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ABSTRACT

This chapter reports 1982 cases involving tort claims within the school context. Torts are seen here as separate independent civil causes of action that define a particular level of conduct that the law recognizes individuals owe one another. This chapter discusses negligence, the most common tort, at greatest length, analyzing cases involving student injuries, educational malpractice, and negligence. Also reviewed are cases involving liability insurance, assault and battery, defamation, false imprisonment, tortious interference with a contract, and constitutional torts. (MJL)

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TORTS

Paul W. Thurston

5.0 INTRODUCTION

Torts is a general term used to define several independent civil causes of action based on noncontractual legal responsibilities that individuals have to avoid harming or injuring another's person, property, or reputation. The word "tort," derived from the Latin word "tortus" meaning "twisted," was at one time common in English as a

general synonym for "wrong."[1] The general sense of tort as wrong suggests the difficulty involved in providing a precise definition. According to Prosser torts is "a body of law which is directed toward the compensation of individuals rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required.[2]

Torts are actually separate, independent causes of action that define a particular level of conduct that the law recognizes individuals owe one another. The more common torts have developed historically and have been recognized for centuries. Examples of these range from negligence to assault and battery to libel and slander. But tort law is not static. As society changes, it is possible for courts to define new legal responsibilities between individuals. Educational malpractice and constitutional torts represent two such emerging areas in school law.

This chapter will report the cases that have been reported during 1982 involving some type of tort claim within the school context. The cases are organized according to the particular type of tort involved. The categorization system employed will follow basically the format used in recent volumes of *The Yearbook of School Law*.

5.1 NEGLIGENCE

Negligence is the most common tort. In the lay person's mind negligence describes a type of conduct. But in a legal sense, for an injured party to secure monetary damages from another party for allegedly negligent action, the injured party will need to plead and prove, at minimum,[3] four elements.[4] Schools and their employees are not responsible as insurers for any and all injuries that occur. For liability to be present it must be shown that the school owes a particular duty to the injured person(s), that the behavior fell short of that required, that this breach was the proximate cause of the injury, that there were real injuries, and that the plaintiff was not responsible for causing the injury. Let us briefly consider the first four elements that make up the prima facie case:

1. W. PROSSER, HANDBOOK ON THE LAW OF TORTS (4th ed. 1971).
2. [illegible]
3. [illegible]tract elements necessary for carrying the plaintiff's burden in the prima facie case will vary from state to state. Some states, for example, will require the plaintiff to plead an absence of contributory negligence while other states do not.
4. *See* PROSSER, note 1, *supra*, for a more detailed description of elements of the prima facie case.

1. *Duty of Due Care.* There is a duty of due care that the law recognizes one person owes to another. It requires a certain standard of conduct for the protection of others against unreasonable risks. One has a legal duty to act as an ordinary, prudent, reasonable person in the circumstances. A child is expected to conform to the standard of care of a child of like age, education, intelligence, and experience.

The duty can be specified by statute or as a matter of common law. Usually in the school context, it is not hard to show that the school (and its teachers) have a duty to protect the health and safety of the students while they are in the custody of the school.[5]

2. *A Breach of the Duty.* This amounts to a failure of one party to conform to the standard required toward another. This can occur either from an action or an omission. The breach of the duty of due care in a specific case is a question of fact. Making a showing of this breach involves both a showing of what actually happened and showing from these facts how the defendant acted unreasonably. Alleging failure to supervise, for example, is alleging that the teacher omitted or failed to take the appropriate action.

3. *Causation.* There needs to be reasonably close causal connection between the alleged misconduct and the resulting injury. This involves both a cause in fact relationship between the behavior and injury as well as the behavior and injury being sufficiently close in time and foreseeability.

4. *Actual Damages.* The plaintiff must show an actual loss or real damages. Nominal damages, to indicate a technical right, or the threat of future harm, not yet realized, are insufficient injury on which to bring a negligence action. Damages awarded depend upon the particular person injured.

There are two other components of the prima facie case that are basic to understanding its operation: foreseeability and the reasonable person standard. Foreseeability, which is either subsumed under the duty of due care element or the proximate cause element, means that the defendant could or should have seen the potentially dangerous consequences of the action when it was taken. This does not mean that the defendant subjectively or personally actually foresaw the potential danger. Rather, the defendant is presumed to be a reasonable person and the jury then is given instructions like the following to determine foreseeability: "Would you, as a reasonable person, standing in the

5. For an elaboration of the implications of the *Larson* case, described in THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) at 237, *see* Hooker, *Court Restores Principals As Instructional Supervisors*, 1 WEST'S EDUC. L. REP. 1 (1980).

place of Y defendant at X time, have foreseen the occurrence of Z injury?" Notice that under this instruction the jury enjoys the luxury of hindsight when determining foreseeability, something which often leads to sharper vision than the defendant actually may have had. A recent Florida Supreme Court decision, in an appeal of a case reported last year,[6] is instructive in showing the application of several of these elements[7]

A high school student was very seriously injured in a 1975 hazing incident conducted off school grounds by a school-sanctioned fraternity. Because of the club's bad reputation prior to this incident it was required by school board regulations to obtain approval from the principal for extracurricular outings and was prohibited from conducting hazings. In addition, a faculty advisor was required to be present at all meetings. The club held two meetings, the second of which was the hazing where the student was seriously injured, and the faculty advisor was absent from both. The student and his father then brought a negligence action against the board and its agents, against the principal and teacher individually both for their negligence and for their gross and reckless negligence. The analysis of the Florida Supreme Court in these allegations is instructive in many of the major elements in negligence.[8]

In assessing the negligence of the defendants the court had to determine whether a duty of due care existed between the defendants and the injured student. This is complicated here because the injury did not occur during the day or on school premises. There are two approaches to find such a duty. One is to determine whether the board and its employees have authority to control student behavior, and a duty then follows. In these facts such a duty existed because of school board regulations and state statutes specifically providing such authority. A second approach, more pragmatic, is to assess the interests of each party and society to determine whether a duty should be imposed. Under this approach, once again with the statutes and school board regulations, the court holds the responsibility for supervising such activities is reasonably imposed upon school authorities.

6. THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 185, 193.

7. Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982).

8. The Florida Supreme Court held that a 1980 statute which relieved all state officers, employees and agents from personal liability for their negligence acts and made retroactive to all suits pending as of June 30, 1980, violated the due process of those injured persons and was unconstitutional. The court articulated the rule that a public officer is answerable to private persons who sustain special damage resulting from the negligent performance of the officer's imperative or ministerial duties, unless the wrong done is a violation of a duty which he owes solely to the public. The student's serious injury provides the special damages while the failure of the teacher to supervise the club, particularly when directed to do so by the board, was ministerial in nature.

The court next had to analyze whether the breach of this duty was the proximate cause of the student's injury. The pivotal issue in this proximate cause case was whether the injury was foreseeable. Does the student behavior which caused the injury act as an intervening cause and thereby release those supervisors from liability or is the student behavior foreseeable? The Florida Supreme Court employs the general rule that certain student misbehavior is itself foreseeable and therefore is not an intervening cause which will relieve the principals or teachers from liability for failure to supervise. Because of the past performance of this fraternity the student behavior was foreseeable. In fact, the school had even anticipated its misbehavior by requiring its supervision.

The Florida Supreme Court rejected the action for willful and wanton negligence against the principal and teacher. For exemplary damages to be recovered the complaint must allege facts and circumstances of fraud, malice, gross negligence, or oppression. Gross negligence must be established by facts evidencing a reckless disregard of human life or rights which is equivalent to an intentional act or a conscious indifference for the consequences of an act. Because the facts here do not support an imputation of intent or conscious indifference there is no basis for willful and wanton negligence.

