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ABSTRACT

The legal system has significantly influenced the everyday operation of American public schools in the last 20 years. Because of the increasing probability of teacher involvement in a legal incident, a working knowledge of the law as it relates to physical education is important. Included in this document, which focuses on tort liability for negligence, are discussions of the Oregon Tort Claims Act, the Oregon court approach to negligence theory and defenses under Oregon law, and duties of physical educators. Each section summarizes legal concepts and presents reported appellate decisions that were reviewed as of July 1988. Thirty-six guidelines for reducing risk and providing more positive student experiences are offered. (18 references) (LMI)

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Legal Liability in the Gymnasium

Fall 1988

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State Superintendent
of Public Instruction

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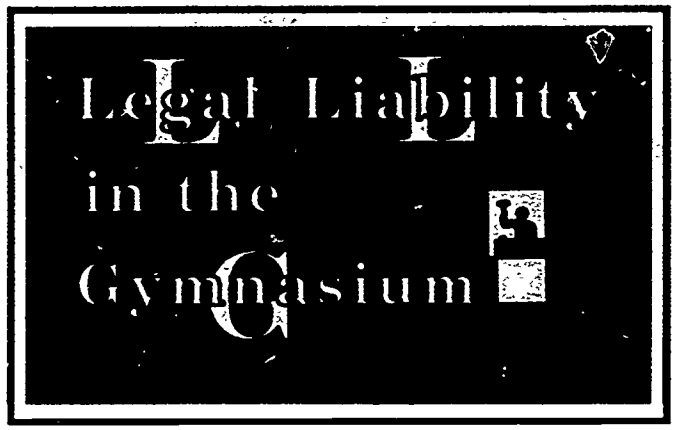
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FOREWORD

Legal Liability in the Gymnasium was written to assist physical education program administrators and teachers to discuss and write guidelines for prudent practice in their lessons. Some special attention should be paid to insure safety and minimal risk for all students while providing a challenge to learn about expressive and efficient human movement, to maintain or increase levels of fitness and to empower students to act responsibly alone or in a group.

For additional assistance or information contact Robert Ritson, curriculum specialist for physical education, 373-7898.

Verne A. Duncan
State Superintendent
of Public Instruction

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The review of research, case studies and initial draft of this paper were done by James E. Hart, Ed.D., Physical Education Specialist, athletic coordinator and coach at Kelly Middle School in the Eugene School District. We thank him for his concern with the subject and his efforts.

PREFACE

This document is intended to alert educators to the kinds of teacher actions and classroom conditions that have given rise to litigation. However, the user is cautioned to be aware of the limitations of any such publication.

Cases settled prior to trial are not available to the researcher. In addition, most cases tried in courts of general jurisdiction, such as Oregon's Circuit Courts, do not have a written opinion. Therefore, the case decisions in this publication are taken from reported appellate decisions. The reader needs to keep in mind the fact that the reported cases surveyed in preparing this volume represent the tip of the iceberg.

Case law is dynamic. Decisions can be overruled or modified by later court actions. The cases presented in this volume were reviewed as of July, 1988. The user should be aware that new cases or revisions of old decisions since that time are not included within this volume.

Finally, the reader is asked to recognize that each case is fact specific and that each jury is unique. Although this paper may provide a useful starting point for awareness and research on liability in the physical education area, it in no way can take the place of consultation with the school district's own attorney.

TABLE OF CONTENTS

INTRODUCTION

Physical education offers opportunities for the total development of school-aged children and youth. Along with all other disciplines, physical education helps students acquire essential learning skills through common curriculum goals. As students advance through the grades, physical education programs enhance the social, emotional and intellectual growth common to the goals of other curricular areas while adding a unique emphasis on fitness, movement skill development, group work, and movement aesthetics.

In recent years we have witnessed a greater acknowledgement of the importance of physical education programs. There has been a rapid increase in elementary school programs characterized by staffs of specialists, inclusion of the handicapped in school programs, expansion of programs beyond the traditional team sport activities, the inclusion of lifetime leisure pursuits as a major area of focus in high school programs, co-education/co-instruction in all classes at all levels, and the increased opportunity for off-campus as well as on-campus activities. Intramural activities, at both the elementary and secondary levels, have become common outgrowths of the instructional program and athletic opportunities have increased, particularly in the area of girls' athletics.

The American system of public education has become interrelated with the legal system within which it works. The last two decades have seen a dramatic increase in the influence of the legal system on the day-to-day operation of our schools. Federal and state constitutions, statutory enactments such as PL 94-142 and Title IX, collective bargaining legislation and the enormous body of judicial decisions and case law have had a powerful effect on school systems and on the teachers and students who make up these systems.

Litigation has become a way of life in our society as the public has become quite sophisticated and willing to seek legal redress for perceived wrongs. Physical educators have numerous opportunities to become entangled in legal disputes.[1] PL 94-142 and Title IX legislation has directly affected the way physical education programs are conducted. The constitutional rights of students have come under examination in the physical education setting, particularly those dealing with religion. Finally, students are injured more often in physical education accidents than in any other school-related activity.

The number of litigations regarding injured pupils has increased significantly in the last twenty years. This may be explained in part by the expansion of programs and the development of new facilities and equipment which have increased the opportunities for students to participate in many new and varied activities.[2] Physical education is one of the most exposed teaching fields because it involves activities which are inherently risky due to actual or possible physical contact and which may be physically challenging to a student.

Because teachers may be more likely to be involved in a legal incident, it is important that they have a working knowledge of the law as it relates to physical education. The focus of this document will be on tort liability for negligence. The Oregon Tort Claims Act and the Oregon court approach to negligence theory and defenses will be presented. Finally, the duties of physical educators in our public school system will be examined in light of some available case law concerned with alleged breaches of these duties.

OREGON TORT CLAIMS ACT

The Oregon Tort Claims Act of 1967 abolished strict governmental immunity and made all public bodies and their officers, employees and agents liable for their torts. This act, along with subsequent revisions, outlines the terms and conditions of liability for all public employees, including teachers. The Tort Claims Act is embodied in the Oregon Revised Statutes (ORS) 30.260 - 30.300. These segments of the legislation having particular importance to physical educators are briefly outlined here.

Scope of Liability — ORS 30.265 (1)

Physical educators are liable for their torts. It makes a great deal of difference whether the tort occurs within the scope of their employment. Scope of employment can represent a grey area and is an elusive term to define. It is generally agreed that "scope of employment" consists of those acts which are in the furtherance of some duty owed to the employer by the employee and over which the employer is or could be exercising some control, either directly or indirectly.[3] In the event of a suit, individual circumstances are carefully examined by the court to determine whether particular actions do or do not fall within the scope of employment. This determination is of critical importance to teachers as those acts which are deemed to be outside the scope of employment relieve the district of liability and leave the teacher standing alone in the suit for action.

Hold Harmless Legislation — ORS 30.285 (1)(2)

If a teacher's actions are determined by the court to be within the scope of employment, Oregon statute requires that school districts defend, hold harmless and indemnify the teacher, except in the case of malfeasance or willful, wanton neglect of duty. Malfeasance is the performance of an illegal act, an example of which might be charges of sexual abuse. Willful, wanton neglect of duty constitutes more than mere negligence. It amounts to deliberately risking harm to a student or showing an utter indifference to their safety and welfare. ORS 30.287 (3) forbids the use of public funds to pay any settlement for an act of a schoolteacher rendered by the court to be outside the scope of employment or deemed by the court to constitute malfeasance or willful, wanton neglect of duty. The teacher, in this case, would be left without the protection of his/her employer.

Statutory Limits on Liability — ORS 30.270 (1)(a)(b)(c)

While ORS 30.265 (1) waives the absolute right of school districts to claim governmental immunity, this right is not abrogated totally. ORS 30.270 (1)(a)(b)(c) sets a statutory limit on liability. This section of the Tort Claims Act limits the liability of teachers and their school districts to $50,000 to any single individual for claims of damages to or destruction of property arising out of a single accident and further limits liability to $100,000 to any single individual for all other claims, including those for personal injury, arising out of a single accident and places a $300,000 cap on any number of claims arising out of a single accident.

Under the Oregon Tort Claims Act, teachers acting within the scope of their employment may be sued for compensatory or actual damages. Punitive damages, those which are non-compensatory and intended to punish and deter others from similar conduct, are not awarded. Punitive damages are often the ones responsible for the huge multimillion dollar awards handed down by courts in the private sector.

Determination of scope of employment and the issues of malfeasance and willful, wanton neglect of duty again becomes critical to the teacher. If the court finds that the teacher was either acting outside the scope of employment or was guilty of malfeasance or willful, wanton neglect of duty, the district is relieved of all liability and the teacher becomes personally liable. In this case, the Tort Claims Act does not apply and, therefore, no limit to liability or ban on punitive damages exists. It is for these circumstances that personal liability insurance becomes necessary for teachers.

Notice of Claim

A final component of the Tort Claims Act which is of importance to teachers, is that dealing with notice f claim. Under Oregon law, students and their parents have 270 days after the alleged loss or injury* to give the district notice of a claim and two years in which to commence action on a claim. It is imperative that teachers do an adequate job of recordkeeping on all mishaps, large and small. All too often, teachers brought into court find themselves in a position of needing to think back to an incident that has escaped their recollection.

*A longer period for submitting a notice of claim is allowed in wrongful death actions.

NEGLIGENCE THEORY UNDER OREGON LAW

Negligence is the failure to act as a reasonably prudent person would act in the same or similar circumstances. To be declared negligent under Oregon law, four essential elements must exist. The failure to show the existence of any one of these elements will bar any recovery of damages in court. The four-point Oregon test for negligence requires a showing of:

1. A duty or obligation, recognized by the law, requiring a person to conform to a certain standard of conduct for the protection of others against unreasonable risk;

2. A failure on a person's part to conform to the required standard of conduct, a breach of duty;

3. The conduct in question being a substantial factor in bringing about the alleged injury; and

4. A legally cognizable injury.[4]

All individuals in Oregon are under a duty to conduct themselves in a manner which does not create unreasonable risk of harm to others. Duty usually arises only under affirmative conduct, the exception being where a special relationship exists, such as between student and teacher. Duty is increased under special relationships, holding a person liable not only for their acts but their omissions as well. A duty is said to exist whenever an individual's acts or omissions create a foreseeable risk of injuring others.

