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Reynolds C. Seitz

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IT IS APPROPRIATE at the outset to state the basic purpose of this article. The term "tort" is applied to a group of civil wrongs, other than breach of contract, for which a court will afford a remedy in the form of an action for damages. The word "liability" in the title connotes that school personnel who ignore the dictates of tort law can be held responsible for damages. The threat of damages is not, however, the primary reason for undertaking this discussion. Neither is the basic purpose prompted by the possibility that school administrators and school boards may be induced to take action by way of discipline against school personnel who disregard the responsibilities thrust upon them by tort law. Nor does the article lose its significance because insurance can be bought which protects against the impact of damages. School people above all others in society should realize that money awards can seldom fully compensate for injuries to pupils.

The real reason for this article is found in the recognition that good law is generally a guide to good conduct. School people ought to know as much about what the law dictates in respect to conduct toward children under their supervision as they know about the teachings of psychology.

Before getting directly into the discussion, it seems appropriate to stress that there is nothing in tort law which makes teachers or administrators the insurers of the safety of children. Accidents will continue to happen which cause injury to children in school. If, however, the teacher or administrator has not fallen down in a responsibility which he owes to the injured child, the law does not blame the teacher for the accident.

Under tort law the basic responsibility of a teacher or administrator is no different than that which rests generally on every member in society. An individual must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbor. Courts recognize that pupils fall within the category of neighbors so as to cause teachers and administrators to have them in contemplation when they act or omit to act. The concrete duty imposed by this attitude is that teachers and administrators must act toward pupils as would a reasonable, prudent person under the circumstances.

Of course, the circumstances with which teachers find themselves confronted can become very complex. Enlightened courts are aware of the fact that an unrealistic interpretation of tort law could make the educator so fearful that he would not do things which might have great

* Professor (Dean 1953-65), Marquette University Law School; formerly Assistant to Superintendent of Public Schools in Omaha and St. Louis; President, National Organization on Legal Problems of Education (NOLPE); currently Editor-in-Chief of *NOLPE School Law Reporter*—quarterly digest of school law decisions.

educational value. A firmly established principle of tort law assists enlightened courts in avoiding such outcome. Prosser, a recognized authority in the area of tort law, in his volume on *Torts,* has stated the principle that "against the probability and gravity of risk must be balanced the utility of the type of conduct in question." [1] The recognized problem is whether the game is worth the candle and the realism of appreciating that sometimes a relatively slight risk may reasonably be run with the full approval of the community. Certainly, to take one example, the principle stated by Prosser ought to in many instances protect the teacher who would permit a small group of three or four students to remain in a classroom without supervision in order that they might complete a research project. Particular circumstances could, of course, not be totally disregarded. For instance, if one of the group was a known serious troublemaker who was prone to engage in horseplay, it would not be prudent to remove him completely from the area of supervision.

Duty of Supervision

A review of the cases raising the issue of negligence because of improper supervision clearly indicates that the courts recognize that manpower is such that schools cannot offer foolproof supervision. The test often becomes whether the most prudent plan of supervision has been worked out. A recent case, decided by the United States Court of Appeals for the District of Columbia,[2] illustrates such fact and also shows an application of the principle that against the likelihood and gravity of harm there must be weighed the utility of the conduct. In that case, Butler, a junior high pupil, was struck in the eye by a piece of metal thrown by a student as he entered the print shop classroom to which he was assigned for instruction. At the time, the printing class teacher was out of the room. The teacher did not get into the room until five to ten minutes after the class was scheduled to start.

Action was brought on the ground of negligent supervision. Evidence showed that the reason for the absence was an assignment made by the principal to duty as a hall or cafeteria supervisor during the lunch period. The principal had drawn up a plan designed to place teachers in positions where supervision was most needed. The enrollment was 1,200. In an effort to provide for maximum safety and order, teachers were deployed in various places outside their own classrooms during certain periods when students were generally outside the classrooms.

The principal had given the students in the printing class (14 students) certain specific rules they were to follow if the teacher was absent at the start of class.