The application of these legal standards depends on the particular set of facts involved. The jury usually plays the central role as fact finder for all the elements of the prima facie case. Still, the judge controls, as a matter of law, which cases involve factual allegations sufficient to go to the jury. All the cases in this chapter involve questions of law. Presumably a much greater number of cases involving school negligence that are heard at the trial court level are decided by the jury and not appealed. These cases are not reported in any systematic way and are not reported in this chapter.

Torts, generally, and negligence, more so than other torts, are strictly a matter of state law. And, it is important to note at the outset, there is considerable variation between states in many areas of negligence law, particularly in the appropriate standard to be used for liability and the existence of immunity, to mention just two. This variation suggests that readers need to be cautious in applying a case decided in one state to another state. Extreme caution is appropriate when thinking about the precedential value of one case to another state. It is, of course, possible for a case to have precedent to another state if the same mode of analysis is applied. Determination of the existence of a duty of due care in a particular situation will often have transferability from one state to another, for example. But because of the diversity between states, both as to their statutes and earlier judicial decisions, caution is

advised. It is quite possible, for example, to take the same fact situation and get quite different results in two different states because of different standards being applied.

5.1a Student Injuries

Schools have a duty to protect the health and safety of students while they are in their charge. Consequently, when students are injured it is common to inquire whether the injury is due to a breach of this duty by a school employee. There is also a strong financial incentive to bring an action against a teacher or a school district because of the availability of money to pay the damages. Since the circumstances will determine the liability and because the circumstances vary widely, it is instructive to look at the following cases reported in the past year that involved student injures. The cases are organized in general categories according to the location of the injury.

5.1a(1) School Settings During School Hours[9]

A first grade student was injured when a classmate shut a heavy metal door on the child's thumb. The father of the child brought an action against the district seeking damages for the injury on the grounds that the door was unreasonably hazardous and that the school was negligent in not properly supervising the children. The Lousiana appellate court affirmed the trial court in dismissing the suit on both grounds.[10] Insufficient evidence was presented to support the claim that the district is strictly liable for injuries caused by metal doors. In addition, the court could find no basis for the alleged improper superivision. There is no requirement for constant supervision, and because metal doors are not in themselves a dangerous condition, there is no showing of the unreasonableness of the supervision.

A high school student was injured in art class when she fell to the floor after another student had knocked the stool upon which she was sitting out from underneath her. The Ohio appellate court rejected claims of negligence against both the principal and teacher.[11] First, the teacher could not have foreseen that one student would do this to another student. Second, there was nothing to suggest that the stools were in any way inherently unsafe in their design or construction.

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9. For articles that deal with specific types of duties owed in the school setting *see* Note, *School Liability for Athletic Injuries: Duty, Causation and Defense*, 21 WASHBURN L.J. 315-41 (1982) and Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J. L. & EDUC. 479-505 (1982).
10. Narcisse v. Continental Ins. Co., 419 So. 2d 436 (La. Ct. App. 1982).
11. Boyer v. Jablonski, 435 N.E.2d 436 (Ohio Ct. App. 1980).

A second grade student in a parochial elementary school was badly burned when she, dressed in a bluebird costume for a school play, came into contact with a lighted candle on the teacher's desk. The candle was lit in May as part of the morning prayer to honor the Mother of Jesus. The Missouri court of appeals affirmed the trial court and the jury's award of $1,250,000 for physical and emotional damages.[12] The lighted candle posed a danger, and the teacher failed to exercise reasonable care in protecting the second grade children from it. The court rejected a claim that the jury award was excessive. The case is instructive on the reluctance of an appellate court to reverse the jury on the matter of damages, and the decision details the physical pain and psychic trauma which the girl experienced that provided the basis for such a large jury award.

An eleven-year-old sixth grade student broke a permanent front tooth in P.E. class when she hit her mouth against the wall while performing a required exercise known as the vertical jump. The Indiana appellate court reversed the trial court's entering a judgment on the evidence for the defendant school district at the conclusion of the plaintiff's case.[13] The appellate court was persuaded that, examining the evidence in light most favorable to the plaintiff, there was sufficient testimony for a jury to find that the instruction given by the P.E. teacher did provide a risk to the students and that these instructions were the proximate cause of the student injury. The case was remanded for further proceedings.

Injuries in shop classes are a common source of negligence actions against school districts and teachers. Three such cases were reported in 1982.

A Pennsylvania superior court affirmed a trial court decision which awarded $95,000 to a student who had lost a finger in a wood shop class when cut by a saw that did not have a guard.[14] The court was satisfied that sufficient evidence had been presented to support the finding that the high school principal was negligent in not correcting a dangerous situation created by absence of a guard on the circular saw. Additionally, the court was satisfied that the testimony of two expert witnesses was sufficient basis for the $95,000 award returned by the jury.

An allegation that a student injury in a shop room accident resulted from failure to supervise the area properly because of absence of teacher at the beginning of the period was sufficient to show a breach of duty by

12 Smith v. Archbishop of St. Louis, 632 S.E.2d 516 (Mo. Ct. App. 1982).
13 Dibortolo v. Metropolitan School Dist. of Washington Twp., 440 N.E.2d 506 (Ind. Ct. App. 1982).
14 McKnight v. City of Philadelphia, 445 A.2d 778 (Pa. Super. Ct. 1982).

the school district.[15] There is a responsibility of the school to protect the health and safety of the students in its charge, and this duty encompasses a negligent failure to act.

A fourteen-year-old student in an agriculture class where instruction in welding was being given was badly injured by a power saw. The saw was stored in the back of the classroom and was used by the student during the class period without authority and at a time when the instructor was absent from the room. The Louisiana appellate court affirmed the trial court in holding the school board liable for having breached its duty to protect the health and safety of its students by allowing such a dangerous instrumentality to be stored in the back of a classroom in a condition where it could be so easily used.[16] The teacher was negligent for not properly supervising the classroom, and the school board assumed his liability under the respondeat superior doctrine. The trial court award of $70,000 against the school board was sustained.

5.1a(2) En Route to and from School

Schools have some responsibility for the safe movement of students to and from school. The precise extent of this responsibility depends on whether busing is involved and the nature of the risk in coming to or going from school. A number of cases were decided in this area last year.

A seventeen-year-old educable mentally retarded youngster with a mental age of seven or eight was one of eleven boys who played on the school's Special Olympics basketball team. Since the school had no indoor gymnasium the teachers took them to practice at a nearby facility by having the students walk the three block distance in an area of heavy vehicular traffic. Only one teacher was supervising this first trip between the schools, during which one student dashed impulsively into the street against the light and was killed. A wrongful death action was brought against the school and the teachers for negligently supervising these students. The Louisiana appellate court affirmed the trial court decision in holding that the teachers had a duty of due care to provide an adequate number of supervisors to accompany the team between the school and the gym several blocks away and a duty to choose the safest route possible.[17] In addition, the court held that such an action was foreseeable. And finally, the conduct of the teachers amounted to a breach of their duty in supervising these students.