The duties owed by physical educators are set forth by both common law and statute and include adequate and proper instruction, supervision, inspection of equipment and facilities and the rendering of first aid, when necessary. Specific duties under each of these broad categories are numerous and will be further illustrated later in the section on duties of physical educators and physical education case law.

In examining whether a teacher breached his/her duty to an injured student, Oregon courts ask the following two questions:

1. Was the type of injury or harm suffered by a student a foreseeable result of the teacher's conduct?

2. Did the teacher's conduct conform to the standards of conduct required of him/her?

In other words, did the teacher act as a reasonably prudent person in light of the risk of harm to the student?

A valid complaint for negligence must support, with facts, that the teacher's unreasonable conduct was a substantial factor in causing a student's injury. The conduct does not have to be the only cause, but must be a substantial factor with a showing of a causal link between the alleged negligent act and the injury.

The final element in negligence theory is that of damages. It is not enough to show that a teacher owed a duty and negligently breached that duty to a student. Actual, not threatened, injury or loss to a student's person or property must be shown.

NEGLIGENCE DEFENSES

A number of defenses have traditionally been employed across the country, by teachers and school districts, in fighting negligence suits. The more common defenses have included claims of governmental immunity, contributory negligence, last clear chance, comparative negligence and assumption of risk.

The only affirmative defense against claims of negligence is to show that a teacher's conduct fails to meet one or more of the four essential elements of negligence. Aside from this, current Oregon law has endorsed a comparative fault statute while statutorily abolishing governmental immunity, last clear chance, contributory negligence and implied assumption of risk. The Oregon comparative fault statute states:

> *Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for death or injury to person or property if the fault attributable to the person seeking recovery was not greater than the combined fault of the person or persons against whom recovery is sought, but damages shall be diminished in proportion to the percentage of fault attributable to the person recovering.*[5]

In jurisdictions embracing the doctrines of contributory negligence and assumption of risk, any showing of negligence on the part of a student or a showing that he/she assumed the risk of an activity, will relieve the defendant teacher or school district of all liability. Many of the principles of contributory negligence and assumption of risk are entertained under the Oregon comparative fault statute. The Oregon comparative fault statute employs the same standard and reasoning for students as the concepts of contributory negligence and assumption of risk used in other parts of the country. But unlike jurisdictions which endorse these two concepts, a showing of contributory negligence or assumption of risk on the part of a student will not bar recovery under Oregon's comparative fault statute, provided the student's negligence is less than that of the teacher. Both concepts are merely figured into the comparative fault formula when apportioning the fault for injury.

Under the concept of contributory negligence, a student, like the teacher, is required to act as a reasonably prudent person of like age, capacity and experience would act in the same or similar circumstances. Age, capacity and experience of a student remain critical factors in applying the principles of contributory negligence under the comparative fault statute, as children are not held to the same standard of conduct as adults. For this reason, the contributory negligence on the part of children, especially young children, is more difficult to establish than for adults.

Under the comparative fault statute, the "inherent risk" issue of the assumption of risk doctrine is analyzed together with the defendant teacher or school district's breach of duty toward the student and both are thrown into the comparative fault formula. Assumption of risk requires both the actual knowledge and understanding of the risk and the voluntary assumption of it. Age, capacity and experience of the student again become factors in this concept. Younger students cannot be assumed to be capable of fully perceiving and comprehending risks involved in various activities and therefore it is difficult to assign comparative fault based upon assumption of risk when dealing with them, especially with children under the age of reason, generally believed to be seven years of age. Assumption of risk arguments only apply to the inherent or normal risks associated with an activity. The risk must also be assumed voluntarily. Therefore, physical educators are not able to claim comparative fault based on assumption of risk, on the part of a student in a required physical education class. The claim can only be made for those activities which are truly voluntary.

DUTIES OF PHYSICAL EDUCATORS AND SUPPORTING CASE LAW

The duties owed to students by physical educators are set by both common law and statute. Common law duty represents the degree of care the community requires to be exercised for the protection of others. The standard of care required to avoid liability is that of a reasonably prudent person in the same or similar circumstances.

Oregon statutory law, together with common law, requires that physical educators provide adequate and proper instruction, supervision, inspection of equipment and facilities and the rendering of first aid when necessary. Specific duties and responsibilities under each of these areas are numerous and an abundance of case law has helped delineate them.

Vast numbers of court actions involving school districts and their employees are threatened each year. Due to the large number of participants and the unique opportunities for physical and social interaction, physical education is particularly vulnerable to court action.

From the large numbers of threatened actions, a small percentage of claims go to trial, as a good number are settled out of court. From the cases which go to trial, an even smaller percentage end up in appellate or supreme courts for review. While records of original trial courts are kept, the only access to these records is by case name at the courthouse. No indexing or reporting system for trial court actions exists. Therefore, the legal researcher, when examining case law, is limited for the most part to appellate or supreme court decisions reported in the National, Regional and State Reporter systems.

While it is recognized that the Oregon approach to negligence and the Oregon Tort Claims Act differ from that of other states, in some respects an overview of physical education cases from other jurisdictions, as well as from Oregon, will give Oregon physical educators a practical and useful glimpse at the type of teacher actions and classroom conditions which have been challenged in court. Matching the fact situations and holdings in these cases to the legal concepts and Oregon law already discussed, should provide physical educators with some practical insight on what might occur in Oregon.

Instruction and Teaching Methodology

Claims of negligent instruction can cover a broad range of complaints including improper instruction, insufficient instructions and improper teaching methodology. Aside from claims of improper supervision, physical educators are most commonly pulled into court over claims of negligent instruction.

The rapid expansion of programs over the past two decades and the increased demand for accountability in programs has led to the requirement for expertise by physical educators in a growing variety of activities.

Physical educators must thoroughly understand all activities which they undertake to teach and must continue to refine their skill and knowledge through inservice opportunities, conferences and workshops. It is especially critical that they upgrade their skill and knowledge in areas of weakness before undertaking the delivery of those areas of the curriculum to students. In addition to curriculum areas, classroom management must constantly be re-examined and skills upgraded where necessary.

When instructing a student to carry out a task, physical educators must be sure that their instructions are proper under the given set of circumstances. Instructions must conform to recognized standards employed within the professional field and with recommended practices for specific activities. When teaching any area of the physical education curriculum, teachers will be held to the standard of a reasonably prudent person qualified to teach that area. The courts will look at more than certification when determining one's qualifications. Physical educators can expect to be challenged whenever their instructions deviate from the recognized standards for the questioned activity or from district and state guidelines.

It is not only important that a teacher's instructions be proper but that they also be sufficient in detail to allow students to carry out the instructions and participate in a safe manner. In viewing the sufficiency of instructions, courts examine the skill instructions, including teacher and/or student demonstrations, as well as safety instructions. While striving

to cut down on "teacher talk" and maximize physical movement and participation in physical education classes, physical educators are cautioned not to short-change the adequacy or completeness of their instructions.

Coercing students to perform can be a very dangerous practice for physical educators. Claims of coercion, together with improper instruction, have been dealt with by the courts. Physical educators would be prudent not to second-guess student fears about performing a skill or to coerce them to execute skills after minimal instruction. Under some circumstances, coercion has been viewed by the courts as constituting willful and wanton misconduct.

A good number of the skills taught by physical educators are sequential in nature. Considerable attention needs to be given to the logical and safe sequencing of skills which will allow for not only safe but successful participation. This is especially important in those developmental activities with elevated risk, such as gymnastics. Planning for proper sequencing should not be left to chance. Physical educators would be prudent to not only prepare written daily lesson plans, but unit plans as well. These documents should be kept on file as courts have sometimes requested that teachers produce them to examine the methodology and sequencing employed in the teacher's class. While daily written lesson plans are extremely important, the often neglected unit plan offers teachers the best opportunity to satisfactorily plan for both the successful and safe learning by students.

Physical educators need to thoroughly acquaint themselves with district as well as state scope and sequence documents and curriculum materials. When the adequacy and propriety of a teacher's instruction are challenged, these documents and the teacher's awareness of and compliance with them often become factors examined by the courts.

The cases which follow offer practical illustrations of the above instructional issues which have been examined by the courts.

BROWN V. QUAKER VALLEY SCHOOL DISTRICT, 486 A. 2d 526

Issue:	Improper Instruction — Failure to warn of risk in gymnastics
Level of Court:	Commonwealth Court
Date/State:	1984/Pennsylvania
Decision:	Defendant/Affirmed

The plaintiff was injured as a result of doing a straddle vault in her high school physical education class. She alleged negligence on the part of the instructor for failing to adequately instruct and supervise gymnastic students as to the safe and proper method of using inherently dangerous equipment, and failing to adequately warn her of the dangers posed by the use of such equipment. The trial court granted the districts motion for summary judgment, holding the district not liable on the grounds of governmental immunity. On appeal, the Commonwealth Court upheld the governmental immunity of the school district and the physical educator.

While the substantive issues of negligence were not entertained or discussed by the court because of the governmental immunity issues and decision, this case sounds a warning for a growing issue in physical education. In any area of the physical education curriculum where the risk is elevated, such as gymnastics, the instructions should include a clear warning of the specific risks involved in the activity. The failure to warn is increasingly being brought into negligence suits involving physical education programs.

WEISS V. COLLINSVILLE COMMUNITY SCHOOL DISTRICT No. 10, 456 N.E. 2d 614

Issue:	Improper Instruction — Failure to instruct about sliding in softball
Level of Court:	State Appellate Court
Date/State:	1983/Illinois
Decision:	Plaintiff/Reversed

Plaintiff brought action against the school district for injuries to his ankle and leg sustained while playing softball in his sophomore physical education class. The plaintiff was pitching on the day of the accident. The plaintiff had run over to cover first base when the runner slid into first base, knocking the plaintiff over and causing his injuries. In suit, the plaintiff alleged negligence on the basis of improper and insufficient instruction.

