



A School Law Primer: Part II

Negligence: Legal Pointers for Public Schools

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OVERVIEW

A tort is a civil wrong, a violation of a duty, which causes harm. In our legal system, an individual who is injured by a breach of duty can sue the other person to collect compensation for that injury. There are basically two types of civil wrongs.

- ✓ **Intentional torts:** trespass, assault, battery and defamation.
- ✓ **Unintentional torts:** negligence and strict liability.

The law also recognizes constitutional torts that occur when a government agent has violated an individual's constitutional rights. These claims are usually brought under 42 U.S.C. § 1983. For more discussion of section 1983, see the chapter on Board Authority in A SCHOOL LAW PRIMER—PART III.



The most common kind of tort that occurs in the public school context is negligence. More specifically, the most common kind of tort claim brought against schools seeks recovery of damages for personal injuries.



Preventing injury is not only an ethical responsibility, but also a legal obligation.

Generally, common sense notions apply in the determination of these legal obligations.

MAJOR PRINCIPLES

Negligence is the failure to exercise due care or reasonably fulfill one's duty of care, which results in injury or loss to another person.



Either the failure to act (omission) or the commission of an improper act can be negligence.

Four elements must be established for a plaintiff to prevail in a negligence lawsuit:

- ✓ **Duty:** The defendant had a duty to protect the plaintiff from unreasonable risks.
- ✓ **Breach:** The duty was breached by the failure to exercise an appropriate standard of care.
- ✓ **Causation:** There was a causal connection between the negligent conduct and the resulting injury.
- ✓ **Injury:** An actual injury resulted.



I. DUTY

The law recognizes a duty of care that one person owes to another when the relationship between the two people is such that one is obligated to exercise at least ordinary care that the other person not be injured.

A. How is a Duty Created?

Duties arise from contract, common sense, or a special relationship between the parties.

Duties can be expanded if a person assumes additional responsibilities.

In the general workforce, a supervisor, and ultimately the employer is responsible for the negligent acts of employees under the doctrine of *respondeat superior*.

However, in education, generally no one is automatically responsible for the acts of another. School districts and administrators are not automatically responsible



for the negligent acts of teachers. In school situations, usually a plaintiff must find a separate duty on the part of each defendant.

B. What Special Duties Exist in Schools?



1. Hire and Retain Qualified and Competent Staff

School boards may be held liable for negligent hiring or retention of employees who end up injuring a third party. To avoid this type of liability, school officials should, and in many states are required to, obtain information on the qualifications and fitness of all applicants and employees who will be placed in direct contact with students. This information may be obtained through applications, interviews and thorough background checks. Adequate supervision of employees must also be maintained. Prompt investigation should be made when claims of employee misconduct arise.

2. Adequately Supervise Students

Usually a duty exists while students are in the custody or control of the school. *See Glaser v. Emporia Unified School District No. 253*, 271 Kan. 178 (2001) (school district was not liable for student's injuries after he ran off school grounds before the start of the school day; no duty to supervise or protect a student who was not in the school building and, therefore not in the school's custody or under its control). But a school may also have a duty to supervise students off school grounds when it has caused them to be there, e.g., while on field trips or extra curricular events.

Schools may have a duty to supervise students on school grounds before and after school when they have caused them to be there, e.g., when the bus drops them off.

Schools may acquire a duty to supervise when they have, by their previous actions, assumed the duty to supervise at a particular time, e.g., when some staff have supervised intermittently or consistently before the official time to arrive.

3. Provide Adequate and Appropriate Instruction

Proper instruction is required to reduce injury when students undertake school-related activities, especially any dangerous activity, e.g., chemistry lab, shop class, or physical education.

Instruction must be given on continual basis if there is an ongoing foreseeable risk of injury.

