even matching of players meet the requirements of adequate supervision.[127] Common sense tells us that recreational activities should be suited to the age, sex, and physical development of the children involved. Rough contests such as tackle-football should be reserved to the school team and should never be conducted or permitted in recess and recreational periods.

Physical Education Classes

The cases in which negligence has been found on the part of the physical education instructor indicate that his standard of care includes matching the child's physical capacity and ability to the

Board of Educ., 263 App. Div. 23, 31 N.Y.S.2d 113 (1st Dep't 1941) (football played in street under inadequate supervision).

120. Bruenn v. North Yakima School Dist., 101 Wash. 374, 172 Pac. 569 (1918). See also Rice v. School Dist., 140 Wash. 189, 248 Pac. 388 (1926) (both the principal and teacher knew of radio aerial left dangling in schoolyard that came in contact with high-tension wire and injured plaintiff).

121. Tymkowicz v. San Jose Unified School Dist., 151 Cal. App. 2d 517, 312 P.2d 388 (1957).

122. Buzzard v. East Lake School Dist., 34 Cal. App. 2d 316, 93 P.2d 233 (1939). In Smith v. Harger, 84 Cal. App. 2d 361, 191 P.2d 25 (1948), a playground supervisor who failed to protect a child from a truck in the schoolyard was described as "utterly remiss in discharging her duties."

123. Ford v. Riverside City School Dist., 121 Cal. App. 2d 554, 263 P.2d 626 (1953).

124. Kanofsky v. Brooklyn Jewish Center, 265 N.Y. 634, 193 N.E. 420 (1934).

125. Gard v. Duncan Board of School Trustees, 62 B.C.R. 323, [1946] 2 D.L.R. 441 (1946). For the use of experts testifying on playground supervision, see Rodrigues v. San Jose Unified School Dist., 157 Cal. App. 2d 842, 322 P.2d 70 (1958).

126. Luna v. Needles Elementary School Dist., 154 Cal. App. 2d 803, 316 P.2d 773 (1957); Underhill v. Alameda Elementary School Dist., 133 Cal. App. 733, 24 P.2d 849 (1933); Graff v. Board of Educ., 258 App. Div. 813, 15 N.Y.S.2d 941 (2d Dep't 1939); Peterson v. City of New York, 267 N.Y. 204, 196 N.E. 27 (1935).

127. Pirkle v. Oakdale Union Grammar School Dist., 40 Cal. 2d 207, 253 P.2d 1 (1953).

activity,[128] including consideration of whether he is unwell or suffering from previous injuries,[129] properly instructing the pupil in the activity (including the rules of the game), taking care that the premises are suited to the activity, and supervising the activity in progress. Thus, in *Luce v. Board of Education*[130] the court said that it is the duty of a teacher "to exercise reasonable care to prevent injuries and to assign pupils to such activities as were within their abilities, and to properly and adequately supervise the activities. The failure to do so constitutes actionable negligence . . . ." Where two boys, novices at boxing, were not taught the principles of defense by the instructor and one boy suffered a cerebral hemorrhage, the teacher was held negligent for permitting the boys to engage in "a dangerous and hazardous exercise" without adequate instruction.[131] Requiring a pupil to perform a dangerous gymnastic exercise which was not in the syllabus prepared by the Board of Regents and which had furthermore resulted in injuries to other boys on previous occasions, resulted in the teacher's liability when one member of the class struck his foot on a bar while somersaulting and fell to the bare floor.[132]

Knowledge that a pupil is not well or is disabled, and nevertheless persuading or permitting him to engage in an athletic contest in which there is danger of physical injury may impose liability on the coach or physical education instructor if the illness or injury is aggravated, or is the proximate cause of another injury.[133] A contrary view,[134] barring the action because of the boy's assumption of risk, appears unsound as it overlooks completely the pupil's inability to appreciate the risk and the pressures of pride and team spirit which would preclude his demurring when the coach asks him to go into play.[135]

Even though the healthy player be held to assume the risk of injuries resulting from violent body contact in such a game of football or in a dangerous gymnastic exercise (assuming he has been

128. Govel v. Board of Educ., 267 App. Div. 621, 48 N.Y.S.2d 299 (3d Dep't 1944), *aff'd without opinion,* 293 N.Y. 928, 60 N.E.2d 133 (1944).

129. Morris v. Union H.S. Dist., 160 Wash. 121, 294 Pac. 998 (1931). *Contra,* Hale v. Davies, 86 Ga. App. 130, 70 S.E.2d 926 (1952).