Under Illinois law, it is required to show willful and wanton conduct on the part of educators and school districts in order to waive immunity. The trial court awarded $62,420 in damages in finding the school district guilty of willful and wanton conduct.

Evidence during the trial showed that students had received instruction in softball from junior high school up to their sophomore year and that a district curriculum for softball instruction had been developed. The physical education teacher testified he prohibited stealing and bunting for safety reasons and that he reviewed the rules taught during the freshman year at the sophomore level. He could not recall instructing his students about sliding. Expert testimony indicated the dangers involved in sliding and its inappropriateness in physical education classes. Student testimony suggested that instruction given to the sophomore class was inadequate.

The Appellate Court reversed the trial court decision for the plaintiff. In so doing, the court held that in order to constitute willful and wanton conduct sufficient to impose liability upon educators and school districts for injuries sustained by students, the teacher or district must be conscious, or should be conscious, of the risks and dangerous consequences of either acting or failing to act. To be willful and wanton, the conduct must be with the knowledge that such conduct posed a high probability of serious physical harm to others. The court noted that while arguments could be made for a case of ordinary negligence, the evidence clearly showed that there was no indifference to the plaintiff's safety or willful, wanton conduct on the part of the district which is required in Illinois to waive governmental immunity.

In Oregon, mere negligence is enough to impose liability on teachers. The teacher's lack of instruction regarding sliding would have been a proper issue for jury consideration in determining whether the duty of reasonable care was breached.

EHLINGER V. BOARD OF EDUCATION OF NEW HARTFORD, CENTRAL SCHOOL, 465 N.Y.S. 2d 378

Issue:	Improper Instruction — Failure to follow recommendations for fitness test administration
Level of Court:	State Supreme Court, Appellate Division
Date/State:	1983/New York
Decision:	Defendant/Remand for New Trial

Plaintiff brought action on behalf of her then 14-year-old daughter who dislocated her right elbow when she struck the wall when running the speed test portion of the New York State physical fitness test in her physical education class. The plaintiff alleged that the defendant was negligent in failing to follow the recommendations in the test manual for designing the course and for failing to provide adequate instructions and supervision for those taking the test.

Testimony showed that the manual recommended a minimum of 14 feet clearance beyond both the start and finish lines and that the defendant, in setting up the course, only provided eight feet of clearance. The only instructions given were for the students to run around the cones three times and for their partner to record their times. The clearance beyond the start and finish lines was reduced due to the class being held in the "girls" gym which was smaller than standard size. The court ruled there was a duty owed to the plaintiff by the defendant to act as a reasonably prudent person under comparable circumstances. The court held that a jury could certainly find it foreseeable that injury would result from running the course as designed, and in light of the defendant's failure to follow the recommendations in the manual or warn students of possible safety hazards due to course modification, the jury could conclude that this duty was breached. The court reversed the dismissal judgment of the lower court and ordered a new trial.

DIBORTOLO V. METROPOLITAN SCHOOL DISTRICT, OF WASHINGTON TOWNSHIP, 440 N.E. 2d 506

Issue:	Improper Instruction — Vertical jump test
Level of Court:	Court of Appeals
Date/State:	1982/Indiana
Decision:	Defendant/Reverse and Remand

The plaintiff, 11 years old and in the sixth grade, broke a permanent front tooth during her physical education class while performing a vertical jump exercise. She brought action against the district, claiming the physical education teacher was negligent in failing to adequately instruct students on the proper performance of the exercise. Testimony indicated that students were instructed to take two to three quick steps toward the wall and to jump and reach the highest point possible. Expert testimony indicated the proper way to perform the exercise was to stand parallel to the wall with shoulders perpendicular to the wall, to crouch momentarily and then to jump and reach the highest possible point on the wall. The plaintiff, as well as other members of the class, were instructed to take two or three steps in order to improve their performance. Evidence indicated that the wall was concrete, was not protected by a mat, that this was the first time the exercise had been done in class, and that no demonstration by the teacher had been given. The trial court entered a judgment for the defendant on the evidence rather than sending the case to the jury.

The Court of Appeals stated the case should have gone to jury unless only one inference could be drawn from the evidence. The Court of Appeals noted that the employee of the defendant, a teacher, owes the care of an ordinary prudent person in the same or similar circumstances. The court held that there was sufficient evidence from which the jury could have inferred that the defendant's employee was negligent in discharging her duty to exercise reasonable care for the safety of the students under her control, thereby subjecting them to an unreasonable risk of harm. The court ruled the trial court's entry of judgment on the evidence against the plaintiff to be in error. The trial court judgment was reversed and the case remanded for further proceedings.

DISTRICT SCHOOL BOARD OF LAKE COUNT V. TALMADGE, 381 So. 2d 698

Issue:	Improper Instruction — Coercion to perform on trampoline
Level of Court:	State Supreme Court
Date/State:	1980/Florida
Decision:	Dismissed/Reversed and Remanded/Affirmed

The plaintiff, a middle school student, brought suit against the school board, its insurance company and the physical education teacher for injuries sustained while performing on the trampoline in his physical education class. The plaintiff alleged the physical education teacher ordered him to perform certain skills on the trampoline. When he refused, the teacher physically picked him up, placed him on the trampoline and ordered him twice to perform. When the plaintiff attempted a forward flip, he injured his knee and teeth. The evidence indicated that the teacher provided the plaintiff with minimal instructions regarding acrobatics and safety on the trampoline and that the plaintiff had little experience on the equipment and was, therefore, unprepared to safely perform the skills demanded by the teacher.

The trial court dismissed the suit claiming that Florida statutes do not allow a cause of action to exist against the teacher. The plaintiff appealed and the Court of Appeals reversed the dismissal against the instructor, holding that Florida statute indemnifies employees of the state against monetary judgments rendered against them as a result of negligent acts occurring within the scope of their employment but does not bar holding

an employee as a party defendant. The court remanded the case against the teacher for proceedings consistent with the above ruling. The district and teacher appealed the appellant court's decision to the Florida Supreme Court.

The Florida Supreme Court upheld the lower court's decision holding that the absence of an explicit prohibition in Florida statutes against suing public employees for their torts suggests that none was intended. The court ruled that the hold harmless statute did not preclude a public employee from being named a defendant in tort action. The court made note that, where a public employee's acts fell outside of the scope of employment or constituted willful and wanton disregard of human rights, safety or property, the employee is not immune from liability and the state need not pay judgments rendered against the employee. Where the district and the teacher are sued jointly, the state is obligated to pay up to the monetary limits of liability imposed by state statute and the teacher is personally liable for any excess.

In Oregon, the public employee is held harmless for all acts within the scope of his/her employment except those which constitute willful and wanton behavior or malfeasance in office. Unlike Florida's statute, Oregon fully indemnifies its employees rather than doing so only up to the statutory limits of liability.

LARSON V. INDEPENDENT SCHOOL DISTRICT No. 314, 289 N.W. 2d 112

Issue:	Improper Instruction and Methodology — Lack of unit plan and progressions in gymnastics
Level of Court:	State Supreme Court
Date/State:	1979/Minnesota
Decision:	Plaintiff/Affirmed

An eighth grade student was injured while performing a headspring exercise over a rolled mat in a required physical education class. As a result of landing on his head, and from the force of running and diving onto the mat, the plaintiff broke his neck, resulting in quadraplegic paralysis. Plaintiff brought action against the teacher, principal and superintendent, claiming negligence in instruction and supervision.

Testimony showed that the teacher involved was a first-year teacher who had only been on the job nine class periods before the accident occurred. He had replaced the previous teacher at mid-year when the previous teacher had to report for military duty. The plaintiff alleged negligence in instruction and supervision based on the argument that the teacher taught a difficult gymnastic skill without first teaching appropriate lead-up skills or progressions, designed in part for safety, and that the teacher was improperly spotting at the time of the accident. Negligence claims against the principal and superintendent were based on their alleged failure to properly develop, administer, and supervise the physical education program. Testimony showed that the principal did not actively participate in developing or administering the physical education curriculum and that these duties were totally delegated to the first-year teacher. The principal's only involvement was to hand the new teacher a copy of the curriculum guide. He merely asked that the two teachers meet and plan physical education classes for the remainder of the year. The two teachers met for 30 minutes; during that time they discussed which units had been taught and which had not. When reporting for duty, the teacher told the principal what subjects he was going to teach. No detailed discussion of activities or teaching methods occurred.

Expert testimony indicated that unit planning in physical education was of critical importance in ensuring that proper progressions for safety were followed and that such planning should be in addition to daily lesson plans. Neither the new nor previous teacher were required to develop or submit any such detailed written plans.

The court found for the plaintiff, declaring the teacher 90 percent negligent, the principal ten percent negligent and the student free from negligence. A directed verdict was issued on behalf of the superintendent on the grounds that a prima facie case of negligence on his part had not been established. The plaintiff was awarded $1,013,630 and his father $142,937. In upholding the trial court decision for the plaintiff, the Supreme Court ruled:

1. The evidence supported a finding of negligence in the instruction and supervision of the physical education class by the first-year teacher.
2. The record indicated that the principal failed to exercise reasonable care in supervising the development, planning and supervision of the physical education program and in supervising an inexperienced first-year teacher.
3. Neither the principal, in his abdication of responsibility for developing and administering the program, nor the teacher, in deciding how to teach and spot an advanced gymnastic skill, were involved in decision making entitled to protection under the doctrine of discretionary immunity.
4. Where found personally liable, the defendants were not entitled to indemnity under governmental immunity.
5. In purchasing insurance, the district waived its absolute claim to governmental immunity up to the limits of its coverage.

Due to the purchase of liability insurance, the court held the school vicariously liable for the torts of its employees and ordered it to pay $50,000 to each plaintiff.