In reacting to the allegation of negligence, the court stated:

> Thus, faced with the knowledge that children, and especially 13-year-old boys, will throw at, kick, hit or push a fellow pupil if a teacher is not immediately present, and using the available super-

[1] W. PROSSER, LAW OF TORTS 122 (2d ed. 1955).

[2] Butler v. District of Columbia, 417 F. 2d 1150 (D.C. Cir. 1969).

visory personnel, the authorities balanced the need for a teacher to supervise several hundred students milling about the corridors and the cafeteria against the need to supervise 14 students in a certain classroom for a short period of time.

The court stressed that there was a plan of supervision, and the plaintiffs did not challenge the plan but simply said there was negligence because the teacher was absent from the classroom. "Liability," said the court, "is not established by such allegation or evidence."

A dissenting judge quarreled with the fact that the case had not gone to the jury for consideration as to why the printing type could not have been closed up in some way.

In a 1970 case[3] the California Supreme Court showed displeasure with a plan for supervision of a large group of students during the lunch hour. The facts involved two boys who, after finishing lunch, went toward the gymnasium building about 1:00 p.m. (next class was at 1:16). The boys stopped outside the north side of the gymnasium building where the injured party and his friend engaged in "slap boxing" (using open hands). One boy fell backwards when slapped and suffered a fractured skull which resulted in death a few hours later. There was no supervision in the area at the time of the boxing episode.

According to the plan in effect, all 2,700 high school students ate lunch during one session. While they were actually eating, students were required to remain in either the indoor cafeteria or the enclosed outdoor area. When they were finished eating, however, they were free to use any part of the 55 acre campus except the parking lot. Provision was made for three administrative personnel and two teachers to supervise during the lunch period, and the area around the gymnasium was made the responsibility of the physical education department. The court found the plan defective because of lack of specificity as to the use of physical education personnel. It said:

> There was evidence . . . to the effect that the responsible department head had failed to develop a comprehensive schedule of supervising assignments and had neglected to instruct his subordinates as to what was expected of them while they were supervising. Instead, it appears that both the time and manner of supervision were left to the discretion of the individual teacher.

An allegation most frequently made against a teacher by the representative of an injured pupil is that the teacher was negligent by reason of not giving the proper supervision required by the circumstances. If the trial court feels that the evidence leans very heavily in one or the other direction, it may direct a verdict. Most often, however, the trial court will send the matter to a jury with instructions on the law which it thinks applicable. Appellate courts will sometimes find the instructions improper. Attitudes of appellate courts in various jurisdictions differ somewhat on the standard of supervision required. Some courts seem excessively liberal in giving protection to teachers, and teachers

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[3] Dailey v. Los Angeles Unified School Dist., 2 Cal. 3rd 741, 470 P. 2d 360, 87 Cal. Rptr. 376 (1970).

would be prudent not to place too much reliance in the philosophy such courts express. Too many other courts do not show such liberality. Even in a jurisdiction which seems presently to allow liberal philosophy, the next case could bring a reversal.

One of the most recent cases to exhibit a liberal reasoning in a supervision situation was decided by the Maryland Court of Appeals.[4] A fourth grade teacher left her classroom for about five minutes to go to the principal's office to inspect the record of a child. At the time, her pupils were engaged in a program of calisthenics. The program of studies permitted such physical education endeavor to be conducted in a regular classroom by the regular teacher on days when the physical education teacher did not take over. There were 30 children in the teacher's class. The classroom was a rather traditional type with usual equipment. On the day when the injury occurred, the weather was inclement and the regular classroom was used for the calisthenics. Before she left the room, the teacher spaced the children around the room an arms distance apart. She then played a record which most of the children knew and told them to follow the record in the manner directed. She told the children she was going into the office and stressed that they should not move from the positions assigned. She stayed for a few minutes to see how everything was going and then went out.

After she left the room, one boy deliberately shifted his position and as a result kicked a girl pupil in the head, causing her head to hit the floor and her teeth to come out.

The teacher had previously recommended that the boy who shifted his position needed psychological study and admitted that on occasion the boy had disobeyed instructions.

The lower court found the teacher negligent and would have permitted the recovery of damages by the injured pupil. The lower court felt that it was the teacher's negligence in leaving the room, which was the proximate cause of the injury.