A junior high student was struck by a car and badly injured while crossing a street after participating in extracurricular activities at the

15. Ankers v. District School Bd. of Pasco Cty., 406 So. 2d 72 (Fla. Dist. Ct. App. 1981)
16. Lawrence v. Grant Parish School Bd., 409 So. 2d 1316 (La. Ct. App. 1982).
17. Foster v. Houston General Ins. Co., 407 So. 2d 759 (La. Ct. App. 1981).

school. The Illinois appellate court affirmed dismissal of the suit because the plaintiff could not show any duty the village had to provide a crossing guard for school children at street intersections or any duty on the school district to provide bus service home to those participating in extracurricular activities.[18]

In New York, a tenth grade student who was enrolled in a vocational training program at another building got into an automobile accident in which several persons were badly injured while he was driving between the schools. The student was legally licensed and driving his own car, although driving it in violation of school rules. The injured plaintiffs alleged that the school district and vocational center failed to meet their duties of due care by failure to enforce the school rules more vigilantly even when they knew that the no-driving rule was being violated. The supreme court, appellate division, upheld the trial court in dismissing the actions against the school and vocational center.[19] The standard of care applicable to a school's supervision of its students is the same degree of supervision which a parent of ordinary prudence would undertake in comparable circumstances. Yet a parent who negligently supervises his child is not liable for the child's tortious conduct unless the parent entrusts a dangerous instrument to the child. Because the school did not have specific knowledge that this student was a reckless driver the school has not breached any duty of due care owed to citizens who were injured in the automobile accident. The court used the lack of foreseeability to cut off any liability the school might have. "It would be extending the legal consequences of wrongs beyond a controllable degree to hold that use of an automobile by a licensed operator under these circumstances constitutes an unreasonable risk to others for which these schools may be liable."[20]

A school bus with a record of mechanical difficulties stalled along a four lane highway. The bus was on its way to school and was partially loaded with children. A nine-year-old accompanied a ten- or eleven-year-old youngster across the highway to make a phone call to the school. On the way back across the highway the two children got separated and the nine-year-old was hit by a car as she stepped off the median. The North Carolina appellate court reversed the trial court's summary judgment for the defendant saying that these facts clearly presented evidence sufficient to go to trial on whether a duty of care owed to the child by the bus company had been breached and whether

18. Plesnicar v. Kovach, 430 N.E.2d 648 (Ill. App. Ct. 1981).
19. Thompson v. Ange, 443 N.Y. Supp. 2d 918 (N.Y. App. Div. 1981).
20. *Id.* at 921.

the bus company's negligence was a proximate cause of the injuries.[21] The bus company argued that the negligence of the driver of the car that struck the child insulated the bus company from liability. The appellate court rejected this on the basis that the settlement from the car's owner did not include an admission of negligence and the fundamental principle of negligence law is that the original negligence is not excused by subsequent negligence if that subsequent negligence was foreseeable. And this is a matter for the jury to decide.

A minor was hit by a car while disembarking from a bus while returning home from school. The bus was operated by the Atlanta Rapid Transit Authority and was not marked as a school bus. A central issue is whether the bus was actually a school bus for purposes of satisfying state law which would require special markings and special safety procedures for boarding and unboarding of children. The Georgia appellate court affirmed the trial court in holding that this bus was a school bus—it carried only students and stopped at locations designated by a member of the safety patrol although other passengers could board the bus.[22] The court affirmed the summary judgment that the failure of the bus to be appropriately marked amounted to negligence per se. Both elements of a duty of due care and breach of duty were satisfied.

A new trial was ordered for the purpose of apportioning liability between the bus company, driver and possible contributory negligence of the child. It was an error to instruct the jury that it would be authorized to find that the child's being struck was not a foreseeable consequence of the violation of the state bus marking requirement and that the bus company was not therefore negligent as to the child and could not be given at the new trial.

A Louisiana appellate court upheld a finding that bus driver was negligent in hitting a girl, even though she darted back into the line of the bus afer provisions had been made to alter the original path of the bus.[23] Because the trial court judge abused his discretion in awarding $450,000 to the injured child's father the judgment was reduced to $200,000.

A nine-year-old student was very seriously injured when struck by a car while waiting at the bus stop for a school bus. The Oklahoma appellate court reversed a lower court decision which had granted a demurrer to the action, and held that the school district has a duty

21. Sharpe v. Quality Educ., 296 S.E.2d 661 (N.C. Ct. App. 1982).
22. Metropolitan Atlanta Rapid Transit v. Tuck, 292 S.E.2d 878 (Ga. Ct. App. 1982).
23. Minton v. St. Bernard Parish School Bd., 416 So. 2d 167 (La. Ct. App. 1982).

to provide a reasonably safe bus stop where children may wait for the bus with reasonable safety, having due regard for their age, immaturity and inexperience.[24] The matter was remanded to trial to determine if the duty was breached.

A school bus driver was driving an automobile owned by the district from her home to the bus barn where she would pick up her bus and deliver children homeward. During this trip to the bus barn she stopped to conduct some personal business and was struck by a motorcyclist as she made a left hand turn. The Idaho Supreme Court held that the school district did not have any liability for the injury separate from that imputed to it by the driver's negligence.[25] The court also refused to apply safety rules, which were designed to control operation of vehicles by employees in transporting pupils, as the standard for the duty of due care when a district driver in a district car area involved in an accident when there is no pupil transportation involved.

5.1b Nonstudent Injuries

School districts have a duty of reasonable care to teachers and other adults. There were two cases reported in this area during 1982.

A thirteen-year-old eighth grade girl had intentionally pulled the chair out from underneath the unsuspecting teacher who fell to the floor and injured her back. The student testified she intended to pull the chair but did not intend to injure the teacher. At the trial the jury had been instructed that if they found there had been offensive touching with an intent to cause harm it is battery and they must find for the defendant since this is not an action in negligence. On appeal the Maryland court agreed generally with the injured teacher that these facts could be the basis of both a negligence action and an assault and battery action.[26] The presence of intent to do an act does not preclude negligence. The appellate court cited Prosser's quote from the Restatement of Torts on this point:

> Every person is negligent when, without intending to do any wrong, he does such an act or omits to take such precaution that under the circumstances he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm. In determining whether his conduct will subject the interests of another to an unreasonable risk of harm, a person is required to take into account such of the surrounding circumstances as

24. Brooks v. Woods, 640 P.2d 1000 (Okla. Ct. App. 1981).
25. Quincy v. Joint School Dist. No. 41, 640 P.2d 304 (Idaho 1982).
26. Chassemieh v. Schafer, 447 A.2d 84 (Md. Ct. Spec. App. 1982).

> would be taken into account by a reasonably prudent person and possess such knowledge as is possessed by an ordinarily reasonable person and to use such judgment and discretion as is exercised by persons of reasonable intelligence under the same or similar circumstances.[27]

In this case the intentional act of pulling out the chair could have the unintended consequence of injuring the teacher—negligence. But since the plaintiff did not seek a specific instruction on negligence at the trial court which focused on the duty owed and the breach of duty that resulted from such intentional action the plaintiff was barred from raising the matter on appeal.

A high school coach in Louisiana was injured at construction site at the high school, and the trial court found negligence against the plumbing contractor. Two grounds for appeal of the verdict were made.[28] First, the appellate court denied an appeal of the exclusion of a remedy for neck injury because there was not sufficient evidence to support such a finding. Second, the appellate court reversed the damages award for future medical expenses because insufficient evidence of such expenses was presented.

5.2 EDUCATIONAL MALPRACTICE

Educational malpractice is a negligence claim that has received considerable public attention. The theory behind educational malpractice, simply put, is to place a duty on the school to provide that standard of education appropriate for the grade level of the particular child. It is a popular topic with legal commentators[29] though to date it has not fared well in the courts.