While the same finding of negligence would likely be found under Oregon law, the awarding of damages would have been restricted. Under the Oregon Tort Claims Act, the teacher and principal would have been entitled to indemnity and the total award would have been limited to the $300,000 cap on total claims arising out of a single accident (ORS 30.270).

MONTAGUE V. SCHOOL BOARD OF THE THORNTON, FRACTIONAL TOWNSHIP NORTH HIGH SCHOOL, 373 N.E. 2d 719

Issue:	Improper Methodology — Use of the spotters in gymnastics
Level of Court:	State Appellate Court
Date/State:	1978/Illinois
Decision:	Defendant/Affirmed

The plaintiff's son was injured in his physical education class while attempting to vault over a vaulting horse. The trial court issued summary judgment for the defendants and the plaintiff appealed.

Evidence and testimony indicated that the plaintiff's son broke his arm as a result of catching his lower leg on the vaulting horse and falling as he attempted to vault in his physical education class. The gym class consisted of 45-60 students who were in their final week of a four-week tumbling unit. While certain activities within the unit were mandatory, vaulting was optional. At the beginning of the unit, the teacher instructed the entire class on the proper use of the vaulting horse. He offered

individual help and observed the vaulting activity. Prior to the accident, the victim had successfully completed approximately 30 vaults. The students were reminded at the beginning of each class to be careful. The only material fact in dispute is whether or not spotters were employed. The teacher claims they were while the injured student claims they were only used during somersault and trampoline exercises.

Illinois statute confers in loco parentis status upon teachers. As a result, teachers have the same liability to students as parents to their children. For a parent in Illinois to be guilty of negligence toward their children requires a showing of willful and wanton misconduct. In upholding the summary judgment of the trial court, the Appellate Court held that, while the disputed facts regarding spotters might raise an issue of ordinary negligence, they would not lead to a finding of willful and wanton misconduct. To be judged willful and wanton misconduct, the act must be intentional or be committed with a reckless disregard for the safety of others.

If this case had been heard in Oregon, the issue of spotters would have become a central area of focus and certainly would have presented a proper claim for jury consideration. The actual vaulting skills being performed, together with the skill level of the students, would be examined in making a decision as to whether reasonable and prudent care required spotters to be used.

LANDERS V. SCHOOL DISTRICT No. 203, O'FALLON, 383 N.E. 2d 645

Issue:	Improper Instruction — Coercion to perform gymnastic skill
Level of Court:	State Appellate Court
Date/State:	1978/Illinois
Decision:	Plaintiff/Affirmed

The plaintiff, then a 15-year-old high school student, was injured in her physical education class while attempting to do a backward roll. Testimony indicated that at the time of the accident, one week after the tumbling unit began, the plaintiff was 5'6" tall and weighed approximately 180 pounds. She was in a class with approximately 40 other girls.

The instructors had students observe another student prior to practicing the backward roll. Prior to the accident, the plaintiff received no personal instruction or attention from the teacher with respect to the backward roll. The plaintiff testified that the day prior to the accident, she went to the instructor's office and told the teacher she was afraid to do the backward roll and that she did not know how to perform it. She claimed to have told the teacher that as a small child she completed the move a half dozen times, but not properly, and that the activity always gave her a headache and bothered her neck. She informed the instructor she was afraid to perform the skill because she was big and heavy. The teacher offered to help the plaintiff but was unable to do so because the plaintiff was a bus student. The following day, after asking the plaintiff if she could do the backward roll and being told no, the teacher told her to practice it and have another student help her. In doing so, the plaintiff suffered a subluxation of her vertebrae. She eventually had to have a cervical fusion, grafting bone from her hip onto four vertebrae in the neck.

Illinois law confers the status of in loco parentis on teachers which results in teachers being subjected to no greater liability for their acts than are parents. Therefore, under Illinois law, teachers are only liable for their acts or omission which are deemed to constitute willful or wanton misconduct. They are not liable for mere negligence.

The trial court held the teacher's conduct to constitute willful and wanton misconduct. In so holding, the court stated that the teacher was aware that the plaintiff was obese, untrained in the skill being demanded, fearful of performing it due to her size and that she had experienced physical problems in the past from attempting to perform the skill. The court ruled that, given these circumstances, the teacher's demand that she do the skill anyway, without any personal instruction or testing of her strength, showed an utter indifference to the plaintiff's safety. The Appellate Court upheld the trial court judgment of $77,000 for the plaintiff.

GREEN V. ORLEANS PARISH SCHOOL BOARD, 365 So. 2d 834

Issue:	Adequacy of Instruction — Lead up to wrestling match
Level of Court:	State Court of Appeals
Date/State:	1978/Illinois
Decision:	Defendant/Affirmed

The plaintiff, who had gone out for football, failed to pass the vision test required by the board and was not allowed to engage in contact activities. He did participate in exercises and noncontact drills. The plaintiff was transferred into sixth period physical education in accordance with the coach's policy of having the football players take physical education together.

After two weeks of spring training, the sixth period physical education class began a six-week unit in wrestling and weight lifting. The first three classes in wrestling consisted of warm-ups and instruction in basic positions and moves. Each move was demonstrated and then practiced "by the numbers" in which each move was broken down into number components, and on command, executed methodically step-by-step through the entire maneuver. This procedure was repeated several times with each move and the speed of the execution gradually increased. On the fourth day, the students were directed to wrestle hard for thirty seconds using the basic moves they were taught as well as any other move they wished. Each thirty-second match was officiated by a varsity wrestler.

While attempting to roll out of a bridge, the plaintiff injured his neck and was left paralyzed. The plaintiff filed suit against the district claiming inadequate instruction and supervision. The Court of Appeals upheld the trial court finding of no negligence on the part of the defendants. The trial court noted that the duty of instructing, preparing and supervising students in dangerous activities was to use due care to minimize the risk of harm. The court ruled the conditioning, including the two weeks of football drills, was adequate and that the students had been properly prepared, through instruction in the basic moves, to take part in the thirty-second drill. The class was held to be organized and properly supervised.

The Court of Appeals carefully noted that the plaintiff's lengthy expert testimony was very impressive and presented a case for negligence; however, the defendant's presentation of expert testimony was just as impressive. As a matter of law, it was not possible for the Court of Appeals to find that the trial

court erred manifestly in finding the evidence did not preponderate in favor of the conclusion that the teacher's instruction, preparation for, and supervision of the drill in which the plaintiff was injured fell below any locally or nationally accepted standard of reasonable care for teachers under similar circumstances.

BROD V. CENTRAL SCHOOL DISTRICT No. 1, 386 N.Y.S. 2d 125

Issue:	Improper Instructions — Going barefoot in the gym
Level of Court:	Supreme Court, Appellate Division
Date/State:	1976/New York
Decision:	Plaintiff/Amended re Damages

The plaintiff, a nine-year-old student, was instructed by his physical education teacher to go barefooted if he wanted to participate in class as a result of forgetting his gym shoes. While chasing a ball in class, the plaintiff's feet stuck to the floor causing him to lose his balance and fall. As a result of the fall, he lost two front teeth. The jury returned a verdict for the plaintiff awarding him $15,000 and $3,800 to his father.

The school district appealed and the Supreme Court affirmed the lower court finding of negligence, stating the evidence supported a finding of negligence and that the negligence was the proximate cause of the plaintiff's injuries. The Supreme Court ruled that the trial court was in error in instructing the jury that lawyer's fees are customarily paid from jury verdicts. The court ordered a new trial limited to the issue of damages unless the plaintiffs, within twenty days, stipulated to reduce the verdict to $8,000 for the boy and $750 for his father.

BAIRD V. HOSMER, 347 N.E. 2d 533

Issue:	Improper Instruction — Inappropriate vaulting equipment and lack of mats
Level of Court:	State Supreme Court
Date/State:	1976/Ohio
Decision:	Defendant/Reversed

The plaintiff, a junior high student, was injured while doing a series of exercises in her physical education class and brought suit against the teacher. The plaintiff alleged the teacher negligently instructed her to do an exercise which consisted of jumping back and forth over an inappropriate obstacle. The obstacle in question was a bench with a hard seat and with sharp corners. The plaintiff also alleged the teacher negligently failed to provide an appropriate safety mat around the apparatus being used. As a result of doing the required exercise, the plaintiff struck her right knee on a sharp corner of the bench and fell to the floor with a great deal of force. Injury to the leg required surgical repair and left a permanent scar.

The trial court granted summary judgment for the defendant and dismissed the case. The Court of Appeals reversed the trial court judgment and remanded the case for jury consideration. On appeal by the defendant, the Supreme Court upheld the Court of Appeals decision, that school teachers are not immune from their torts committed within the scope of their employment in Ohio and that the complaint which alleged the student suffered injury as a direct and proximate result of the teacher's failure to use reasonable care in the performance of her duties, stated a proper cause of action.

HAUSER V. SOUTH ORANGETOWN CENTRAL SCHOOL DISTRICT No. 1, 376 N.Y.S. 2d 608

Issue:	Teaching Methodology — Keeping activity within the ability of students
Level of Court	Supreme Court, Appellate Division
Date/State:	1975/New York
Decision:	Defendant/Affirmed

The plaintiff, a somewhat overweight 12-year-old student, was injured while attempting the running high jump during his physical education class. Just before the jump leading to the accident, he and several other students failed to clear the bar. Testimony was conflicting as to whether the bar was raised after the unsuccessful jumps and whether the plaintiff was told by his teacher to try the raised height. The plaintiff did attempt a second jump, and as a result, was injured.

The plaintiff requested a proffered charge to the jury that "If the teacher knew or should have known that the boy had failed to clear the bar on his first jump, but nevertheless had the bar raised and permitted or encouraged him to attempt to clear it, and if the second jump, in light of all the circumstances, was an inherently dangerous activity for the student, the jury could render a verdict for the student subject to the caveat of contributory negligence." The trial court refused to give such a charge to the jury claiming to do so would be tantamount to a directed verdict for the plaintiff. The Supreme Court, with dissent, affirmed the decision of the lower court for the defendant.