The following sample jury instruction explains a teacher's duties as follows:

A teacher occupies a supervisory position in relation to students. A teacher has the duty to instruct and to warn the pupils in his or her custody of any dangers of which the teacher knows, or in the exercise of ordinary care, ought to know are present in the classroom (laboratory, gym, playground) and to instruct them in methods which will protect them from those dangers, whether the dangers arise from equipment, devices, machines or chemicals. A failure to warn students of such danger or instruct them in means of avoiding such danger is negligence.

4. Provide a Safe Environment

Schools also have a duty to maintain the school grounds and facilities in a reasonably safe condition. Courts have held schools liable for injuries resulting from unsafe conditions that school officials knew or should have known about and failed to take precautions or provide reasonable warnings, e.g., slippery entrances, unlighted areas, inadequate handrails, violation of building codes, etc. *See Sinto v. City of Long Beach*, 736 N.Y.S.2d 700 (App. Div. 2002) (school was found not liable for injuries resulting from a damaged swing because the custodian inspected the playground on a daily basis, negating the school's constructive notice that the swing was defective).

Schools generally are not liable for the acts or omissions of students that result in injury to other students, but liability has been imposed for failure to supervise when there were foreseeable dangerous circumstances. Also schools are generally not liable for failure to provide security against physical attacks by outside individuals unless the school had some advance knowledge of a foreseeable danger and failed to take reasonable precautions.

Schools may be held liable for student suicide if the danger is foreseeable. Schools must act reasonably to inform parents of behavior that may indicate an increased risk of suicide. *See Eisel v. Board of Education of Montgomery County*, 324 Md. 376, 597 A.2d 447 (Md. 1991) (school counselor was found negligent for failing to inform student's parents or school administration that student had made suicidal statements).

5. Provide Safe Transportation

If a school district provides transportation to students between school and home, it owes a duty of care with respect to that transportation. This duty could encompass employing qualified and fit bus drivers, adequate

supervision of loading areas, maintaining buses in safe operating condition and avoiding dangerous traffic situations related to loading and unloading of school children from buses.

C. Educational Malpractice—One Theory of Negligence

Schools may encounter claims of “educational malpractice” that assert the district has negligently (or intentionally) failed to educate the student plaintiffs. These students seek recovery for diminished earning capacity, cost of remedial instruction and other losses. The courts have uniformly rejected this theory, often finding no satisfactory or uniformly accepted standard of care by which to evaluate the work of educators and too many uncertainties in determining the cause and nature of any claimed “injury.” Claims for compensation for failure to educate may be asserted on other grounds besides negligence, especially in the area of special education. These theories are still being developed in the courts, with no certain answers yet.



II. BREACH OF DUTY

Once a duty has been established, the injured individual must show that the duty was breached. The duty has been breached when the individual unreasonably fails to carry out the duty.



A. Standard of Care to Determine Breach

In carrying out his/her duties, one is expected to act as an ordinary, prudent, and reasonable person, considering all of the circumstances involved. The court or jury makes a determination of how the reasonable person would have acted; if the individual did less, he/she is found negligent. *See Gonzalez v. City of New York*, 730 N.Y.S.2d. 154 (App. Div. 2001) (court held that teacher did not exhibit ordinary care by tripping a child to prevent him from running in the hall).

B. Circumstances Determining Standard of Care

The standard varies for professionals, e.g., a reasonable teacher or principal. Defendants who are professionals will be held to a standard based on the skills or training they should have acquired for that position. Thus, the question to be answered is: What would the reasonable professional have done under the same or similar circumstances? *See Danna v. Seankha Central School District*, 662 N.Y.S.2d 71 (App. Div. 1997) (court found that a reasonable person cannot guard against every thoughtless or careless act by which one pupil may injure another).



The standard varies also with the individual circumstances of the situation. Each situation gives rise to a unique set of circumstances. Some of the factors which may be considered in determining the standard of care include:

- ✓ Age and maturity of the parties involved;
- ✓ Nature of the risk involved;
- ✓ Precautions taken to avoid injury;
- ✓ Environment and context, including characteristics of students, location, physical characteristics, etc.;
- ✓ Type of activity engaged in;
- ✓ Previous practice and experience.