In a suit seeking monetary damages for alleged improper placement, testing and supervision of a child, the Maryland Court of Appeals refused to recognize an educational malpractice claim that could result in money damages.[30] The court thought other remedies were available

27. W. PROSSER, HANDBOOK ON THE LAW OF TORTS at 207, n. 12 (4th ed. 1971).
28. Stewart v. Hanover Ins. Co., 416 So. 2d 286 (La. Ct. App. 1982).
29. Note, *Educational Malpractice*, 4 GEORGE MASON U. L. REV 261-83 (1981); Note, *Torts—School Board's Placement of Student with Average Intelligence into Classes for the Mentally Retarded, Along with 12 Years Failure to Retest, Not Actionable under Negligence Principles*, 10 HOFSTRA L. REV. 279-309 (1981); Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743-813 (1981); Note, *Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?*, 21 WASHBURN L. J. 555-79 (1982); Note, *Educational Malpractice: D.S.W. v. Fairbanks North Star Borough School District (628 P.2d 554, Alaska)*, 11 UCLA-ALASKA L. REV 111-18 (1981).
30. Hunter v. Board of Educ., 439 A.2d 582 (Md. 1982).

and did not want to put the judiciary in the position of overseeing the day-to-day operation of the schools. The court did allow the plaintiff to continue on the theory that individual educators can be liable for the intentional torts they commit in the educational context. "It is our view that where an individual engaged in the educational process is shown to have willfully and maliciously injured a child entrusted to his educational care, such outrageous conduct greatly outweighs any public policy considerations which would otherwise preclude liability so as to authorize recovery."[31]

In Pennsylvania a senior failed health education class and was not graduated until she successfully completed a make-up course during the summer. The girls' parents sought money damages alleging that the district's actions amounted to a gross violation of public policy. The court disagreed and treated the matter basically as one of educational malpractice; and not being able to find any manifest illegal action on the part of the district, dismissed the complaint.[32] The Eighth Circuit Court of Appeals refused to treat a section 504 (1973 Rehabilitation Act) claim as a basis for educational malpractice.[33]

5.3 NEGLIGENCE DEFENSES

Even if the injured plaintiff can satisfy the prima facie case, the defendant teacher or school district or administrator still has a number of defenses available to overcome the claim. These defenses range from immunity—either common law sovereign immunity or statutory immunity—to the more usual affirmative defenses to the introduction of a different standard of liability. The reader should be alert to the divergent motivations underlying these defenses. Immunity, for example, limits the flow of public money to private citizens because liability payments will detract from the educational functions of the schools, whereas the affirmative defenses keep the plaintiffs from recovering for behavior that in some way was responsible for the injury that occurred.

5.3a Immunity

5.3a(1) Common Law (Governmental) Immunity

A quarter of a century ago, tort liability in public schools was almost nonexistent because of sovereign immunity enjoyed by the state.

31. *Id.* at 589.
32. Aubrey v. School Dist. of Philadelphia, 437 A.2d 1306 (Pa. Commw. Ct. 1981).
33. Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982).

Sovereign immunity has eroded to a great extent—though it still exists in several states. In many states the courts have abolished sovereign immunity or the legislatures have abolished it or passed some substitute form of statutory immunity.[34] Numerous cases reported in 1982 involved one of these immunity defenses.

The Virginia Supreme Court affirmed trial court dismissal of a negligence suit against principal and superintendent which claimed that stabbing of one student by another student was proximately caused by administrator's failure to provide a safe environment.[35] As both administrative positions require significant amounts of discretional and management functions in the school, they are insulated from liability by sovereign immunity.

An eleven-year-old child was struck by an automobile while enroute to catch a school bus at the bus stop. The child's estate brought a wrongful death action against the school district for negligently locating the school bus stop on one street rather than another and negligently failing to post warning signs to passing motorists of the bus stop location. The Florida appellate court affirmed the trial court decision that this action was barred by soveriegn immunity.[36] Discretionary governmental functions enjoy sovereign immunity while operational functions do not. Since the decisions as to placement of the bus stop location and as to placement of warning signs involved policy making, planning or judgmental government functions, there was discretion involved and sovereign immunity applies.

A high school student struck in the eye by a nail during vocational agriculture class brought action against the board of education and the superintendent, principal and teacher for negligence. The Missouri Supreme Court, elaborating upon its recent holding on sovereign immunity,[37] held that sovereign immunity barred suit against the board of education.[38] Yet sovereign immunity does not apply to individuals who may have acted outside the scope of their official duty; and consequently the pleadings can be amended to allow specific factual allegations of individual wrongdoing by the administrators which resulted in the injury. Finally, the court affirmed its earlier decision that the existence of liability insurance does not act as a waiver of the sovereign immunity defense.

34. Note, *Sovereign Immunity—Discretionary Function Exemption to the Tort Claims Act: Larson v. Independent School District No. 314, 289 N.W.2d 112 (Minn.)*, 5 HAMLINE L. REV. 103-21 (1982); Note, *Torts—Government Immunity Under the New Mexico Tort Claims Act*, 11 N.M.L. REV. 475-85 (1981).
35. Banks v. Sellers, 294 S.E.2d 862 (Va. 1982).
36. Harrison v. Escambia Cty. School Bd., 419 So. 2d 640 (Fla. Dist. Ct. 1982).
37. Spearman v. University City Pub. School Dist., 617 S.W.2d 68 (Mo. 1981).
38. Lehman v. Wansing, 624 S.W.2d 1 (Mo. 1981).

Two cases were decided by Missouri appellate courts.[39] A photographer injured at football game by players crashing into him just out of bounds on the sideline was barred from recovery by statutory sovereign immunity. The statute, which permits tort claims only for injuries arising from a public employee's operation of a motor vehicle or the condition of public entity's property, was challenged for violating the equal protection clause of both the federal and state constitutions. The Missouri Supreme Court held that the classifications are reasonable because they allow for the protection of certain state resources while allowing for recovery in certain specified areas.[40] The statutory classifications are rationally related to the statute's objectives, and are therefore constitutional.

In two short opinions the West Virginia Supreme Court of Appeals, in reversing the trial court decisions, reiterated its interpretation that local boards of education do not have state constitutional immunity nor common law governmental immunity from suit.[41]

5.3a(2) Statutory Immunity

There are a variety of ways in which a statute can limit liability of a school district. One is to put a monetary limit on the maximum claim that a successful plaintiff can recover. Another way is to provide governmental immunity generally with specific statutory exceptions allowed.

In Pennsylvania a sixth grade student was severely injured when struck in the eye by a pencil thrown by another student at a time when the teacher was absent and the classroom was unsupervised. The court rejected the plaintiff's claim that the use of the pencil to cause the injury amounted to personal property, one of the exemptions to sovereign immunity, because the real underlying claim was negligent supervision.[42] The court also upheld the sovereign immunity statute from claims of its violating both the federal and state constitutions.

A wrongful death action brought against the district for alleged negligence for improperly supervising the study hall where a student was stabbed to death was barred by the Pennsylvania Tort Claims Act.

39. Allen v. Salina Broadcasting, 630 S.W.2d 225 (Mo. Ct. App. 1982) (Consideration of whether school district's operation of a radio station is a governmental function or a proprietary function was remanded.); Johnson v. Carthell, 631 S.W.2d 923 (Mo. Ct. App. 1982) (Actions of bus driver not protected by sovereign immunity because they are ministerial. "Operation of motor vehicle" exception did not apply to the facts of the case.).
40. Winston v. Reorganized School Dist. R-2, 636 S.W.2d 324 (Mo. 1982).
41. King v. Wayne Cty. Bd. of Educ., 296 S.E.2d 351 (W. Va. 1982); Smith v. Board of Educ. of Cty. of Kanawaha, 394 S.E. 2d 469 (W. Va. 1982).
42. Robson v. Penn Hills School Dist., 437 A.2d 1273 (Pa. Commw. Ct. 1981).

The commonwealth court rejected an argument that this fit under the statutory exceptions dealing with the care, custody or control of real property.[43]

A Pennsylvania school district had been appointed trustee of a public library. When a person was injured at the library and brought suit against it, the school district sought dismissal of the action arguing that because of the agency relationship the library enjoyed immunity under the state tort claims act. The federal district court disagreed, holding that the trust relationship was not an agency relationship, that the two operations were separate for tax purposes and that the library was not a governmental agency within the meaning of the tort immunity statute.[44]

A swing broke during school hours and the ten-year-old girl swinging on it suffered a fractured left leg. The Texas appellate court affirmed a dismissal of the suit on the grounds that the furnishing of swings for use of school children during school hours is a governmental function and, therefore, the district is protected by the doctrine of governmental immunity. The court refused to abrogate the doctrine and upheld its constitutionality.[45]

A third way to limit liability is to make the employee liable only for willful and wanton misconduct. A recent Illinois case involved such a matter. A child fell from a swing on the school playground and sued the district for injuries sustained. The appellate court affirmed the trial court dismissal of the action for failure to allege willful and wanton misconduct on the part of the school, necessary elements under the tort immunity act.[46] The court also rejected an alternate theory that this was liability under attractive nuisance. Because the attractive nuisance doctrine applies to indicate the presence of a child at a dangerous location and therefore the duty of care owed to an uninvited child is irrelevant to the present situation as the immunity statute precisely states the duty of care owed to children on public playgrounds.