PASSAFORD V. BOARD OF EDUCATION, OF THE CITY OF NEW YORK, 353 N.Y.S. 2d 178

Issue:	Improper Instructions — Going barefoot in gym
Level of Court:	Supreme Court, Appellate Division
Date/State:	1974/New York
Decision:	Plaintiff/Reversed and Granted New Trial

The plaintiff was awarded $50,000 for injuries he sustained as a result of slipping on the gym floor while participating in gymnastics during his physical education class. Testimony was conflicting regarding the instructions given to the plaintiff. The plaintiff alleged that the physical education teacher told him to participate in his stocking feet because he forgot his tennis shoes. The defendant denied giving such an instruction and testified that the plaintiff was directed to stay at the side of the gym and observe the class. The evidence established, and the defendant agrees, that participating in stocking feet is a bad practice. A substantial question of fact regarding the given instructions was presented to the jury.

The charge given to the jury instructed that recovery could be predicated on the improper instruction to exercise in stocking feet or in the failure to provide adequate or sufficient supervision for the students in the class. The jury found in favor of the plaintiff and the defendant appealed.

On appeal, the defendant claimed that the suit brought by the plaintiff was based on giving improper instructions and that the court's charge to the jury regarding supervision was, therefore, improper. The Supreme Court agreed with the defendant and ruled that, although the plaintiff injected evidence of inadequate supervision while charging the teacher with giving improper instructions, the evidence submitted at the trial cannot support a conclusion of insufficient supervision and the judgment must be reversed. Even if the evidence of inadequate supervision was

sufficient, the court noted that the plaintiff, by his own admission, attributed that accident to his required participation in stockings.

The court held that improper supervision could not have been the proximate cause of the injury regardless of whose testimony the jury accepted, as the student slipped before reaching the mat where the activity was being conducted and where student leaders and spotters were present and was instructed, according to the defendant, to not participate in the first place. Finally, the court ruled that the school board was not an insurer of student safety and was not required to provide such continuous supervision that it controlled the movements of all students at all times.

The lower court judgment against the defendant was reversed and a new trial granted.

BERG V. MERRICKS, 318 A. 2d 220

Issue:	Teaching Methodology — Back rollover on trampoline
Level of Court:	Court of Special Appeals
Date/State:	1974/Maryland
Decision:	Defendant/Affirmed

A 19-year-old high school senior was injured in his physical education class and brought suit against the physical education teacher, the principal, the superintendent, the Board of Education, the seven members of the board individually and the county. The class had been involved in trampoline activities and on the day of the accident were practicing the back roll over. The plaintiff fractured his neck while performing on the apparatus and was left a paraplegic.

Evidence at the trial court indicated that the teacher had considerable experience in teaching trampoline activities. He had previously explained the inherent dangers of the trampoline and stressed the need to respect the equipment and to absolutely refrain from all horseplay. On the day of the accident, after warming the class up, he had one of the more advanced students demonstrate the back pull over. The 38 members of the class were then divided into two groups and instructed to practice the back pull over. Those waiting for their turn were instructed to position themselves around the frame of the trampoline as "spotters." The teacher required eight spotters at each of the two trampolines. The teacher stood midway between the trampolines in order to observe both groups. Expert testimony indicated that four spotters was a safe number and that it was proper procedure for the teacher to stand midway between the two trampolines.

Evidence was uncontradicted that when the plaintiff took his turn, he took two or three bounces and then went back over without doing a seat drop; in other words, a back somersault. This was against the instructions which required the students to do a seat drop, pull over and then land on the stomach.

The trial court dismissed the claims against all the defendants but the principal and the physical education teacher. After trial, the court awarded a directed verdict in favor of both remaining defendants. The plaintiff appealed on a number of grounds. The Court of Appeals upheld the judgment in favor of the county, the Board of Education and the individual school board members on the grounds of governmental immunity. While neither the principal nor superintendent enjoyed immunity, the court found both of them free of negligence, stating that the Physical Education Department was responsible to a county supervisor of physical education, not the principal and that the principal did not control the number of students in physical education classes nor exhibit any negligence which could be shown to be a cause of the injury. The evidence did not show any genuine dispute of material issue that the superintendent was negligent or that his acts resulted in injuries to the student.

In answering the charges against the teacher, the Court of Appeals held:

1. Expert testimony has shown that an instructor of 40 students using two trampolines should stand some distance from the trampolines so that he could observe both groups at the same time. Nothing in the evidence indicated this accident could have been avoided if the teacher kept his attention on the plaintiff.
2. There was no evidence that the presence of the teacher on the frame, desk or special platform attached to the trampoline would have prevented the plaintiff's injury.
3. Although the coach had told the boys to hurry up so they could take showers, there was no testimony indicating that any of the boys, including the plaintiff, felt rushed, anxious or concerned by the time.
4. Although testimony differed on the correct landing position, there was no evidence that the instruction to land on the stomach caused the accident. The plaintiff was not injured because he concluded the exercise improperly, but because he began it improperly.
5. It was contended that confusion existed among the students as to the instructions. Testimony by the plaintiff during the trial court indicated he knew what was expected of him.
6. The appellants failed to establish that keeping a log of student progress and experience on the trampoline could have averted this accident or that such a procedure was generally followed within the profession.
7. The coach has demonstrated his qualifications and there is no evidence that any more extensive training should have been required.

The court ruled that the burden is on the plaintiff to show that the acts or omissions of the defendant teacher failed to conform to a standard of reasonable conduct. Given the methodology used and the failure of the plaintiff to follow the directions, the trial court judgment in favor of the defendant cannot be reversed.

DARROW V. WEST GENESEE CENTRAL SCHOOL DISTRICT, 342 N.Y.S. 2d 611

Issue:	Improper Instruction — Insufficient safety instructions in soccer
Level of Court:	Supreme Court, Appellate Division
Date/State:	1973/New York
Decision:	Dismissed/Reversed

The plaintiff was injured while playing line soccer during his regularly scheduled physical education class. The game was played by dividing the class into two teams and arranging them in opposing lines. The ball was centered between the two lines. Each team member was given a number with corresponding numbers being given to each of the players on the other team. The teacher called out one or more numbers and those whose numbers were called ran out and attempted to kick the ball through the opposing team's line.

The plaintiff alleged negligence in the teacher's failure to provide proper instructions for his own safety. On the day of the accident, the plaintiff and another student ran into each other while going for the ball. By the gym teacher's own admission, he did not instruct the boys as to what they should do when two players met at the same time. Expert testimony indicated reasonable care required a demonstration and an explanation that students must play the ball as much as possible with their feet, without charging to the ball to the point of bringing about bodily contact and without pushing and shoving.

The trial court dismissed the case without sending it to the jury. The Supreme Court reversed the dismissal and ordered a new trial. In reversing the dismissal, the Supreme Court held that teachers have an affirmative duty to instruct students in physical education class on reasonable safety precautions to be observed while engaged in class activities. In noting the teacher's admission that he did not instruct the students as to what to do when two players met the ball at the same time, the court held there was sufficient evidence to warrant an examination and determination by the jury.

CHERNEY V. BOARD OF EDUCATION OF THE SCHOOL, DISTRICT OF THE CITY OF WHITE PLAINS, 297 N.Y.S. 2d 668

Issue: Improper Instruction — Student expressed apprehension about this activity

Level of Court: Supreme Court, Appellate Division
Date/State: 1969/New York
Decision: Plaintiff/Reversed and New Trial Granted

The plaintiff, a 17-year-old high school student, was injured while performing a gymnastic exercise known as "jumping the buck." She testified that she had weak wrists, that she told her teacher about this condition and expressed apprehension about engaging in the activity, that her teacher insisted she try it anyway and that as a result of following the teacher's direction, her wrist collapsed causing her to pitch forward and sustain injury. The record showed that the father issued an affidavit 11 months after the injury in which no mention was made of the weak wrists or of the notification of the teacher of such condition. In an accompanying affidavit, the plaintiff stated she has read her father's affidavit and affirmed the facts contained in the affidavit to be true.

The trial court awarded for the plaintiff and the school district appealed. On appeal, the school district claimed the trial court erred in excluding the father's affidavit as evidence. The Supreme Court agreed in finding that the father's statement was admissible as the plaintiff's statement and omission of the father's affidavit constituted an omission by the plaintiff. The court held that its exclusion precluded an evaluation of the omissions related to the weak wrist and notice given to the teacher by the jury and how these omissions might have tainted the plaintiff's version and credibility at the trial. The Supreme Court reversed the trial court decision for the plaintiff and ordered a new trial.

Supervision

More claims are filed against teachers for improper supervision than for any other single reason. The supervisory duties of physical educators are many and require more than mere presence or passive supervision.

While absence from one's class does not constitute negligence as a matter of law, courts have pretty much agreed that it is reasonable to expect teachers to be present in classes which they have been entrusted to teach. Decisions on negligence due to temporary absence from the classroom have gone both ways. In determining whether or not temporary absence from class on the part of the teacher constitutes negligence, the courts generally examine the equipment with which, and the activity in which, the students are working, as well as the age and composition of the class, the teacher's past experience with the class and the reason and duration of the teacher's absence.[6]

In addition to presence in the classroom, the supervisory duties of physical educators generally include passage to and from class, locker room and hall supervision. Case law has made it abundantly clear that teachers are expected to be where assigned on time and to provide active rather than passive supervision.

Active supervision requires more than mere presence. In addition to overseeing student participation in the assigned class activity, physical educators are expected to monitor and keep activities within the skill level of individual students, keep students from participating in dangerous and unsafe activities, enforce class and school rules, keep records and be aware of the health status of individual students, make accommodations for size, age and skill differences when matching students for participation or competition and provide spotting for individual performance in activities of elevated risk, such as gymnastics.

The skill level within the average physical education class varies greatly from student to student. Depending upon the activity, it may or may not be reasonable to expect all students to perform at the same level or even perform the same task. Individualization of instruction not only makes good sense educationally, but also makes for good practice from a liability standpoint. It is one way to help staff effectively monitor individual student progress and to assure that instructional demands are within the skill capability of the individual student.