The Court of Appeals thought otherwise. It felt that since the facts were admitted, the lower court should have directed a verdict in favor of the defendant. The Appeals Court said:

> In our view the proximate cause of Mary's injury was an intervening and wholly unforeseen force—the fact that Bobby left his assigned place and did not do his push-ups as he had been instructed to do.
>
> At another place the court adopts the language that:
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> Variously stated, the universally accepted rule as to the proximate cause is that, unless an act, or omission of duty, or both, are the direct and continuing cause of an injury, recovery will not be allowed. The negligent acts must continue through every event and occurrence, and itself be the natural and logical cause of the injury . . . where the negligence of any one person is merely passive and potential, while the negligence of another is the moving and effective cause of the injury, the latter is the proximate cause of the injury and fixes the liability.

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[4] Segerman v. Jones, 256 Md. 109, 259 A. 2d 794 (Ct. App. 1969).

The Court stated that:

> The teacher had no reason to apprehend that any child would leave his assigned place or that any of the children would perform the exercises improperly. . . . To say that Bobby's acts should have been foreseen by the teacher would be sheer conjecture.

The court was so sure of its position that it indicated that "while proximate cause is ordinarily a question of fact, it becomes a question of law in cases where reasonable minds cannot differ."

One of the cases the Maryland court relied upon was the New York Court of Appeals decision in *Ohman v. Board of Education.*[5] In that case, in a 3-2 decision, the court overturned a jury verdict finding of negligence when a boy was hit in the eye by a pencil thrown while the teacher was out of the room. The court in *Ohman* talked about no proof of similar accidents; the accident could have happened while the teacher was in the room, and the pencil was not a dangerous instrumentality and, therefore, the teacher's absence was not the proximate cause of the injury.

Not all courts follow the philosophy of *Ohman.* Some of the cases cited by the Maryland court did not follow it, although the court tries to distinguish them. The dissenters of the appeals court in *Ohman* (2 out of 5), and majorities in other courts, feel that a teacher could foresee that absence from assigned duties in a classroom might encourage some kind of "horseplay" and that, if such event does happen, it is immaterial that the exact injury need be foreseen. In their view, something like a pencil can be a dangerous instrumentality.

In spite of the broad language which the Maryland Court of Appeals used in discussing proximate cause, and in spite of citing *Ohman* as one of those cases on which it relied, there is some indication that the court would have been concerned if the teacher had been out of the classroom for a substantial period of time. The court drew attention to a California case[6] which referred to a long absence from supervising as "imprudent." In *Ohman* the New York court had said it was not concerned with the facts on the length of absence because it was immaterial on the matter of proximate cause.

The reason it cannot be said with certainty that the Maryland Court of Appeals would have had a different viewpoint if the absence from the classroom had been longer is because it was able to distinguish from the California[7] case where liability was found after injury to a child through horseplay when a teacher absented herself from lunchroom supervision. The court noted that a statute required supervision during such period.

In Ohio[8] a court has adopted the *Ohman* philosophy. The facts indicated that a teacher was out of the room when one pupil threw a milk bottle which struck another pupil in the head, causing him even-

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5 300 N.Y. 306, 90 N.E. 2d 474 (1949).

6 Forgnone v. Salvadore Union Elementary Dist., 41 Cal. App. 2d 423, 106 P. 2d 932 (1940).

7 *Id.*

8 Guyten v. Rhodes, 65 Ohio App. 163, 29 N.E. 2d 444 (1940).

tually to lose the sight of one eye and impairing the vision in the other.

On the point that the milk bottle could have been thrown while the teacher was in the room, the courts which differ with those in Maryland, New York, and Ohio would stress that it would be much less likely to happen if the teacher were present in the room.

In the state of Washington,[9] where the ability to foresee the exact injury was more difficult than in the New York, Ohio, and Maryland cases, the court found no problem in finding a physical education teacher liable who left the gymnasium unsupervised when during his absence a boy dragged a girl into an adjacent room and perpetrated an immoral act.