The uncertainty over the precise scope of Michigan's sovereign immunity defense in the public school context continues.[47] In a case involving alleged repeated, slanderous remarks and assaults and batteries by a teacher against a student the appellate court held the school district could not be liable for its alleged negligence in hiring and supervising the teacher because of the doctrine of governmental

43. Close v. Voorhees, 446 A.2d 728 (Pa. Commw. Ct. 1982).
44. Bliss v. Allentown Pub. Library, 534 F. Supp. 356 (E.D. Pa. 1982).
45. Duson v. Midland Cty. Indep. School Dist., 627 S.W.2d 428 (Tex. Ct. App. 1981).
46. Jackson v. Board of Educ., 441 N.E.2d 120 (Ill. App. Ct. 1982).
47. THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) at 198.

potentially liable, though, on a respondeat superior theory, and the matter needs to be remanded to make a factual determination of this claim. To prevail on this respondeat superior claim the injured student must prove that unprovoked and unjustified verbal or physical assaults were used by the teacher and that the student believed the use of this force was within the scope of the teacher's employment.

In analyzing whether governmental immunity exists there needs to be a showing that the incident occurred within the day-to-day operation of the school and that the activity out of which the injury arose must be examined and found to be a governmental function. Consequently, in a suit against a Michigan school district by an eighteen-year-old student who was injured in a power press accident on the employer's premises as part of a work experience program, the court held that because the purpose of this type of employment was remuneration and work experience with only a coincidental learning purpose the district did not enjoy governmental immunity.[49] The court withheld judgment on whether immunity would be lost if a student were injured on the job as part of a work study or cooperative program where learning was a large part of the assignment.

In another Michigan case, the appellate court, reversing the trial court, held that the school district as immune from liability for alleged negligent supervision when a vocational education student was injured at the job site.[50] The court held that the operation of a vocational education program is a governmental function, and therefore covered by the immunity statute, because such vocational education programs are an internal part of the curriculum of modern secondary schools. The public building exception to governmental immunity is not available because the injury occurred at the site of the employer.

Several other cases have been decided by Michigan appellate courts which applied immunity because the conduct falls under a governmental function and does not fit into one of the exceptions.[51]

48. Gaston v. Becker, 314 N.W.2d 728 (Mich. Ct. App. 1981).
49. Bokano v. Wayne-Westland Commun. Schools, 318 N.W.2d 613 (Mich. Ct. App. 1982)
50. Weaver v. Duff Norton Co., 320 N.W.2d 248 (Mich. Ct. App. 1982).
51. Belmont v. Swieter, 319 N.W.2d 386 (Mich. Ct. App. 1982) (Injury to eighth grade student hit in eye by eraser thrown by another student while teacher was absent from classroom was barred by statutory immunity.); Cobb v. Fox, 317 N.W.2d 583 (Mich. Ct. App. 1982) (Maintenance and operation of a school bus system does constitute an immune governmental function.); Lewis v. Beecher School Sys., 324 N.W.2d 779 (Mich. Ct. App. 1982) (Wrestling coach acting within scope of his employment enjoys governmental immunity.); Lee v. School Dist. of City of Highland Park, 324 N.W.2d 632 (Mich. Ct. App. 1982) (Injury of four-year-old preschool student when ping pong table fell upon her could not be the basis of recovery because the operation of a school is a governmental function and the falling of the table was not the result of a dangerous or defective condition of the school building itself.)

When the Salt Lake City school district sought contribution from Salt Lake City as a codefendant in a negligence action where two five-year-olds were injured crossing a street on the way home from school the city argued that it was immune from suit under the Governmental Immunity Act provision that "no claim hereunder shall be brought by ... any ... governmental entity." The Utah Supreme Court rejected this argument, holding that the right to contribution under comparative negligence laws was not to be equated with the "claim" referred to in the Governmental Immunity Act.[52]

5.3b Other Defenses

5.3b(1) Assumption of Risk

In a previously mentioned case,[53] a high school boy was injured on a power saw stored in the back of an agriculature class. The district raised the defense of assumption of risk. The test for assumption of risk in Louisiana is articulated in the following way: "[T]he defense of assumption of risk is in fact quite narrowly confined and restricted by two requirements: first, that plaintiff must know and understand the risk he is incurring, and second, that this choice to incur it must be entirely free and voluntary."[54]

The court dismissed this affirmative defense because the injured student had never used a power saw before or been instructed in its use.[55]

5.3b(2) Contributory Negligence

In this same case where the fourteen-year-old boy was injured in an accident with a power saw the district alleged contributory negligence. Even though the district had told students not to use this equipment the court held that the act of the student switching on the saw did not amount to contributory negligence because this behavior was foreseeable.[56] The saw should not have been stored in the back of the classroom in an area so accessible to students.

Contributory negligence by a nine-year-old for not crossing a four-lane highway safely was alleged as one reason for granting a summary judgment to the defendant school bus company. The North Carolina appellate court reversed, citing the principle that there is a presumption that a nine-year-old child is incapable of contributory

52. Madsen v. Salt Lake City School Bd., 645 P.2d 658 (Utah 1982).
53. *See* text accompanying note 16, *supra*, for a description of the case.
54. Lawrence, *supra*, note 16 at 1321.
55. *Id.*
56. *Id.*

negligence.[57] Since no rebuttal evidence was presented a finding of contributory negligence was inappropriate.

A twelve-year-old was injured when he fell through a pane glass window in the school corridor while racing another student during a break from P.E. class. The Louisiana Supreme Court reversed the appellate court on the question of the boy's contributory negligence.[58] Because the injured boy was engaged in a race in the hallway which was simply an extension of the races going on in the gym, and because he did not know that the window did not contain safety glass, the court concluded that they were acting as one would expect of the typical twelve-year-old of normal intelligence and experience.

5.3b(3) Statute of Limitations

Some states limit claims against school districts by placing a more restrictive statute of limitations on the initiation of a suit.

Two cases decided in 1982 involved determining the appropriate statute of limitations for claims filed under 42 U.S.C. § 1983. In one case a teacher alleged that his reassignment and dock in pay violated his federal civil rights. The school district, inter alia, argued that his failure to file his claim within the 120 days specified by the Oklahoma tort claims act barred suit. The Tenth Circuit held that this limitations period is not applicable to section 1983 claims because such short statute of limitations periods are inconsistent with the broad remedial purposes of the federal civil rights acts.[59]

Faced with a similar situation where a teacher alleged that he had been discharged illegally on the basis of his race, and the suit had been filed outside of the Louisiana one-year statute of limitations, the Fifth Circuit Court of Appeals held that federal courts apply the state statute of limitations governing analagous causes of action.[60] To do this the court must characterize the claim as it would be characterized under state law and then apply the appropriate state limitations period. In doing this the court characterized the racial discrimination claim under section 1983 as a tort (the right to be free from racial discrimination is independent of any contractual right) and therefore controlled by the one-year statute of limitations. Yet the due process violation claim made under section 1983 is based on property rights acquired through tenure, and is therefore a matter of contract which enjoys a three-year statute of limitations.