In determining negligence, children are not held to the same standard of care as adults; instead, their actions must be reasonable for a child of similar age, maturity, intelligence and experience. Some states further classify children according to a presumption of capabilities. In those states, children under seven are not held responsible for negligence or unreasonable acts. The noted exception, however, is that a child may be held to an adult standard of care when engaged in an adult activity, e.g., driving a car or handling a weapon.

C. An Example of One Standard of Care

The following sample jury instruction illustrates one standard of care:

This relationship requires the teacher to maintain a degree of supervision which an ordinarily prudent teacher would maintain under the same or similar circumstances. In determining whether the defendant exercised ordinary care, consider the age, intelligence, and experience which the defendant knew, or ought to have known, that the plaintiff possesses. You may further weigh and consider the responsibilities which had been placed upon the defendant by his employment, such as the curriculum he was required to carry out, the daily schedule which was imposed upon him, the number of pupils assigned to him in the class, the size and arrangement of the classroom, the equipment, devices and other objects therein.



III. CAUSATION

A. Generally

To recover for an injury, the plaintiff must show that the defendant's negligence was the cause of the injury. If the accident would have occurred anyway, there can be no liability. *See Hull v. Wellston Independent School District*, 46 P.3d 180 (Okla. Civ. App. 2001) (lack of supervision was not proximate cause of injury received while participating in varsity football scrimmage).

B. Direct Causes

The defendant's negligent act must be a continuous and active force leading up to the actual harm. For example, a high school has an outside track and field arena



where interscholastic meets are held. There are old bleachers there for spectators, but no regular inspection or maintenance of the bleachers is performed. Several hours before a meet, the bleachers fall on a passerby. The school could be held liable for the injuries sustained by the passerby.

When there is a lapse of time between the defendant's negligence and the injury, other contributing causes and intervening factors may be the actual cause of the injury.

C. Indirect Causes

When there is a series of events leading up to an injury, the person starting that chain of events may be liable for the resultant injury if it was a foreseeable result of his/her negligence. For example, during a well attended track meet at the arena described above, the fans become excited and jump up and down on the bleachers, and they collapse. The school could be held responsible for injuries sustained by the spectators under a theory of negligent maintenance of the bleachers by failing to inspect them.

If the injury at the end of the chain of events was not a logical (foreseeable) result of the negligence, there is no liability. For example, during the bleacher collapse at the track meet, an expensive necklace worn by one of the spectators comes loose and is lost. The school could not be held responsible for the loss of the necklace.

D. Intervening Acts

When another independent act occurs in between the defendant's negligent act and the plaintiff's injury, it may cut off the liability. In other words, someone else's actions may have been the cause of the injury. For example, one of the spectators at the track meet gets a sprained ankle due to the collapsing bleachers but decides to drive himself to the hospital. Along the way his car is hit by another vehicle operated by a drunk driver. The school could not be held responsible for the damages to the car.

Intervening acts will not cut off liability when those intervening acts were foreseeable. For example, the spectators becoming excited and jumping up and down on the rickety bleachers is an intervening act, but it is foreseeable and therefore does not negate the school's liability.

IV. INJURY

A. Tangible Injury

The plaintiff must show an actual loss or real damage, e.g., a physical bodily injury or a real loss.



Compensation may include direct monetary damages for medical expenses, replacement of property, lost wages, etc.

B. Intangible Injury

The plaintiff may have intangible injuries, e.g., pain and suffering or emotional distress. In some situations an intangible injury is sufficient for recovery. However, some states require at least a physical manifestation of an injury, if there are no tangible injuries.

If proven, monetary compensation may be awarded for intangible injuries.

C. Third Party Injury

If a child is injured, his/her parents may also have an action to recover their own expenses and compensate their own injuries. Most commonly, these would be medical expenses and their own emotional damages.