One of the most recent pronouncements differing with positions similar to those taken by the Maryland, New York, and Ohio courts on the matter of the significance of failure to supervise was expressed by the Supreme Court of California[10] in the "slap-boxing" case previously discussed. The Court commented:

> The fact that another student's misconduct was the immediate precipitating cause of injury does not compel a conclusion that negligent supervision was not the cause of Michael's death. Neither the mere involvement of a third party nor that party's wrongful conduct is sufficient in itself to absolve the defendants of liability, once a negligent failure to provide adequate supervision is shown . . . Nor is this a case in which the intervening conduct of the other student is so bizarre or unpredictable as to warrant a limitation on liability through the expedient of concluding, as a matter of law, that the negligent failure to supervise was not the proximate cause of the injury. There was testimony . . . that "roughhousing" and "horseplay" are normal activities for high school boys and it is the function of adult supervision to control just such conduct. . . . Of course, it is not necessary that the exact injuries which occurred have been foreseeable; it is enough that "a reasonably prudent person would foresee that injuries of the same general type would be likely to occur in the absence of adequate safeguards."

The reasoning of the California court appeals to this writer. It is submitted that teachers, looking for the guidance found in good law, follow the dictates of the California court.

Of course, situations can arise when absence from supervisory responsibilities is indeed not the proximate cause of an injury. If, for instance, a physical education teacher were to leave the gym floor while pupils were playing a basketball game and the game were to go on as usual, without horseplay, but two boys collide and severely injure each other, the absence of the teacher from the floor would truly have nothing to do with the accident.

A very particular responsibility in respect to supervision rests upon teachers who instruct in areas where students work with equipment, materials, and machines which are inherently dangerous if care is not used. Shop, physical education, science, and home economics teachers work in such areas.

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[9] McLeod v. Grant County Dist. No. 128, 42 Wash. 2d 316, 255 P. 2d 360 (1953).

[10] Dailey v. Los Angeles Unified School Dist., 2 Cal. 3rd 741, 470 P. 2d 360, 87 Cal. Rptr. 376 (1970).

Such teachers have more than a duty to give reasonable supervision. They have the duty to give careful instruction in the use of the various instrumentalities. A recent Wisconsin[11] case illustrates the duty in an unusual way. The Wisconsin Supreme Court sustained a finding of negligence in the case of one injured while using a machine in a vocational school. Evidence showed that the injured plaintiff had not been given proper advance instruction on how to operate a complicated high speed machine and of the necessity of having a guard in proper position. On the latter point facts indicated that the instructor was lax in enforcing safety regulations. The case is particularly interesting because the injured person was 21 years of age and had a job working with machines during the day. He had, in the year before the accident, been given a set of instructions which pointed out the proper operation of machines at the school and warned against certain dangers. Without saying so in so many words, it was obvious that the court did not feel it was reasonable to fully charge plaintiff with continuous warning on the basis of a notice received in 1961 when he did not begin to work with the machine until 1962. Under the Wisconsin comparative negligence statute, the court did conclude that the plaintiff was 25 percent negligent. The court also noted that, although the plaintiff worked with machines at his employment, they were not of the complicated type with which he was to work at the vocational school. It should be obvious that if there is a duty to give careful instruction to an adult, there is even more need to give it to elementary and high school pupils.

There are, of course, a great variety of situations, other than classroom, which call for some degree of supervision. School authorities have certain responsibilities in respect to supervision on field trips, at dismissal time, at periods of movement between classes, at school sponsored activities such as dances and athletic contests, and in connection with gatherings of pupils before and after classes. The present writer has discussed the application of basic principles to such situation in a previous article in the *Hastings Law Journal.*[12] Limitation on space does not suggest coverage in this discussion.

Equipment As Attractive Nuisance

Administrators are often worried about the possibility that certain equipment found on school playgrounds may be held by courts to be an attractive nuisance, so that if a child is injured on the equipment while it is not supervised, liability will be incurred. Recently an Illinois Appellate Court[13] dealt with a very interesting case involving the issue of attractive nuisance. The assertion was made that various playground equipment, including the higher of two slides, were inherently attractive to young children. The Court responded by stating:

> A plaintiff in tort litigation for personal injuries must allege facts . . . which will raise a duty. The social utility of furnishing slides

[11] Seversen v. City of Beloit, 42 Wis. 2d 559, 167 N.W. 2d 258 (1969).