57. Sharpe v. Quality Educ., 296 S.E.2d 661 (N.C. Ct. App. 1982).
58. Wilkinson v. Hartford Accident and Indem. Co., 411 So. 2d 22 (La. 1982).
59. Childers v. Independent School Dist. No. 1 of Bryan Cty., 676 F.2d 1338 (10th Cir. 1982).
60. Jones v. Orleans Parish School Bd., 679 (F.2d 32 (5th Cir. 1982).

On suggestion for rehearing the Fifth Circuit Court of Appeals withdrew a portion of its earlier opinion.[61] The court concluded that one-year statute of limitations applies to a claimed violation of due process in being dismissed for allegedly racial reasons rather than the three-year period which the court earlier suggested controlled in this contractual area.

5.3c Use of a Different Liability Standard

The reasonable care standard has been used as the mode of analysis in those circumstances in which immunity does not foreclose suit all together. Illinois employes a different standard—a willful and wanton misconduct standard—for alleged negligence in those situations in which a teacher has a supervisory relationship with students. Two recent articles elaborate upon developments in this willful and wanton misconduct standard.[62] And a Georgia case elaborates upon the relationship of sovereign immunity and willful and wanton misconduct. In this case parents brought a wrongful death action against school board members, the school district and many district administrators for the death of their daughter, an elementary school student, when a metal soccer goal fell and struck her as she knelt to tie her shoe during a physical education class. The appellate court held that all defendants should be granted summary judgment because they are protected by sovereign immunity.[63] Sovereign immunity applies to discretionary acts or omissions performed within one's official capacities and within one's scope of authority so long as not done without willfulness, malice or corruption. Even though the plaintiffs had amended the pleadings to claim willful and wanton misconduct the court found insufficient grounds to support this allegation. Willful and wanton is conduct "such as to evidence a willful intention to inflict the injury, or else was so reckless or so charged with indifference to the consequences . . . as to justify the jury in finding a wantonnes equivalent in spirit to actual intent."[64] The court could find no factual basis for the necessary intent, actual or imputed, to prove willful and wanton misconduct. In addition, the court denied punitive damages cliams as not being available in a wrongful death action.

61. Jones v. Orleans Parish School Bd., 688 F.2d 342 (5th Cir. 1982).
62. For elaboration of recent developments of the use of the willful and wanton misconduct standard in Illinois *see* Note, *Lynch v. Board of Education, [(Ill.) 412 N.E.2d 447]— Teacher's Apparent Authority Renders School District Liable for Negligence*, 34 DE PAUL L. REV 220-41 (1981) and Siegel, *Recent Trends In School Tort Immunity*, 71 ILL. B.J. 240-6 (1982).
63. Truelove v. Wilson, 285 S.E.2d 556 (Ga. Ct. App. 1981).
64. *Id.* at 559.

5.4 LIABILITY INSURANCE

A student had been injured while waiting for a bus, and the jury stipulated damages of $190,000 of which twenty percent were allocated to the bus company and bus driver and eighty percent to the negligence of the school district, forty percent due to negligence in loading procedures and forty percent due to negligence in supervision of students. Declaratory judgment action was brought to determine liability of several insurance companies for coverage of the school district's liability. The Minnesota Supreme Court held that evidence that the insurance company would have insured school district had it been requested to do so is insufficient to prove existence of insurance contract.[65] Exclusion in the insurance policy for bodily injury arising out of use of motor vehicle includes within its scope negligent supervision of students and negligent bus loading procedures. Finally, the court held that it was improper to order insurer under all-liability policy to pay attorney fees incurred by insurer under comprehensive general liability policy.

An Oregon case is instructive on the applicability of insurance to compensate for alleged discriminatory actions. A number of complaints were filed against the school district alleging employment discrimination. The district had primary insurance coverage with a policy of comprehensive general liability insurance and excess insurance policy coverage which would provide higher levels of protection. The insurance companies refused to accept the defense of or liability for any of the employment discrimination claims. Consequently the district had to defend itself, and in the course of doing so settled some cases out of court and then sought reimbursement and attorneys fees from the insurance carrier. The first issue the Oregon appellate court considered was whether the errors and omissions coverage of the comprehensive policy should be interpreted to include defense of alleged discriminatory behavior.[66] The insurance company agreed that discrimination involved intentional conduct and was outside the scope of the coverage. The court held that claims of disparate treatment are not covered by the policy because such allegations involve intentional acts while claims of disparate impact are covered because there is no requirement to show discriminatory intent. Discriminatory claims containing allegations that could be interpreted as disparate impact claims are potentially within the coverage of the policy and the insurer has a duty to defend such claims. This general standard was then applied to

65. St. Paul School Dist. v. Columbia Transit, 312 N.W.2d 41 (Minn. 1982).
66. School Dist. No. 1 v. Mission Insurance Co., 650 P.2d 929 (Or. Ct. App. 1982).

a number of discrimination suits filed against the district. A couple of suits involved claims that a district policy regarding pregnant probationary teachers had injured the teachers. The court held that these were claims of disparate impact, and the insurer had responsibility for defending against the claim. Where the district reached a settlement before going to trial, the court held the insurer responsible because the word "suits" in the policy is sufficiently broad to cover administrative hearings before the Oregon State Bureau of Labor or Equal Employment Opportunity Commission. The settlement was made after an administrative hearing had made a finding of substantial evidence to support the charge. Suits alleging harassment because of association with a black man and alleged harassment along with other blacks are claims of disparate treatment and fall outside the insurance coverage. The policies of the excess carriers were held not to obligate coverage or defense of the disparate treatment claims not covered by the primary carrier. Although the policy defined "personal injury" to include discrimination, the alleged discrimination did not come within the policy definition of an "occurance," because it did not "unexpectedly and unintentionally cause the injury to the complainants.

Although the trial court had split the cost of attorneys fees between the primary and excess carriers, the Oregon appellate court held that the primary carrier was singularly responsible for payment of attorney fees since this policy had obligated them to it.

5.5 ASSAULT AND BATTERY

Assault and battery are usually talked about together although they actually are two separate intentional torts. Battery is an intentional and unpermitted touching of another while assault is an act of putting another in fear of the touching.[67]

In a lunchroom dispute which resulted in a fifteen-year-old boy shattering the bone surrounding a fifteen-year-old girl's left eye, a battery action was instituted to recover damages. The applicable law is that a plaintiff cannot recover damages for a battery if the evidence establishes that the plaintiff is at fault in provoking the difficulty in which the injury complained of is received. The person responding to such aggressive force may use only that force which is necessary to repel the aggression. The trial court held that the plaintiff was barred from recovery because there were sufficient facts to show that the blow to the eye was provoked by her actions. The Louisiana appellate court affirmed the trial court in dismissing the claim.[68]

67. *See* PROSSER, note 1, *supra*, Section 9 at 34-41.
68. Dixon v. Winston, 417 So. 2d 122 (La. Ct. App. 1982).

5.6 DEFAMATION

Defamation is the general term that covers the specific torts of libel and slander; libel applies in general to the written word while slander applies generally to the spoken word. The torts cover words that, in the eyes of the community, invade the person's reputation and good name.[69]

The prima facie case of defamation consists of five elements: (1) defamatory words, (2) publication, (3) falsity, (4) malice, actual or implied, and (5) resulting injury.

Three teachers brought defamation suit against two parents who were talking to the principal and other parents about how these teachers were taking indecent sexual liberties with high school students in their classes. The Louisiana appellate court affirmed the trial court in finding that the parents enjoyed a qualified privilege to talk about these matters.[70] A qualified privilege exists as to a communication, even if false, when made between parties that share an interest or duty and when made in good faith and without malice. It was not unreasonable for the jury to find that statements made about alleged teacher improprieties to the principal and other parents were made in good faith and about a matter of common interest.