Students, especially younger ones, do not always display the best judgment in their activity with peers. Physical educators, through their efforts of supervision, need to guard against students participating in dangerous and unsafe activities. In the physical education setting, this becomes especially important in the moments before class actually starts as students begin to assemble in the gymnasium. Horseplay is not a harmless passage of time and these moments before the start of class cannot be "down time" for the teacher. In guarding against unsafe and dangerous activities, physical educators also have to be alert to those students, who for one reason or another, are determined to perform or attempt skills which are beyond their capability.

Reasonable classroom and school-wide rules are a necessity for the efficient and safe operation of school programs. This is especially true for the physical education setting due to the nature of the activities and the equipment and facilities used to carry out the program. Courts have not been very understanding of schools and staff when these established rules have not been enforced. The message sent by the courts is clear. Schools and staff are not free to violate or fail to enforce their own rules. To do so has been held to constitute negligent behavior.

Being aware of the health status of the students in a class is a critical responsibility of physical educators. A number of permanent and temporary conditions can affect a student's ability to fully participate in the activities within a physical education program. It is clearly within the responsibility of the physical educator to be aware of any conditions which might preclude an individual student from fully participating in a given activity as well as being aware of those conditions which might require first aid and prompt attention on the part of the teacher. Physical educators would be well advised to be aware of all students in their classes who have medical conditions such as seizure disorders, bee sting allergies, severe asthma and any other condition which might require prompt action on their

part in a crisis situation. It is also imperative that teachers keep files on students who have brought in medical excuses for temporary exclusion from given activities. Any student who is removed from participation by doctor's note should only be readmitted with the doctor's written permission. Physical educators need to be aware of the reason for any extended absence of a student and, where necessary for health and safety reasons, their return to activity should be gradual and modified. Finally, even though with certain students it is a temptation to do so, excuses from home or from the student should not be dismissed lightly. It is a much safer policy to honor the excuse for that day and follow up with the home in those cases where the teacher suspects a problem other than health. The courts will not view favorably any attempts by physical educators to diagnose possible medical problems.

Although much more so at some grade levels than others, each physical education class is characterized by variances in size, experience and in some cases, age. These variances can be extreme in some instances. It is the responsibility of the physical educator to make accommodations for these variances when matching students up for general participation as well as competition. While this is often attended to in individual activities such as combatives, it is equally neglected in a good number of others. Accommodations should be made whenever there is a foreseeable risk of physical contact of any type.

The courts, while being very clear about the required duty of teachers to provide active supervision, have been equally clear in holding that teachers are not insurers of student safety and that proper supervision does not necessarily require constant and continuous sight of all students by supervising teachers. The nature of the activities as well as the age, capacity, experience and number of participants play a role in determining the extent of supervision required. The following cases are offered as further illustration of how the courts view the critical issue of supervision.

MERKLEY V. PALMYRA-MACEDON CENTRAL SCHOOL DISTRICT, 515 N.Y.S. 2d 932

Issue:	Supervision — Shot put
Level of Court:	Supreme Court, Appellate Division
Date/State:	1987/New York
Decision:	Defendant/Reversed and Remanded

The plaintiff suffered a hand injury in his physical education class when another student dropped a shot on his hand. Suit was filed against the school district and against the student causing the injury, who in turn, filed a cross-claim against the school district charging negligence on the part of the teacher.

Testimony indicated the plaintiff had completed a throw and was in the process of measuring when another student dropped a shot on his hand. It was unclear whether this other student was carrying the shot or had just been handed the shot by someone else. The physical education teacher testified that the shot put was a dangerous activity which required special care. However, he admitted that at the time of the accident he was standing 15 yards away and was also supervising a group of students who were high jumping. He testified that students were instructed not to hand the shot to one another nor carry it around while others were measuring. The trial court granted the school district's motion for summary judgment on both the claim and cross-claim. The lower court's ruling on the cross-claim was appealed.

On appeal, the Supreme Court reversed the dismissal of the cross-claim and ordered it remanded to the trial court for further action. The court noted the question of reasonable conduct on the part of the teacher was a factual question for the jury and should not have been resolved by summary judgment. Specifically, the court noted that the jury should consider whether the teacher, in standing 15 yards away and attempting to supervise two different activities while not enforcing safety rules, acted in a reasonable and prudent manner.

MERCANTEL V. ALLEN PARISH SCHOOL BOARD, 490 So. 2d 1162

Issue:	Improper Supervision — Teacher aide left in charge of class
Level of Court:	State Court of Appeals
Date/State:	1986/Louisiana
Decision:	Plaintiff/Modified and Affirmed

The plaintiff, a 12-year-old seventh grader, fractured his femur during his physical education class while playing a makeshift football game using a paper cup. Evidence at the trial court indicated the physical education teacher was called to the principals office for a conference and a teacher aide was sent to cover the class. During the teacher's absence, the makeshift game, which included tackling, got underway. The accident occurred toward the end of the period and testimony was conflicting as to whether or not the teacher had returned to the class prior to the injury occurring.

The game had lasted somewhere between 10 and 20 minutes. As a result of the accident, the plaintiff spent five and a half weeks in the hospital in traction, and then placed in a cast from the chest down for an additional five to six weeks at home. Once out of the cast, he was confined to a wheelchair for another month and a walker for two months after that. As a result of the injury, the plaintiff suffered a premature closure of the growth centers in his right leg, which is now two and a half inches shorter than his left.

The trial court found the district negligent for failing to properly supervise the class but absolved both the teacher and the teacher aide of all liability. The trial court awarded $200,000 for the plaintiff. The decision was appealed by both the plaintiff and the defendant.

On appeal, the Appellate Court stated the trial court apparently based its finding against the district on negligence for withdrawing the qualified teacher from the class, which the court notes, implies the teacher had not returned to the class prior to the accident. The testimony of the teacher and three of the students was contrary however. The Appellate Court concluded the teacher had returned and ruled the trial court in error for holding the school negligent for failing to provide adequate supervision.

The court held that the teacher aide owed no duty to the students once the teacher had returned. The court went on to state that the game being played by the boys was a normal activity for boys this age and was one probably played at home as well. While saying it hesitated to find that the teacher had breached her duty in this case, the court held that it felt bound to consider the testimony of the teacher who said she considered it her duty to stop rough-housing and that she would have stopped the game had she seen it. Noting the evidence supported the conclusion that the game had gone on for some 10 to 20 minutes, the court ruled the teacher should have noticed the activity within that time. The teacher was held to be five percent negligent.

The Appellate decision left the plaintiff with a $10,000 judgment. However, the plaintiff was left to pay 95 percent of the trial and Appellate Court costs with the defendant responsible for the remaining five percent.

The finding of this court is bizarre at best and certainly should not be relied upon for precedent of any kind. The case does not forward a couple of important considerations for Oregon physical educators however. While some teacher aides hold valid teaching certificates, most do not. Without a valid teaching certificate, they cannot legally assume solo responsibility for classroom instruction. Even where they possess a valid certificate, the regular teacher is the one who has the assigned responsibility for the class and assumes supervisory responsibility over the actions of the aide. Before delegating any responsibility for instruction to an aide, a great deal of communication about activities, progressions, and classroom expectations needs to take place. Second, the appropriateness of an activity needs to be closely scrutinized. What students do at home or away from school in unsupervised situations should not serve as a guide to what is appropriate in an instructional program.

The finding in this case would most probably have been weighted much heavier, if not completely, in favor of the plaintiff if the case had been tried in Oregon. In addition to the legal and prudent use of teacher aides, the court would most likely be asked to examine the appropriateness of the activity and where it fits into the district curriculum, the lack of safety equipment where tackling occurs, and the adequacy of both the instruction and supervision within the class.

WEBER V. YEO, 383 N.W. 2d 230

Issue:	Improper Supervison — Failure to warn parents of risk in swimming class
Level of Court:	State Court of Appeals
Date/State:	1985/Michigan
Decision:	Defendant/Reversed in Part

suit was filed against all three swimming instructors, the school administrators and the school district. The student had dove into the deep end of the pool and failed to resurface. He was pulled from the pool but all attempts to revive him failed. The plaintiff alleged negligence of the instructors and school district for:

1. Improperly removing the victim from the pool;
2. Improperly carrying out resuscitative efforts;
3. Not properly observing each student in the class;
4. Not properly positioning themselves around the pool;
5. Not immediately providing assistance and first aid;
6. Not refraining from activities which would distract their attention from their supervisory responsibilities; and
7. Failing to warn parents of the condition of the pool, the lack of a lifeguard, and the lack of constant supervision of those in the class.

The trial court granted a summary judgment for all of the defendants while holding that their actions were discretionary and therefore cloaked in governmental immunity. The court of appeals ruled that, while the manner of rescue from the pool was discretionary, the resuscitative efforts, instruction, supervision, and failure to warn all constituted ministerial acts for which the defendants did not enjoy immunity. The Appellate Court reversed the summary judgment pertaining to the above ministerial acts, ruling they were proper questions for the jury.

SMITH V. VERNON PARISH SCHOOL BOARD, 442 So. 2d 1319

Issue:	Supervision — Students violate rules pertaining to use of trampoline
Level of Court:	Court of Appeals
Date/State:	1983/Louisiana
Decision:	Defendant/Affirmed

A 15-year-old girl broke an arm and a wrist as a result of a fall on a trampoline during her physical education class. The plaintiff brought suit against the school board, physical education teacher and the insurer of the teacher claiming negligent supervision.

Evidence showed that plaintiff's daughter was a straight A student with four years of instruction in the use of trampolines. On the day of the accident, she and four other girls requested permission to bounce on the trampoline which was stored on the stage in the gymnasium. The physical education teacher helped the girls open the trampoline, watched them for a couple of minutes, then left the stage to talk to another teacher who was teaching a class in the gym. Testimony showed that after the physical education teacher left the stage, the girls sent a friend to make sure the teacher could not see them and then proceeded to have all five bounce on the trampoline at once. After one bounce, all five fell to the trampoline mat and the injury resulted. Testimony was clear that the physical education teacher had a steadfast rule of no more than two people on the trampoline at a time, that this rule had been repeated to the class on numerous occasions, and that the safety hazard of having more than two on at a time was made clear to all members of the class.