[12] Seitz, *Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Toward Pupils,* 15 HASTINGS L. J. 495 (1964).

[13] Chimerofsky v. School Dist. No. 63, 121 Ill. App. 2d 371, 257 N.E. 2d 480 (1970).

> for pleasure and enjoyment of children is a commendable function of governmental bodies at all levels. The existence in this state of many unsupervised public playgrounds and public recreational facilities that provide playground slides is common knowledge.
>
> The cost and burden of supervising . . . and requiring children to be sorted out because of age, height, weight, and attitude and directed to and from higher and lower playground slides would be such a burden and duty, in view of the risk involved, to require elimination of most such facilities in this state.

And then the court, quoting from another Illinois case,[14] made the very significant statement:

> After the event, hindsight makes every occurrence foreseeable, but whether the law imposes a duty does not depend upon foreseeability alone. The likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant, must also be taken into account.

Consequently, the court did not sanction recovery for injuries sustained by a three and one-half-year-old child.

Contributory Negligence as a Defense to Charge of Improper Supervision

A defense frequently presented to an allegation of negligent supervision is the assertion that the injured pupil was himself guilty of contributory negligence. In certain jurisdictions which permit use of formula, an effort is made to reduce damages through a comparative negligence formula.

The problem with contributory negligence as a defense is that the court uses as a yardstick that degree of care which the great mass of children of like age, intelligence, and experience would ordinarily exercise under the circumstances. The danger is that the court may often conclude that, although pupils recognize that a warning of danger has been given, they do not fully comprehend the extent of the danger. The court is quite likely to see in the failure to properly supervise the creating of an improper atmosphere of temptation to experiment. As the age of the pupil advances into senior high school, it is quite likely that a court would find contributory negligence if the evidence indicated that the pupil had been thoroughly instructed as respects the danger of careless conduct. On the other hand, courts will follow the philosophy of a recent decision of the Supreme Court of North Carolina which held that, as a matter of law, a six-year-old child is incapable of contributory negligence.[15]

The duty of one charged with supervising to warn of danger often exists even though a pupil could recognize some danger. In a California situation the teacher failed to warn that the guard on a power saw was broken. Although the pupil could observe the fact and knew of the danger, the court held that, although the pupil did know there was some danger, he did not know the amount of it.[16]

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[14] Lance v. Senior, 36 Ill. 516, 224 N.E. 2d 233 (1967).

[15] Chimerofsky v. School Dist. No. 63, 121 Ill. App. 2d 371, 257 N.E. 2d 480 (1970).

[16] Ridge v. Boulder Creek Union Jr.-Sr. High School Dist., 60 Cal. App. 2d 453, 140 P. 2d 990 (1943).

Responsibilities Other Than Supervising

There are a number of occasions other than in the area of supervision which can give rise to questions as to whether teachers and administrators have used due care toward pupils.

The mere plea of good samaritan will not excuse the school man who gives medical attention when he should recognize that he does not know how to administer proper treatment. The question then becomes a question of reasonable action under the circumstances. Sending pupils home during the school day without making proper contact with parents could result in liability if a child suffers injury or harm. The keeping of pupils after school so as to cause them to have to confront conditions which would have been absent if they had been dismissed on time can bring liability if a pupil suffers harm. Sending pupils on errands both within the school and outside the school can have unfortunate consequences for teachers and administrators if the child is injured and the errand has confronted him with risks not justified in view of his age and experience.

Individual teachers and administrators often find themselves in situations where the law thrusts upon them certain responsibilities to warn of defects in school property and to do what is possible to keep students away from the danger.

Limitations of space do not permit a more extended discussion of the non-supervisory responsibilities. A more detailed analysis can be found in the article of the present writer in the *Hastings Law Journal*.[17]

School District Liability

It is not the intent of this article to discuss the question of the liability of school districts for the negligent conduct of teachers and administrators. The same *Hastings Law Journal* just mentioned[18] discusses such matter. In general, some jurisdictions follow the doctrine of governmental immunity. Ohio is in this category. Other jurisdictions have done away with such immunity either by statute or court decision.

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[17] *Supra* note 12.

[18] *Id.*