Tallent, a classified employee, filed an action to recover actual and punitive damages for allegedly slanderous and defamatory statements made by the superintendent in response to a reporter's question that two people had resigned and that "any claim Mrs. Tallent was fired is false." Over objection of superintendent's counsel the matter was submitted to the jury who found slander and set actual damages at $1,500.

On appeal, not withstanding the verdict, the superintendent argued that the statement was not defamatory and that special damages had not been proven. This last point was central to the North Carolina appellate court's analysis.[71] Defamation distinguishes between slander per se, where no proof of damages need be proven, and slander, per quod, where special damages must be plead and proved. There are four categories of slander actionable per se: Those which charge a person with a crime or offense involving moral turpitude, impeach his trade or profession, impute to him a loathsome disease or charge incontinency to a woman. The facts in this case do not satisfy the elements necessary to impeach one in his trade or profession as alleged false statements are insufficient to do this. Consequently the plaintiff needs

69. *See* PROSSER, note 1, *supra*, for a more detailed description.
70. Desselle v. Guillory, 407 So. 2d 79 (La. Ct. App. 1981).
71. Tallent v. Blake, 291 S.E.2d 330 (N.C. Ct. App. 1982).

to show special damages by pleading actual pecuniary loss at the time the action is instituted. Emotional distress and humiliation are insufficient in themselves to show special damages. Because special damages cannot be shown the appellate court reversed the trial court and ordered a directed verdict for the superintendent.

In a defamation suit brought by former school principal against superintendent for remarks made to the school board during proceedings to dismiss the principal, the appellate court held that a Tennessee statute[72] provided absolute immunity for the superintendent.[73] The court analogized the superintendent, who is acting to dismiss employees, to the prosecutor bringing charges against someone, and therefore absolute immunity is appropriate to bar any defamation actions against the superintendent while acting within this scope of employment.

5.7 FALSE IMPRISONMENT

In a case where there was extreme factual disagreement between the parties, a student sought damages from the school district for injuries suffered through an alleged false imprisonment while being held at the school for disciplinary reasons prior to arrival of the police.[74] The New York standard for false imprisonment involves the following elements:

> The action for false imprisonment is derived from the ancient common law action of trespass and protects the personal interests of freedom from restraint of movement. Whenever a person unlawfully obstructs or deprives another of is freedom to choose his own location, that person will be liable for that interference. To establish this cause of action the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was otherwise privileged.[75]

The civil court of the city of New York dismissed the claim because the student was being held pursuant to authority given to the school officials, and the school officials were not exceeding their authority.

72. TENN CODE ANN. § 49-1416(a). "The superintendent . . shall not be held liable, personally or officially, when performing [his] duties in prosecuting charges against any teacher or teachers under this chapter."
73. Buckner v. Carlton, 623 S.W.2d 102 (Tenn. Ct. App. 1981).
74. Smalls v. Board of Educ., 450 N.Y.S.2d 987 (N.Y. Civ. Ct. 1982).
75. *Id.* at 991.

5.8 TORTIOUS INTERFERENCE WITH A CONTRACT

A teacher alleged that the superintendent had tortiously interfered with her contracted relationship with the board. In Florida the tort of malicious interference with a contract between two persons has been defined as an intentional interference with a contract between two persons where one of the parties is induced to breach the contract to the injury of the other. The appellate court affirmed the trial court in summarily dismissing the claim because the superintendent's refusal to sign the teacher's salary warrants did not induce either the teacher or the board to breach the contract.[76] The superintendent, although not technically a party to the contract, was viewed as enjoying dual control with the board, and therefore could not be considered a third party to the employment relationship for the purposes of the tort of malicious interference with a contractual relationship.

5.9 CONSTITUTIONAL TORTS

In a number of decisions over the past several years the Supreme Court has refined the area of constitutional torts where individuals,[77] absent good faith immunity, and municipalities are liable for depriving persons of constitutional[78] or federal statutory[79] claims. Punitive damages are not available against a municipality[80] under 42 U.S.C. § 1983.[81] A number of cases decided this past term provide guidance about many of the subtleties in this area.

State action is a necessary element for a constitutional tort. The United States Supreme Court elaborated upon the variety of ways that state action might exist in the *Rendell-Baker v. Kohn* decision.[82]

Several teachers who were dismissed from their employment in a private school brought a section 1983 action against the school claiming their constitutional rights had been violated. The school taught handicapped students who were placed there from public schools pursuant

76. Doyal v. School Bd. of Liberty Cty., 415 So. 2d 791 (Fla. Dist. Ct. App. 1982).
77. Wood v. Strickland, 420 U.S. 308 (1975).
78. Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978). Owen v. Independence, 445 U.S. 622 (1980) extends this liability to municipalities and denies immunity to the governing body even if the action was taken in good faith.
79. Maine v. Thibotout, 448 U.S. 1 (1980).
80. City of Newport v. Fact Concerts, 101 S. Ct. 2748 (1981).
81. For a more detailed description of the development of the constitutional tort, *see* THE YEARBOOK OF SCHOOL LAW 1980 (P. Piele, ed.) at 260-67; 1981 (P. Piele, ed.) at 226-29 and 1982 (P. Piele, ed.) at 205-08. *See also, Causation In Constitutional Torts*, 67 IOWA L. REV. 443-83 (1982).
82. 102 S. Ct. 2764 (1982).

to state regulations. Over ninety percent of the school's funding came from public sources, but the state regulations imposed few specific personnel requirements. Before the merits of the section 1983 claim could be reached a determination had to be made whether this school's conduct was state action. The Court looks for four factors to find state action and concludes that none exist in this situation. First, the large amount of support which public moneys provided to the school. The Court held that the relationship was more of a contractual one, and the acts of the private contractors did not become governmental because of their almost total engagement in public contracts. Second, there was extensive regulation by the state of the operation. Generally, the Court has not found regulation to be dispositive of state action. Here the Court had little trouble dismissing this part of the state action claim because the extensive regulations went to the admission and housing of the students, not to employment practices of the institution which was the basis of this suit. Third, was the activity a public function? The Court refined this to be whether the function performed has been traditionally the exclusive prerogative of the state. Since the state allows a private entity to educate some of these handicapped children it is clearly not an exclusive prerogative. Finally, was there a symbiotic relationship between the school and the state? The Court distinguished the facts here from *Burton v. Wilmington Parking Authority*,[83] because of the contractual relationship that exists between the state and the school. Because none of these criteria were satisfied no state action existed.

In *Patsy v. Board of Regents of State of Florida*,[84] the United States Supreme Court held that one is not required to exhaust state administrative remedies as a prerequisite to an action under section 1983 unless Congress makes explicit exceptions. Two lower court decisions also dealt with exhaustion of remedies for a tort liability claim.[85]

A federal district court in Nebraska held that the state of Nebraska could not be sued under section 1983.[86]

A case from Texas explored the federal statutory sections that are actionable. A parent of a handicapped student based a claim for relief on 42 U.S.C. § 1983 alleging that, pursuant to *Maine v. Thibotout*,[87] deprivation of the federal statutes, Education For All Handicapped Children Act (EHCA) and section 504 of the Rehabilitation Act.