The trial court found the physical education teacher free of negligence and the plaintiff's daughter contributorily negligent in causing her own injuries and, therefore, awarded no damages. The plaintiff appealed the trial court decision to the Court of Appeals.

The Court of Appeals reiterated that the duties of teachers required the exercise of reasonable supervision, commensurate with the age of the children and the circumstances, and that a greater degree of care must be exercised only when requiring students to use objects which are inherently dangerous or where it can be reasonably foreseen that an injury or accident will occur. The court affirmed the lower court decision that the teacher, under the circumstances, exercised reasonable care and that the "greater degree of care standard" did not apply in this case because the trampoline was not an inherently dangerous object and had the rules been followed, the activity was not one where it was reasonably foreseeable that an accident might occur. The court stated that the girl "by a conscious and willful violation of the rules, cannot transform a non-risky event into one in which the accident is reasonably foreseeable." Because of finding no negligence on the part of the defendants, the court did not discuss or rule on the issue of contributory negligence on behalf of the plaintiff's daughter.

HARRISON V. MONTGOMERY COUNTY BOARD OF EDUCATION, 456 A. 2d 894

Issue:	Inadequate Supervision — Excessive number of students in gym due to inclement weather
Level of Court:	State Court of Appeals
Date/State:	1983/Maryland
Decision:	Defendant/Affirmed

The plaintiff, a 14-year-old eighth grade student, received injuries resulting in quadripolegia as a result of participating in activities in his physical education class. The trial court record indicated that due to inclement weather, three physical education teachers brought their classes to the gym to participate in a "free exercise day." A total of 63 students occupied the gymnasium.

As a part of the free exercise day, the teachers allowed students to use any of several pieces of athletic equipment in the gym. The plaintiff, along with several other students, practiced tumbling moves on a 6-8 inch thick crash pad. On the last of several attempts to complete a running front flip, the plaintiff lost control, resulting in the permanent injury.

The plaintiff's suit against the school district and all three of the physical education teachers alleged negligence in allowing the plaintiff to engage in a dangerous activity without proper supervision, in failing to properly train the boy before permitting him to engage in the dangerous activity, in failing to provide proper equipment to prevent injury to the plaintiff, and in failing to properly train the defendant teachers.

During the course of the trial, the defendants relied, in part, on the doctrine of contributory negligence as a complete defense to the plaintiff's claim. The plaintiff, on the other hand, sought to have the jury instructed on the doctrine of comparative negligence, contending the notion of contributory negligence was outmoded and overly harsh. The trial court refused the plaintiff's request for a jury instruction on comparative negligence and returned a verdict in favor of all the defendants.

The plaintiff appealed to the Court of Appeals which upheld the lower court decision. The Court of Appeals ruled that the doctrine of contributory negligence would not be judicially abrogated. The decision to abandon contributory negligence in favor of comparative negligence, was held by the court to involve fundamental public policy considerations which should be properly addressed by the state legislature.

With statutory replacement of contributory negligence with comparative fault, Oregon has addressed this problem. In Oregon, the contributory negligence of a plaintiff will not act as a bar to recovery except in those cases where they are more than fifty percent at fault.

RAGNONE V. PORTLAND SCHOOL DISTRICT 1J, 291 Or. 617, 633 P. 2d 1287

Issue:	Improper Supervision — Teacher absent from class
Level of Court:	State Supreme Court
Date/State:	1981/Oregon
Decision:	Defendant/Affirmed/Reversed

The plaintiff, a school cafeteria employee who was on medical leave of absence following major surgery, was invited to and did attend a birthday party for the cafeteria manager at the school. After accompanying the cafeteria manager to the office on business, the plaintiff and cafeteria manager began to return to the kitchen to pick up their coats. They used the same route they had taken previously, but on the way back, the gymnasium was occupied by seventh and eighth grade students playing dodgeball.

Before crossing the floor, the cafeteria manager called out to the students, requesting that they discontinue the game and stand still until the two women reached the kitchen on the other side of the gym. Two-thirds of the way across the floor, a couple of students bumped into the plaintiff, knocking her to the floor and thereby breaking her hip. The plaintiff brought action against the district based on their failure to reasonably supervise students.

Evidence showed that the gym class was unsupervised at the time of the accident and that school district regulations provided that students were not to be left unsupervised. The evidence is uncontested that the plaintiff's injury occurred as a result of being knocked down by students in an unsupervised class. It was also shown that occasions, such as the birthday party attended by the plaintiff, were common and condoned by the administration and that the plaintiff was specifically invited to attend. Based on the evidence, the jury rendered a verdict and judgment for the plaintiff, finding the defendant negligent in failing to properly supervise a physical education class, thereby creating an unreasonable risk of harm which resulted in injury to the plaintiff.

The trial court granted the defendant's motion for judgment notwithstanding the verdict and the Court of Appeals affirmed the trial court's conclusion that the plaintiff, as a matter of law, was not entitled to recover damages. The trial court and Court of Appeals based their ruling on the fact that the plaintiff was a licensee and held that the duty of the defendant was to not injure the plaintiff through affirmative or active negligence. The trial court stated that the failure to maintain "proper control" and "provide proper supervision" are omissions, not acts, and as such are allegations of passive negligence, not active negligence.

The Supreme Court noted that stating duty in terms of active and passive negligence has led to confusion. The court held that the Court of Appeals erroneously equated active negligence with commission and passive negligence with omission. As noted by the court, the use of the term "active negligence" in their prior decisions, referred to the negligent conduct of activities on the land while "passive negligence" referred to hazards arising from the physical condition of the land. The Supreme Court held that

active negligence does not equate with commission and passive negligence does not equate with omission. In light of the fact that the plaintiff was lawfully on the school premises, whether an invitee or a licensee, the defendant owed a duty to exercise reasonable care in the conduct of its activities. The decision of the Court of Appeals was reversed and the case remanded to trial court for reinstatement of the judgment for the plaintiff.

KERSEY V. HARBIN, 591 S.W. 2d 745

Issue:	Inadequate Supervision — Teacher asked to cover two classes at same time
Level of Court:	Court of Appeals
Date/State:	1979/Missouri
Decision:	Defendant/Reversed and Remanded

The plaintiff's son, Daniel, then an eighth grader, became involved in a scuffle during passage from the locker room to the gym. Another student, Steve, stepped on the heels of Daniel's shoes as they headed to the gym. Daniel retaliated by elbowing Steve in the genitals which prompted Steve to pick Daniel up. Daniel, subsequently, either fell or was dropped to the floor. Daniel requested and was given permission to see the nurse. Finding no apparent sign of extreme injury, the nurse permitted Daniel to return to class. When he started to feel worse, Daniel returned to the nurse's office and his parents were summoned. He was taken to his physician and died shortly after from a massive cerebral hemorrhage resulting from a skull fracture. The plaintiffs brought suit against the school superintendent, principal, physical education teachers and the nurse.

The evidence showed that Daniel's regular teacher was absent the day of the accident due to a workshop. The principal had arranged for the other physical education teacher, who shared the same facility, to cover both classes, which was agreeable to both teachers involved. There were between 20-25 students in each of the two classes. The physical education teacher left in charge departed from his normal routine on the day of the accident. His normal practice was to stay in the locker room until everybody was dressed in order to prevent horseplay. On the day of the accident, the teacher instructed his class to proceed to the gym after getting dressed but told Daniel's class to remain in the locker room until everyone was dressed. He then proceeded to join his class in the gym. During the time Daniel's class was unsupervised, the scuffle and resulting injury occurred. Evidence indicated that Steve had been in trouble before.

The defendants filed and received a summary judgment from the trial court. The summary judgment was granted on a number of technical grounds as well as the defendants' claims to governmental immunity. The Appellate Court noted that the rules governing summary judgment against a plaintiff in a tort action state that, "In no case shall a summary judgment be rendered on issues trialable by jury...unless the prevailing party is shown by unassailable proof to be entitled thereto as a matter of law." The Court of Appeals rejected the defendants' claim to immunity and held that the defendants owed a supervisory duty of ordinary care. The Court of Appeals reversed the trial judgment and remanded the case for trial with at least two questions to be answered by the jury:

1. Did the superintendent, principal or teachers have actual or constructive knowledge of the quarrelsome and disruptive nature of the student causing the injuries?
2. Given such knowledge, did the defendants take appropriate measures to prevent such injuries by exercising ordinary care and by supervising students?

Although not provided with the analysis and answers to those questions in this case, the factual situations arising in this case should certainly alert Oregon school administrators, physical educators and nurses to a number of policy considerations regarding locker room supervision and the covering of classes for teachers who are absent.

COOK V. BENNETT, 288 N.W. 2d 609

Issue:	Improper Supervision — Allowing students to play a hazardous game
Level of Court:	Court of Appeals
Date/State:	1979/Michigan
Decision:	Defendant/Affirmed in Part, Reversed in Part

Plaintiffs, on behalf of their son, filed suit against the school principal and classroom teacher for injuries received by their elementary school son in the game "Kill" being played during a recess period. The game "Kill" consisted of one person having possession of a football while all other participants attempted to gain possession by tackling the person with the ball and wrestling it away.

Testimony indicated the game in question was ultra hazardous yet was allowed to be played on numerous occasions by both the teacher and the principal who observed it being played but made no attempt to stop it. On the day of the injury, the teacher was on leave of absence and was replaced by a substitute. The teacher requested and received summary judgment in his favor stating that due to his absence, he owed no duty to supervise. The court issued summary judgment in favor of the principal as well on the basis of governmental immunity.