130. 2 App. Div. 2d 502, 157 N.Y.S.2d 123, 128 (3d Dep't 1956).

131. La Valley v. Stanford, 272 App. Div. 183, 70 N.Y.S.2d 460 (3d Dep't 1947). Compare Hall v. Thompson, [1952] 4 D.L.R. 139 (1952) (wrestling-match, no instruction in holds, but wrestling held not "inherently dangerous.")

132. Govel v. Board of Education, 267 App. Div. 621, 48 N.Y.S.2d 299 (3d Dep't 1944), *aff'd without opinion,* 293 N.Y. 928, 60 N.E.2d 133 (1944). *But see* Sayers v. Ranger, 16 N.J. Super. 22, 83 A.2d 775 (1951) (teacher not negligent in supervision; 14 year old boy had also assumed risk); Wright v. Cheshire County Council, [1958] 2 All. E.R. 789 (intervening act of fellow pupil rather than teacher's negligence responsible for injury).

133. Morris v. Union H.S. Dist., 160 Wash. 121, 294 Pac. 998 (1931).

134. Hale v. Davies, 86 Ga. App. 130, 70 S.E.2d 926 (1952).

135. For a discussion of liability for injuries arising from participation in athletics see Note, 1958 U. ILL. L.F. 446.

properly instructed),[136] he does not assume the risk of negligent handling in removing him from play after injury or of the failure of the coach to secure prompt and adequate medical treatment demanded under the circumstances. Ordinarily, the choice of a physician is left to the parent, and no duty to provide medical aid existed in the case of a boy whose shoulder had on several previous occasions snapped out of place;[137] but the court in that case said by way of dictum that where an emergency exists, the duty to act arises and the teacher will be liable if he fails to act and the injury is thus aggravated. Thus in the recent California case of *Welch v. Dunsmuir Joint Union H. S. Dist.*,[138] the court upheld an award of $206,804 to a football player hurt in scrimmage whose injuries were aggravated by the negligent manner in which he was handled in being removed from the field, the coach having failed to direct his removal.

Activities not involving violent body contact or not of a nature requiring a high degree of skill, as gymnastics do,[139] are not such "inherently dangerous" activities as to require the same degree of instruction and supervision as those which are. Tag has been so classified,[140] softball would surely be included (but perhaps not hardball), and in "free basketball play" not conducted under regular rules or under the supervision of a referee but played in the presence of the physical education teacher, the teacher was said not to have been negligent when a boy died as the result of being hit in the head by the ball.[141] In this case the boy suffered from an aneurism, of which the instructor had no knowledge; liability would undoubtedly have attached had he known of the condition and nevertheless required or permitted the child to play.

While an injury resulting from unsafe conditions of the premises does not usually point the finger of fault at the teacher but at the school authorities for allowing the danger to exist,[142] the teacher must nevertheless be on guard to do what he reasonably can to

136. Sayers v. Ranger, 16 N. J. Super. 22, 83 A.2d 775 (1951).
137. Duda v. Gaines, 12 N.J. Super. 326, 79 A.2d 695 (1951).
138. 326 P.2d 633 (Cal. App. 1958). "Compromised upon hearing with approval in the Supreme Court [Minutes of Court, Sac. 7009, 50 A.C. 116 (1958)] for $137,500 by his guardian ad litem." David, *Tort Liability of Local Government: Alternatives to Immunity from Suit,* 6 U.C.L.A. L. REV. 1, 22 (1959).
139. That tumbling exercises are "inherently dangerous", requiring a "proper mental attitude," see Bellman v. San Francisco H.S. Dist., 11 Cal. 2d 576, 81 P.2d 894 (1938). Shenk, J., dissenting, questioned the reliability of the "inherently dangerous" criterion.
140. Ellis v. Burns Valley School Dist., 128 Cal. App. 550, 18 P.2d 79 (1933). "The game of tag . . . has surely been played by children of the race long before the annals of history, and surely the court cannot say there is anything inherently dangerous in the game . . ." *Id.* at 81.
141. Kerby v. Elk Grove Union H.S. Dist., 1 Cal. App. 2d 246, 36 P.2d 431 (1934).
142. *E.g.*, Redfield v. School Dist., 48 Wash. 85, 92 Pac. 770 (1907) (scalding water on hot air register).

make the place of play safe. Thus, in gymnastics he must see that mats are properly placed,[143] and if he conducts an activity in a dangerous place, such as a street, he must exercise vigilance to protect his pupils.[144] To conduct a game of touch football in a gymnasium with an uneven and unsteady floor "may possibly be negligence," the court said in *Read v. School Dist.*,[145] but the plaintiff failed in that case because he was unable to establish a causal relationship between the teacher's alleged negligence and his being hit in the back by another player, an impact which the court pointed out might have happened as easily outside as in the gymnasium.