D. Duty Subsequent to Injury

When students are injured in the school setting, school personnel have a duty to provide reasonable assistance commensurate with their training and experience. Where reasonable treatment is provided, no liability will be assessed for the results of treatment even if it is later proven to be inappropriate. Good Samaritan statutes in many states shield individuals who provide treatment in emergency situations from liability.

V. DEFENSES

Once the basic elements have been established, the court looks at what defenses may diminish or discharge liability. The most common defenses are:

- ✓ Governmental immunity;
- ✓ Assumption of the risk;
- ✓ Comparative or contributory negligence.

A. Governmental (Sovereign) Immunity

In states that still have strict sovereign immunity, an individual may not bring legal action against the state. In these states, sovereign immunity is a complete bar to an action. For these purposes, school districts are often, though not always, treated as the state.

In most states, sovereign immunity has been eroded by court decision or abrogated by statute. Under these modern rules, people may sue the state for its proprietary, but not governmental actions.



Governmental actions are those the state undertakes as a policy maker. Thus, an individual is not allowed to sue the school for an injury caused by a policy decision such as making a curriculum choice or setting the date and time for school to start.

Proprietary actions are those the state undertakes when acting outside of its governmental functions, such as an employer or business. Thus, an individual may sue the school for an injury caused by unsafe buildings or buses.

Some states have abrogated sovereign immunity up to a particular dollar limit or to the extent of insurance coverage. These states usually have strict notice and pleading requirements at the outset of a legal action and often require that a written claim be presented by a statutory deadline before a lawsuit can be filed.

B. Assumption of Risk

1. Generally

This defense is based on the idea that if the plaintiff knowingly and voluntarily accepted the risks of an activity, he/she should not be allowed to recover for injuries caused by those known risks. For knowing acceptance to occur, it is important that all risks inherent in an activity are apparent or explained and that they are voluntarily assumed.

If successful as a defense, this is a complete bar to monetary damages.

REMEMBER – Only known risks can be assumed. Hidden or spontaneous risks cannot. For example, a person may assume the known risks of riding in a car or bus, but unless he knew about the vehicle's defective brakes, he couldn't assume the risks of the brakes failing. When the injured person is a child, it is often difficult to establish that a known risk was voluntarily assumed.

2. Assumption of risk for sports/ athletic events

Students in athletic activities are asked to assume the risk of playing that sport. It must be shown that the plaintiff understood how the specific activity was dangerous and nonetheless voluntarily engaged in it. For example, students who are playing tennis should be told there is always a risk of falling or twisting an elbow or ankle. If such an injury were to occur during the normal course of a match, the school would not be responsible. However, were the fencing to fall on a student during play, this would not be the kind of risk which would have been assumed, so the school could be held responsible.



3. Permission slips

Many people mistakenly believe that parents assume all risks for their children when they sign permission slips. While the parents may assume the normal risks associated with the activity, they do not waive their rights for any and all injuries that may occur. They cannot assume risks of which they have no knowledge. In addition, in many states parents cannot limit their children's right to recover for the children's own injuries.

In sum, some permission slips aren't worth the paper on which they are written in terms of waiving liability. They often only serve to provide parents an opportunity to opt their children out of certain activities.



C. Contributory and Comparative Negligence

1. Generally

If the injured party caused part of his/her own injuries through negligence, the defendant's liability is diminished; a person who causes his/her own injuries should not be granted full monetary recovery.

To reduce the damage award states use either a system of comparative negligence or contributory negligence. As in sovereign immunity, it is important to know and understand the relevant state's statutory and case law.

2. Contributory Negligence

A minority of states still use contributory negligence. Under contributory negligence, if the plaintiff has been negligent and caused any part of his/her own damages, there is no recovery. Recognizing that this all or nothing approach often results in drastic consequences, most states have moved to the less severe system of comparative negligence.



3. Comparative Negligence

Comparative negligence apportions the damage award among the negligent parties depending on the level of fault or their contribution to the injuries. For example, if the plaintiffs caused 10% of his injuries, his damage award would be reduced by 10%. There are various forms of comparative negligence as determined by state statute.



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