83. 365 U.S. 715 (1961).
84. 102 S. Ct. 2557 (1982).
85. Scott v. Unified School Dist. No. 377, 638 P.2d 941 (Kan. Ct. App. 1981) and H.R. v. Hornbeck, 524 F. Supp. 215 (D. Md. 1981).
86. Prettyman v. Nebraska, 537 F. Supp. 712 (D. Neb. 1982).
87. 448 U.S. 1 (1980).

compensatory damages could be sought. The federal district court dismissed these claims because, like here, section 1983 is not applicable in situations where the governing statute provides an exclusive remedy for violations.[88] Because of the availability of a private right of action under the EHCA, the detailed statutory administrative and judicial scheme, and the absence of a traditional damage remedy under the act the court concluded that the judicial remedy under the act was intended to be exclusive of a section 1983 action. The court arrived at the same conclusion about section 504 because it limits the available remedy to equitable relief. In a subsequent case the Eighth Circuit remanded for consideration to the Missouri district court whether monetary damages are available pursuant to section 1983 for alleged violation of section 504 and EHCA.[89]

The availability of damages and attorneys fees arose in several cases reported in 1982. A teacher brought a section 1983 action against the school district challenging the handling of her involuntary leave of absence. Although she was awarded nominal damages of one dollar for the initial failure of the district to provide all necesary procedural safeguards surrounding her layoff, the court refused to award attorneys fees which were in excess of $23,000 because she was not a "prevailing party" as required by statute since she had not prevailed on the other, more major parts of the lawsuit.[90]

A West Virginia Supreme Court decision provides guidance on the legality of school board members using district moneys to pay attorney fees for their defense in federal civil rights action and to pay for settlement that avoids any personal school board member liability.[91] The critical determination is whether the original action of the board members which is the basis of the civil rights suit was done in good faith. This determination of good faith generally tracks the federal standard. An official is not acting in good faith when he knows or reasonably should know that actions taken within the scope of his official responsibility violate another's constitutional rights. The standard of reasonable knowledge applicable to any government official must be determined by the totality of the circumstances in each individual case. Finally, a mere after-the-fact determination that a violation occurred does not necessarily demonstrate lack of good faith.

If the board members acted in good faith it is immaterial that they entered into a settlement with the aggrieved school personnel by which

88. Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460 (S.D. Tex. 1982).
89. Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982).
90. Fast v. School Dist. of City of Ladue, 543 F. Supp. 785 (E.D. Mo. 1982).
91. Martin v. Mullins, 294 S.E.2d 161 (W. Va. 1982).

all of the damage issues were settled by a payment of school board funds since if any damages had been recovered against the members of the board as individuals, they would have had a right to indemnification from the board.

Yet if the trial court determines that the board members' actions were not taken in good faith then the court must further inquire into whether there was a significant likelihood that damages would have been awarded against the school board members personally rather than in their official capacities. If there was a significant potential personal liability, the trial court must then determine whether the settlement into which the members of the school board entered reflected an illegal diversion of school board funds for the purpose of insulating the individual defendants from personal liability. The same analysis applies to the use of school board money to hire counsel for overall representation.

5.9a Student-Initiated Cases

Two high school students were given a short-term suspension which complied with *Goss* and Michigan statutory requirements. Subsequent actions of the principal and superintendent extended this suspension without either calling for a formal due process hearing before the board of education to decide on the merits of expulsion or to end the suspension. The federal district court held that this amounted to a deprivation of the students' due process rights.[92] In determining what remedy is appropriate the federal district court concluded that the administrators do not enjoy good faith immunity from liability because they could at best argue that they were confused about the authority for expulsion lying with the board of education, and confusion is insufficient grounds to entitle one to good faith immunity. The students are entitled to compensatory damages. But since the board of education subsequently heard the case and expelled the students for the remainder of the year the only compensation to which they were entitled were nominal damages of one dollar.

A number of cases involved decisions that certain allegations were not actionable under 42 U.S.C. § 1983. One case which involved a wrongful death action brought against the school district, study hall supervisor and principal on the basis of alleged negligence for improper supervision at the time of the stabbing was not actionable under section

92. Darby v. School, 544 F. Supp. 428 (W.D. Mich. 1982).

1983.[93] Several cases held that section 1983 claim could not be maintained for relief available under the Education For All Handicapped Children Act.[94] In a number of cases the alleged deprivation was held to be without merit.[95]

5.9b Employee-Initiated Cases

Many cases are brought on alleged deprivation of procedural due process. In one such case the school board decided to not renew the contract of a nontenured teacher because of her apparent emotional instability and resentment. Publication of the alleged emotional instability in open meeting constituted a liberty deprivation, and since no procedural safeguards were provided amounted to a due process violation. The court held that school board members do not enjoy a qualified good faith immunity.[96] Determination of appropriate compensatory and punitive damages against individual board members will be made by the trial court. Punitive damages against the school district are precluded by the *City of Newport* decision.

A teacher's dismissal at mid-year for alleged personal misconduct did not comply with required due process because a pretermination hearing was not provided. The matter was remanded to the district court to determine the compensable damages for mental and emotional distress caused by the failure to provide the hearing, not for distress attributed to the removal from the position which was jusitifed by a post-termination hearing that satisfied all due process requirements.[97]

In a number of other cases there was no deprivation of due process.[98]

The first amendment provides another basis for a constitutional tort claim. In one such case the Eleventh Circuit Court of Appeals affirmed

93. Close v. Voorhees, 446 A.2d 728 (Pa. Commw. Ct. 1982).

94. McGovern v. Sullins, 676 F.2d 96 (4th Cir. 1982) (Civil rights claim could not be maintained for relief available under the EHCA.); Davis v. Maine Endwell Cent. School Dist., 542 F. Supp. 1257 (N.D.N.Y. 1982) (Civil rights statute not available to enforce a claim under EHCA.); Noe v. Ambach, 542 F. Supp. 70 (S.D.N.Y. 1982) (Violation of EHCA may not be basis of an action under section 1983, and therefore cannot trigger attorney fee provision under Civil Rights Attorney's Fees Awards Act.); and William S. v. Gill, 536 F. Supp. 505 (N.D. Ill. 1982) (Federal district court refused to dismiss class action suit by handicapped students alleging that state's distinction between educational and noneducational costs, and refusal to fund noneducational costs, violated state and federal special education statutes and federal and state equal protection clauses.).

95. Reineman v. Valley View Commun. School Dist. No. 365-U, 527 F. Supp. 661 (N.D. Ill. 1981); Stern v. New Haven Commun. Schools, 529 F. Supp. 31 (E.D. Mich. 1981); and Diggles v. Corsicana Indep. School Dist., 529 F. Supp. 169 (N.D. Tex. 1981).

96. Bomhoff v. White, 526 F. Supp. 488 (D. Ariz. 1981).

97. Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

98. Robertson v. Rogers, 679 F.2d 1090 (4th Cir. 1982); Board of Educ. of Bellevue v. Rothfuss, 639 S.W.2d 545 (Ky. 1982); and Maddox v. Clackamas Cty. School Dist. No. 25, 643 P.2d 1253 (Or. 1982).

a district court decision that dismissal of two teachers violated the teachers' first amendment rights.[99] It reversed the trial court for refusing to reinstate the teachers to their teaching positions. There is a rule that reinstatement is presumed to be the appropriate remedy for unconstitutional discharge, and a suggestion of friction on the job between the teachers and others in the school is insufficient grounds for denying reinstatement.

In several other cases the claimed first amendment deprivation was held to be without merit.[100]

A Michigan case granted summary judgment to the board of education in approving an affirmative action layoff provision of a collectively bargained contract which had been challenged by a group of nonminority faculty.[101]

The Oakland school board passed an affirmative action plan applicable to general contractors who submit bids for construction contracts solicited by the district. When sued under the policy for allegedly violating the equal protection clause the court held that school board members enjoyed a good faith qualified immunity, and although the school board and school district do not enjoy immunity as entities they nonetheless are not liable because the policy does not violate the fourteenth amendment.[102]

99. Allen v. Antauga Cty. Bd. of Educ., 685 F.2d 1302 (11th Cir. 1982).

100. Hadley v. Moffat Cty. School Dist. RE-1, 641 P.2d 284 (Colo. Ct. App. 1981); Derrickson v. Board of Educ. of City of St. Louis, 537 F. Supp. 338 (E.D. Mo. 1980); and Burris v. Willis Indep. School Dist., 537 F. Supp. 801 (S.D. Tex. 1982).

101. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982).

102. Schmidt v. Oakland Unified School Dist., 662 F.2d 550 (9th Cir. 1981).