Where non-participants or spectators are injured by participants or in athletic activities by pupil spectators under supervision, liability is governed by what is prudently foreseeable. When a fourteen year old boy running in a supervised race on a public sidewalk saw a woman pedestrian in his way but deliberately ran into her, the supervisor was held not to have been negligent, although he may have violated a city ordinance prohibiting "games in any street, alley, or other public space."[146] Rather the "reckless negligence" of the boy, "inexcusable and unusual conduct on the part of a boy 14 years old [which] certainly could not be foreseen" was held to be the proximate cause. Similarly, where teachers were to supervise student spectators at a football game and plaintiff was injured by a bottle thrown from the student section, the complaint was held not to state a cause of action in the absence of an allegation that the teachers or school authorities had reason to expect rowdyism.[147]

Classes Involving Hazardous Activities

As might be expected, injuries sustained in vocational training and chemistry classes have accounted for a comparatively large number of the cases involving the question of the teacher's liability for negligence: hands get caught in the gears of printing presses, fingers are lost in the operation of power-tools, and chemical mixtures explode. California has been the jurisdiction where the plaintiff has been most successful in winning a verdict or in establishing on appeal his right to get to the jury. Negligence is generally predicated on the teacher's failure adequately to instruct and warn concerning correct procedure and inherent danger.[148] Where the operation was particu-

143. Govel v. Board of Educ., 267 App. Div. 183, 70 N.Y.S.2d 460 (3d Dep't 1947).
144. Lee v. Board of Educ., 263 App. Div. 23, 31 N.Y.S.2d 133 (1st Dep't 1941).
145. 7 Wash. 2d 502, 110 P.2d 179 (1941).
146. McDonnell v. Brozo, 285 Mich. 38, 280 N.W. 100 (1938).
147. Weldy v. Oakland H.S. Dist., 19 Cal. App. 2d 429, 65 P.2d 851 (1937).
148. Govel v. Board of Education, 267 App. Div. 621, 48 N.Y.S.2d 299 (3d Dep't 1944), *aff'd without opinion*, 293 N.Y. 928, 60 N.E.2d 133 (1944), involving same plaintiff in the Govel case cited *supra* note 132. Ahern v. Livermore

larly hazardous and the teacher failed to warn or supervise the specific acts to see that due care was exercised the plaintiff has recovered or was held to have stated a cause of action.[149] The California courts, nevertheless, draw the line rather clearly when one pupil is injured by a fellow-pupil's negligence, in shop cases and elsewhere, and in two such cases have held the teacher not to have been negligent for failure to keep the negligent actor or actors under close scrutiny in the absence of knowledge of poor safety habits[150] or of the specific danger involved.[151] A contrary result has been reached in New York.[152] A student's hand was caught in a machine he was cleaning when another pupil carelessly stepped on the foot-treadle. The teacher was held negligent because he failed to observe "from time to time whether or not the machine was being used or tampered with by any of the other students." The danger may have created the duty of close supervision, but it is difficult to see how anything less than continuous observation would have prevented the injury. Nevertheless, the court said that "but for the negligence of the teacher, no act of a third person could have operated to the injury of the infant plaintiff."[153]

If the teacher negligently places a dangerous instrumentality in the hands of a student who does not appreciate the hazard, or during the time the teacher has authority over the student fails to relieve him of it, assuming the teacher has knowledge of it, the teacher is liable should injury occur.[154] In *Maede v. Oakland H. S. Dist.*[155] the teacher was held negligent for giving a student the wrong gauge to affix to an oxygen tank; the gauge blew off and plaintiff lost an eye. In the "comic-opera" case of *Woodman v. Hemet Union H. S. Dist.*,[156] the shop teacher allowed boys to use an ancient truck, belonging to the school and "maintained" by the teacher, for Boy Scout activities. It

Union H.S. Dist., 208 Cal. 770, 284 Pac. 1105 (1930). In Klenzendorf v. Shasta Union H.S. Dist., 4 Cal. App. 2d 164, 40 P.2d 878 (1935), instruction and warning were held sufficient to negate negligence where plaintiff lost fingertips on jointer having an improvised wooden guard. Compare Lehmann v. Los Angeles City Bd. of Educ., 154 Cal. App. 2d 256, 316 P.2d 55 (1957), where plaintiff was injured by press not guarded in conformity with state law and the court said in granting a new trial, "violation of the safety regulations, considered alone, was negligence."

