

Liability In and Out of the Classroom

What are we as teachers responsible for?

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

(Blyth v. Birmingham Water Works (1856) 11 Ex. 781)

The issue of tort liability is not a new one. The above quote illustrates the fact that the litigious society we live in today is not necessarily a new phenomenon. Most educators today are worried about the possibility of being sued. In today's world of "Sue first, ask questions later." it is a legitimate concern. This article will show ways to possibly prevent being sued, but more realistically, help you avoid punishment when and if you are sued. Normally, a school board, as an agency of the government enjoys governmental immunity and cannot be held liable for accidents occurring in connection with school activities. School administrators would not be negligent because there is no personal liability of the administrator for the negligent performance by his or her teachers. (Kigin, 1973, p.13) The teacher ends up standing alone as the single liable party. Negligence will be discussed in this paper with no emphasis on intentional torts, the other primary category of school tort actions.

Negligence

What is negligence? Negligence is 'failure to exercise the degree of care expected of a person of ordinary prudence in like circumstances in protecting others from a foreseeable and unreasonable risk of harm in a particular situation.' (<http://dictionary.lp.findlaw.com/scripts/results>) To support a successful claim of negligence, it must be shown that:

1. The defendant had a duty to protect the plaintiff from unreasonable risks
2. The duty was breached by the failure to exercise an appropriate standard of care
3. There was a causal connection between the negligent conduct and the resulting injury
4. An actual injury resulted

Duty

Although state statutes require educators to provide proper supervision, school personnel are not expected to have every child under surveillance at

all times during the school day. Also, they are not expected to anticipate every possible accident that might occur. (**Hernandez v. Renville Pub. Schools, 1996**) "The level of supervision required in any given situation is determined by the circumstances, including the age, maturity, and prior experience of the students, and the specific activity in progress". (McCarthy, 1998, p 436) The courts have stated that duty is the sum total of those considerations of law which lead the law to say that a particular plaintiff is entitled to protection. Factors a court will consider in determining if a duty exists include:

1. Foreseeability of harm to the plaintiff
2. Closeness of connection between the injury the defendant's conduct
3. Moral blame attached to the defendant's conduct
4. Policy of preventing future harm
5. Extent of the burden on the defendant
6. Consequences to the community
7. Availability and cost of insurance for the risk
8. Role of the educational institution
9. Budgetary limitations

Courts generally do not assess damages against school personnel unless an injury was foreseeable and would have been prevented by the exercise of proper supervision (McCarthy, 1998, p 436) **Sheehan v Saint Peter's Catholic School, 1971**, illustrates the importance of foreseeability as a teacher was found liable since rock throwing had been happening for ten minutes before an injury occurred. In contrast, no liability was assessed in **Fagan v. Summers, 1972**, when a teacher aide walked past a group of students moments before a rock was thrown injuring another student.

As a teacher, it is also our responsibility and duty to protect people from foreseeable risks posed by third parties (other students or persons not employed by the school district) **Bratton v Calkins, 1994**. Liability has been imposed on districts for negligence in hiring and retaining employees where school officials had prior knowledge of prior sexual misconduct (**Doe v Town of Blandford, 1988**) In **Broward County School Board v. Ruiz, 1986**, the court found that the school breached its duty to provide adequate security to students, when adopting a comprehensive system of supervision and patrols designed to prevent students from being left alone on campus either during the school day or during after school activities, a student was left in the cafeteria. The student was subsequently attacked and beaten by three other students. For teachers, administrators, and school boards, in order to protect themselves when and if they are sued, these general guidelines should be followed:

1. Be responsible
2. Know your authority
3. Consider student's age
4. Avoid overcrowding
5. Use prudent supervision
6. Teach responsibility
7. Report problems
8. Recognize potential problems and respond proactively
9. Inspect facilities frequently
10. Work towards solutions of problems immediately

Standard of Care

The amount of liability a school system and its employees are accountable for involves three factors: (McCarthy, 1998, p 443)

1. The degree of care teachers owed students is determined by the age, experience, and maturity level of the students
2. The environment within which the injury occurs
3. The type of instructional and recreational activity