149. Dutcher v. City of Santa Rosa H.S. Dist., 137 Cal. App. 2d 481, 290 P.2d 316 (1955); Mastrangelo v. West Side Union H.S. Dist., 2 Cal. 2d 540, 42 P.2d 634 (1935); Damgaard v. Oakland H.S. Dist., 212 Cal. 316, 298 Pac. 983 (1931).

150. Goodman v. Pasadena City H.S. Dist., 4 Cal. App. 2d 65, 40 P.2d 854 (1935).

151. Perumean v. Wills, 8 Cal. 2d 578, 67 P.2d 96 (1937).

152. De Bennedettis v. Board of Educ., 271 App. Div. 886, 67 N.Y.S.2d 30 (2d Dep't 1946).

153. *Id.* at 886, 67 N.Y.S.2d at 31.

154. King v. Ford, 1 Stark. 421, 171 Eng. Rep. 517 (1816).

155. 212 Cal. 419, 298 Pac. 987 (1931).

156. 136 Cal. App. 544, 29 P.2d 257 (1934).

lacked a hood, floorboards, and emergency brake. A "hot-shot" battery, connected by clips to a coil post, was used to start the machine, after which one clip was removed and, in this case, held by one boy by the insulated wire lead. The engine was pumping oil, sending it through the broken windshield. The boys, to keep their shirts clean, removed them and placed them on the seats. The shirts threatened to blow away; the passenger reached for them and in so doing touched the driver with the live clip, shocking him so that he lost control and the truck crashed. Judgment against the teacher was affirmed on appeal; he had been negligent in failing to instruct the boys in how to start the truck safely and in placing "a dangerous instrumentality . . . in the hands of immature and inexperienced children." Judgment as to the school board was reversed, since the teacher had acted "entirely beyond the scope of his employment and upon business of his own in permitting the use of the truck for the benefit of an activity in no way connected with the District."[157]

Outside of the states which provide a direct action against the school-governing unit, suits for injuries due to shop accidents have almost entirely lacked success. In *Brooks v. Jacobs*[158] exceptions to a verdict for the defendant shop teacher were sustained in a case where a student was seriously injured owing to defective staging on a class building project which was under the teacher's supervision. Otherwise, the courts in the few reported cases have held that the plaintiff had failed to show negligence on the part of the teacher where a student's hand was caught in a printing press when a fellow-pupil turned the flywheel,[159] where a student was injured by a power-saw which needed adjustment,[160] and where a teacher left an uncorked bottle of acid on a high shelf, which was knocked down by one of two students cleaning up the storeroom, resulting in severe burns suffered by the plaintiff.[161] In contrast to the California cases, where contributory negligence and assumption of risk do not appear to serve the defendant well,[162] the first two above-mentioned cases emphasized (although the cases were not decided on this point) that the pupils were old enough to appreciate and assume the risk of the

157. *Id.* at 552, 29 P.2d at 261.
158. 139 Me. 371, 31 A.2d 414 (1943).
159. Taylor v. Kelvin, 121 N.J.L. 142, 1 A.2d 433 (1938).
160. Fulgoni v. Johnston, 302 Mass. 421, 19 N.E.2d 542 (1939). *Contra,* Herman v. Board of Education, 234 N.Y. 196, 137 N.E. 24 (1922).
161. Grosso v. Wittemann, 266 Wis. 17, 62 N.W.2d 386 (1954).
162. Mastrangelo v. West Side Union H.S. Dist., 2 Cal. 2d 540, 42 P.2d 634 (1935) (wrong chemical, wrong procedure, boy 16 years old); Ridge v. Boulder Creek Union Junior-Senior H.S. Dist., 60 Cal. App. 2d 453, 140 P.2d 990 (1943) (power saw, boy 17 years old; knowledge of danger not sufficient to charge him with contributory negligence as matter of law); Henry v. Garden Grove Union H.S. Dist., 119 Cal. App. 638, 7 P.2d 192 (1932) (jointer, boy 14 years old).

machinery. In the acid-bottle case, the jury had found the division of negligence as being fifty-five per cent attributable to the teacher and forty-five per cent attributable to the pupil under the Wisconsin comparative negligence statute.[163] Motion for judgment notwithstanding the verdict was granted and judgment entered dismissing the complaint. On appeal, the judgment was affirmed on the ground that plaintiff had failed to show negligence on the part of the instructor, despite the specific findings of the jury that the teacher had been negligent in placing and maintaining the bottle on the shelf and in failing to warn the plaintiff of its contents. The concurring opinion, stressing the greater comparative negligence of the plaintiff, who had been scuffling in the storeroom with his classmate, seems to be a sounder basis for decision.

Despite the fact that New Jersey has a "save harmless" statute, the intervening act of a fellow-pupil has been treated as the proximate cause of an injury in two vocational training class cases,[164] thus relieving the teacher of liability for alleged negligent supervision. In both cases, pupils set machines in motion while others were working on them, similar to the New York case where the boy stepped on the foot-treadle and the teacher's failure to observe "from time to time" was held to have been the proximate cause of the injury.

CONCLUSION

In the balancing of interests, which is the very essence of determining tort liability,[165] it follows that the higher the level of social responsibility of a particular function, the less inclined will judges be to permit juries to find conduct in the exercise of the function tortious and will accordingly circumscribe the scope of the jury's discretion by appropriate instructions. To the extent that it still applies to the sovereign in tort actions,[166] the medieval doctrine that the sovereign can do no wrong, which in feudal times derived from the notion that no court existed superior to the king and in its seventeenth-century form rested on the concept of the absolutist state, can today be validated only as the ultimate extension of the view that takes the degree

163. WIS. STAT. § 331.045 (1958).

164. Meyer v. Board of Education, 9 N. J. 46, 86 A.2d 761 (1952); Taylor v. Kelvin, 121 N.J.L. 142, 1 A.2d 433 (1938).

165. See Terry, *Negligence*, 29 HARV. L. REV. 40 (1915).

166. It is common for writers to profess mystification as to why *rex non potest peccore* found its way into American law, but as Dr. Hannah Arendt points out: "[T]he act of foundation, namely the colonization of the American continent, had preceded the Declaration of Independence, so that the framing of the Constitution, falling back on existing charters and agreements, confirmed and legalized an already existing body politic rather than made it anew. Thus the actors in the American Revolution were spared the effort of 'initiating a new order of things' altogether. . . ." Arendt, *What Was Authority?*, NOMOS I (Harvard 1958).

of social responsibility into account.[167] The view that tort liability varies inversely with the level of social responsibility at which one functions applies today within limitations and in varying degrees to the professions, its application beginning where popular knowledge of the subject matter of the particular function leaves off and fluctuating perhaps to some extent with the esteem in which the profession and its members are held at any given moment. That it plays a vital part in determining tort liability of legislators, judges, and lawyers, a substantial part in the case of medical practitioners, and at least a limited part in the cases of teachers, the clergy, and other groups whose functions are primarily social, cannot be denied.

There is no admitted wider margin for error in performing the professional function, for indeed we know that very often a "higher standard" of care is at least said, although erroneously, to be exacted of the professional. However, there is much conduct in certain of the professions which remains a mystery to the layman (including the judge) simply because it is beyond the scope of his knowledge or comprehension. The inability of the layman to probe, to know, and to evaluate conduct of this kind may indeed result in a greater margin for error unless the conduct is policed by the profession itself. Such internal standards and whatever sanctions, if any, may be imposed by colleagues for deviation, do not help the plaintiff in a law suit; res ipsa loquitur may come to his aid, but only rarely. Judges are unwilling to allow liability to be imposed unless the wrong is clear and its nature understood in rather certain terms by the layman. It is a matter of proof, of evaluation of evidence, rather than of substantive liability.

Closely allied with this factor is that the preponderance of evidence is also more difficult to marshal against the member of a profession since proof cannot invade the area of discretion. Ideally, where science and reason establish specific modes of conduct for given situations, discretion falls away and deviation may result in liability. A failure in communication, the ignorance of laymen, or collusion of the professionals may nevertheless preserve an area of discretion where one is no longer justified.

This "partial immunity" of the professional, then, can result from (1) a recognition of the social benefit conferred by him, and that he cannot confer this benefit if he is constantly threatened with liabil-

167. "The immunity from public responsibility for torts on the continent depends . . . in principle, upon the nature of the function." Borchard, *Government Liability in Tort*, 34 YALE L.J. 129, 132 (1925). See LOCKE, SECOND ESSAY §§ 159, 160 (Dent ed. 1924): "[T]he good of the society requires that several things should be left to the discretion of him that has the executive power . . . This power to act according to discretion for the public good, without the prescription of the law and sometimes against it, is that which is called prerogative."

ity,[168] (2) ignorance of the layman of the subject matter with which the professional is concerned, and his consequent inability to judge the correctness of the professional's conduct,[169] and (3) the necessity of the exercise of discretion in areas where alternatives exist because the norm, or what may pass for the norm, has not yet been determined.[170] There is an interplay among the three, and perhaps none alone would save the professional from liability in a given situation, but the first would seem to be a sine qua non.