In assessing whether appropriate care has been taken, courts consider whether the defendant acted as a 'reasonable' person would have acted under the circumstances. This 'reasonable' person is a hypothetical individual who has: (McCarthy, 1998, p 444)

1. The physical attributes of the defendant
2. Normal intelligence, problem solving ability, and temperament
3. Normal perception and memory with a minimum level of information and experience common to the community
4. As much superior skill and knowledge as the defendant has or purports to have

Proximate Cause

If a duty has been established, and the standard of care is inappropriate, the court considers whether a negligent act will result in liability. Proximate cause is the initial act that sets off a natural and continuous sequence of events that produces injury. Foreseeability is important in establishing proximate cause of an injury. In **Butler v Oklahoma City Public School System, 1994**, the school was not liable for a student's injuries that occurred when another middle school student pushed him from the bleachers. The proximate cause of the accident was the intentional act of another student. On the other hand, if a teacher leaves a classroom unsupervised to go to the bathroom, or take a phone call, and a student known to exhibit violent behavior throws a chair or beats up another student, the teacher would be

found liable. To answer questions regarding proximate cause, courts will attempt to ascertain "was the injury a natural and probable cause of the wrongful act (i.e., failure to supervise), and ought to have been foreseen in light of the attendant circumstances?" (**Scott v. Greenville, 1965**). Once again, the issue of foreseeability comes up. It is imperative that teachers, administrators concentrate on this aspect of tort liability to possibly lessen the likelihood of liability.

Injury

Legal negligence does not exist unless actual injury is incurred either directly by the individual or the individual's property. Without injury, there is no legal negligence, and no basis on which to justify an award of punitive damages. (McCarthy, 1998, p 446-447) **Czaplicki v Gooding Joint School District, 1989**, underscored the fact that a teacher may be liable for failing to obtain prompt medical attention for injured students or for other unreasonable actions.

Defenses against Negligence

Traditionally, schools use governmental immunity as a defense in that they cannot be sued for any reason, regardless of the extent of the injury or the degree of culpability of governmental employees. According to the Kansas Tort Claims Act, if a teacher is less than 49% responsible for the injury, he or she is free of negligence as far as payment of an award. Comparative negligence assesses percentage blame to each of the members involved. *Brown v Tesack, 1990*, apportioned the blame on both the school board and the children involved in an incident with flammable duplicating fluid in the school dumpster.

Even though the state can be sued according to the Kansas Tort Claims Act, there are still situations in which a school can be exempt from liability. These include:

1. Legislative functions such as adopting or failing to adopt a policy
2. Judicial functions such as a student teacher due process hearing
3. Enforcement, or failure to enforce a statute, regulation or board resolution
4. Adoption, or failure to adopt written personnel policies which protect personal health
5. Any claim based on the performance or failure to perform a discretionary function or duty regardless of whether discretion is abused.
6. The assessment or collection of forces
7. Any claim by an employee which is covered by worker's compensation

8. Snow or ice or other temporary or natural conditions on school property
9. Any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area, for recreational purposes, except in cases of gross or wanton negligence
10. The natural condition of any unimproved public school property

Final Thoughts

A key word mentioned throughout the literature is that of foreseeability. Webster defines these terms as: being such as may be reasonably anticipated. Think of your duty as a 'reasonable' person. Do not cut corners. As a teacher, if you are aware of a dangerous situation, inform your superiors and steer your students away from that danger. The same rule holds true for administrators, except quite often you will be the driving force in seeing that the problem is resolved. Do not neglect this duty. It could come back to haunt you.

Be Proactive, Not Reactive

- Develop plans which address standard of care and proper supervision. These policies should be in writing and available to all staff. This includes, certified, non-certified, substitute, and custodial staff.
- Train your staff. A half hour in-service will not seem near adequate enough when you are sitting in a court of law.
- Don't rely on waivers. Educators sometimes assume that teachers and schools can release themselves from damages by having parents sign waivers or releases. This is untrue because parents cannot waive their children's claim for damages
- Document, Document, Document. Keep thorough records. Anecdotal records can be crucial in liability cases. Whenever possible, records should include the signatures of witnesses. Every novice or season teacher or administrator should keep a log of disciplinary actions. These could make or break a case of tort liability. As they say, if it isn't written down, it wasn't done.