The teacher, alas, measuring his function against these criteria, can find only small comfort.[171] The "social benefit" which he confers has been vastly underrated and is gaining recognition by fits and starts only because it has appeared that we are lagging behind the Russians in space exploration. Few laymen profess ignorance of the mysteries of teaching; indeed in no field of endeavor are the professionals subjected to so much non-professional advice and interference. And the area of discretion is small: methods of teaching and of maintaining classroom discipline have been so standardized and regulated that the teacher who departs from the standard is as likely to find himself censured by his principal or his board as by a truculent parent.

Examination of the cases involving teacher's liability for negligence reveal that either one of two generalizations is possible: (1) That in the common law jurisdiction there is a reluctance to find negligence in actions against teachers even in situations where the status of teacher *qua* teacher has fundamentally nothing to do with the question of liability; or (2) that the common law jurisdictions are merely

168. As much so as in the case of government officials. See L. Hand, J., in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

169. "Leaving aside, then, the authority of such impersonal entities, we return to the situation of the teacher, the scholar, the doctor, or the lawyer. Here authority seems to be related to the fact that the person wielding authority possesses superior knowledge or insight. Frequently . . . the authority of X rests upon the fact that he could give extended reasons for the opinions he expounds. It is not essential for such authority, however, that these opinions are conclusively demonstrable; indeed only where they are not thus demonstrable, the phenomenon of authority in the strict sense is involved." Friedrich, *Authority, Reason, and Discretion,* NOMOS I (Harvard 1958).

170. "Discretion may be defined in various ways, but what is always involved is (1) the notion that a choice between several alternatives can, indeed must, be made; and (2) the notion that such a choice is not to be made arbitrarily, wantonly, or carelessly, but in accordance with the requirements of the situation . . . To put it another way, discretion comes into play whenever no rules (or principles) can be, or have been, formulated, while at the same time, mere whim cannot be allowed." Friedrich, *supra* note 169.

171. "It was contended that we ought to hold that the employment of a teacher is *in pari materia* with the employment of a physician . . . The analogy, in my opinion, is a false one. The position of a medical man is in such matters a very special one, and bears no resemblance to that of a teacher of an elementary school. The layman is presumably incapable of judging the right treatment to be adopted by the medical man, and accordingly he is not required to interfere with it, or even warranted in doing so." Moulton, L.J., in Smith v. Martin, [1911] 2 K. B. 775, 781.

applying classic rules of negligence law strictly against the plaintiff, as a result of which teachers are usually exonerated, whereas the three states providing a direct action against the school unit have diluted traditional negligence concepts and in many cases, despite the protestations of their courts to the contrary, tend to treat the school unit as an insurer. In either case, the teacher's social function may possibly come to his aid in the common law jurisdiction or there may be a recognition of his discretionary function; this concept naturally ceases to play a role in any jurisdiction where the fault principle is withering in the shadow of a predominant compensation theory and the teacher is not required to pay for the consequences of his negligent conduct.

With respect to the exercise of authority to maintain school discipline, particularly in the case of the infliction of corporal punishment, we seem to be undergoing a nationwide change of mind: the deterioration of our educational standards has inevitably been linked to the decline in discipline and this, in turn, has for many pointed to a need for employment of corporal punishment to bring our youngsters "into line." As this is written, newspaper accounts tell of hearings in New York on a bill proposing to withdraw from local school units the right to prohibit the infliction of corporal punishment, which is permitted by New York law.[172] A resort to corporal punishment may indeed help, but it will probably do less to solve our educational problems than asking parents to examine and redefine their values. But if the rod is to be employed, the applicable law has long since been clearly defined in most jurisdictions. It is believed to provide the teacher blessed with common sense with as much latitude as he requires to maintain his authority even in the face of the complaints of easily-outraged parents. The enhanced appreciation by the public of the teacher's high social function, resulting from the pressure of external events, may well give again a discretionary content to "common sense" in order to give precedence to the high social and national interest values at stake.

172. N.Y. PENAL LAW § 246 (4) (McKinney 1946).