On appeal, the Court of Appeals upheld the summary judgment for the teacher and reversed the judgment for the principal. The Appellate Court ruled that the trial court erred in assigning governmental immunity to the actions of the principal. The court ruled that the principal's duty to supervise staff and students fell within her ministerial rather than discretionary powers. As a ministerial function, liability of the principal for supervision exists under Michigan law.

This case raises a potentially important point for Oregon physical educators. The court, in this case, ruled that a teacher owes a duty of reasonable care over students in his or her charge and that this duty is coterminous with the teacher's presence at school as supervision implies oversight. It could be a mistake to assume that a teacher's absence automatically relieves the teacher of all duty. While certainly true, given the above set of facts, other factual circumstances could make the teacher's duty while absent an arguable point. The fact that teachers have a professional duty, and in many districts, a duty imposed by board policy, to prepare lesson plans for the substitute, seems to imply that some duty remains. This duty might conceivably be linked to proper instruction and progressions as well as alerting substitutes to students with particular health problems and those students with a propensity toward disruption. Substitutes must be able to rely on being in a position of anticipating and foreseeing potential problems. Without adequate plans left by the regular teacher, this could become impossible in many cir-

cumstances. Given Oregon's use of the substantial factor standard rather than proximate cause, Oregon teachers would be well advised to carry out their duty to plan well for their absences.

BRAHATCEK V. MILLARD SCHOOL DISTRICT No. 17, 273 N.W. 2d 680

Issue:	Inadequate Supervision — Student absent on day of safety instruction in golf class
Level of Court:	State Supreme Court
Date/State:	1979/Nebraska
Decision:	Plaintiff/Affirmed

A 14-year-old boy was fatally injured during a physical education class when a classmate accidentally struck him with a golf club. The evidence showed that the plaintiff's son was absent on the first day of the unit when the rules of safety were discussed. There were two teachers assigned to the combined class of boys and girls, with a total of 57 students enrolled. On the first day, in addition to safety instruction, students were instructed on the golf grip, stance and swing.

One of the regular teachers was absent the day of the accident, the second day of the unit. His place was taken by a student teacher who had been at the school for five weeks and had assisted with 4-6 golf classes on the previous two days. The regular teacher present repeated the instructions and divided the class into small groups to practice the grip and swing.

David had never swung a golf club and when his turn came, he asked for help. A classmate volunteered to demonstrate the proper stance and grip and to demonstrate a few practice swings. The plaintiff's son moved closer to the boy demonstrating, who was unaware anyone was standing near him. While observing a swing, the plaintiff's son was struck in the head by the golf club. The blow rendered him unconscious and he died two days later without regaining consciousness.

At the time of the accident, the student teacher was working with an individual in another group and the regular female instructor was supervising a group of girls. She testified that, had she known that the student teacher was devoting all of his attention to one boy, she would have watched the entire class.

Testimony showed that on Monday, the first day of instruction, one person from each group would walk up to their respective mats. The two regular instructors would see that only one individual was at each mat when the students were to commence their swings. They would walk back and forth behind the students who were hitting, offering individual instruction and at the same time making sure no other students were up and in the way. On Tuesday, the second day, this procedure was not followed. Testimony indicated there was a fair amount of milling around by students. Had the same procedures been followed, the dilemma of the deceased would have been observed and students would not have been assisting one another. The student teacher testified that he had no lesson plan because the regular teacher was going to handle that. He further stated he gave no oral instructions to any of the students as a whole.

The parents of the deceased based their wrongful death suit against the district on negligent supervision. The defendants claimed that the action of the fellow students was an intervening cause of the accident and that they were thereby relieved of any negligence. In addition, they claimed the deceased was contributorily negligent.

The trial court ruled the district was negligent in its supervision of the golf class and that there was no evidence to support a claim of contributory negligence on the part of the deceased. The court held that the deceased could not have appreciated the danger of the situation as he had never played or become familiar with the sport and had received absolutely no instruction due, in part, to his absence the previous class period. The court held that the district should have been able to foresee the danger that could result from an activity such as this one, when dealing with a bunch of inexperienced ninth graders. The court ruled the lack of proper supervision was the proximate cause of the student's death. The Supreme Court upheld the $53,470 in damages awarded by the trial court.

WARD V. NEWFIELD CENTRAL SCHOOL DISTRICT No. 1, 412 N.Y.S. 2d 57

Issue:	Inadequate Supervision -- Failure to enforce safety rules
Level of Court:	Supreme Court, Appellate Division
Date/State:	1978/New York
Decision:	Dismissed/Reversed

The plaintiff was injured as a result of falling from a playground "jungle gym" during a supervised school recess. The record indicated the plaintiff was wearing mittens at the time which was a violation of school regulations which prohibited children from playing on that apparatus while wearing mittens or gloves. The trial court granted the defendant's motion to dismiss the case.

The Supreme Court ruled that it was an error for the trial court to dismiss the complaint. In so ruling, the Supreme Court held that the question of whether the failure of the district, through adequate supervision, to enforce the above playground regulation constituted negligence and was the proximate cause of the plaintiff's injuries, was a question for the jury. The Supreme Court ordered a new trial.

CLARK V. FURCH, 567 S.W. 2d 457

Issue:	Supervision — Free time on playground
Level of Court:	State Court of Appeals
Date/State:	1978/Missouri
Decision:	Defendant/Affirmed

A six-year-old kindergarten student broke his arm during his physical education class as a result of swinging by a jump rope tied to a jungle gym. The parents brought suit, on behalf of their son, against the physical education teacher alleging negligent supervision.

The evidence showed that the plaintiff and the other 21 members of his kindergarten physical education class had been jumping rope on the playground pursuant to the teacher's instructions. Near the end of the 20-minute class period, the students were given free time to play on the swings, slide and jungle gym. The plaintiff, still in possession of the jump rope, climbed to the top of the jungle gym, tied the rope to the top bar and started to swing down. As a result, he fell and broke his arm.

Testimony indicated the plaintiff had been taught for almost an entire semester about the use of the playground equipment and was aware that his action was dangerous. At the time the plaintiff climbed up the apparatus, the teacher was looking in a direction away from him. The evidence gave no indication of

how long it took the boy to go from the ground to the top of the apparatus or how long he was there before he fell. No evidence suggested the teacher was inattentive or saw the boy climbing the apparatus with the rope in his hand.

The trial court entered judgment in favor of the teacher and the plaintiff appealed. On appeal, the plaintiff challenged the admission of evidence and giving of an instruction to the jury on contributory negligence, as a six-year-old is incapable of contributory negligence as a matter of law. The Court of Appeals upheld the finding of the lower court ruling that no evidence of negligence was apparent. The court stated the teacher's duty was to exercise ordinary care in supervising children. The teacher is not an insurer of their safety. The court held that ordinary care does not require having each of the 22 six-year-olds constantly and continuously in sight. The court stated there was no indication that the teacher saw the boy in a place of danger or acting dangerously and failed to act, therefore, there was an insufficient basis for liability.

KINGSLEY V. INDEPENDENT SCHOOL DISTRICT NO. 2, 251 N.W. 2d 634

Issue:	Improper Supervision — Failure to take corrective measures in maintaining school discipline
Level of Court:	State Supreme Court
Date/State:	1977/Minnesota
Decision:	Plaintiff/Affirmed

The plaintiff, then a 17-year-old junior, was injured when she climbed up a locker to retrieve her coat which someone had thrown on top. Her class ring and finger got caught on the metal portion of the locker top as she attempted to jump down. All the skin and underlying tissues from the base of the finger to the top were lost. The finger was completely "denuded" leaving only muscle and bone.

Testimony at the trial court showed that five or six units of 16 small lockers were put together in a manner so as to form a coat rack. The lockers involved were near the principal's office and across from the library. The injured girl testified that on each of the five days prior to the accident, someone had removed her coat from the hanger and thrown it on top of the lockers. She, as well as her mother, had reported this to the principal. There were school regulations against keeping objects on top of the lockers and the principal and superintendent testified they patrolled the halls occasionally to enforce the regulations. The school custodian testified that a couple of days before the trial, he inspected the locker and found a protrusion of metal of about 1/16 of an inch in the top corner of the locker as well as a depression in the angle iron in which he caught his finger while passing over it. There was also evidence of dust mops being snagged in the same spot.

The trial court found the school district negligent in the supervision of students and in the maintenance of the school and the district appealed. The Supreme Court found that there was sufficient evidence of negligent supervision in light of testimony that removing coats from hangers and throwing them around had taken place some time prior to the accident, that there were insufficient numbers of hangers available, and that no corrective measures were taken after the plaintiff and her mother both complained to the principal. On appeal, the district attempted to have their negligence in maintaining the school reversed. Although they conceded they owed a duty to maintain the premises and equipment and to protect the students from unreasonable risk of harm due to the premises and equipment, they maintained there was no evidence to support what portion of the locker caused the injury or whether the dangerous condition of the locker even existed at the time of the accident. This totally overlooked the graphic testimony of another student who said that he went back to the locker after the accident and picked what remained of the plaintiff's finger off of the locker. The Supreme Court upheld the finding of negligence on both counts.

While not a physical education case. this case has real implications for physical educators as they are responsible for supervising locker rooms where the same locker maintenance problems and tendency of students to throw others' belongings exist. The court has clearly communicated that those who are in charge of these facilities will be responsible for not only maintaining the facility but for dealing with behaviors and supervising problems promptly when they arise.

TASHIAN V. NORTH COLONIE CENTRAL SCHOOL DISTRICT NO. 5, 375 N.Y.S. 2d 467

Issue:	Inadequate Supervision — Failure to enforce school rules
Level of Court:	State Supreme Court, Appellate Division
Date/State:	1975/New York
Decision:	Plaintiff/Affirmed

A third grade student was injured during a softball game at lunch recess. He was hit on the nose by a baseball bat being swung by a fourth grade student. The student was given first aid and x-rays disclosed no broken bones. About four weeks after sustaining the injury, the student had an epileptic seizure followed by recurrent seizures thereafter. The boy required hospitalization and continued use of anti-convulsant medication.

The boy's parents brought suit alleging negligence in supervision on the part of the school district. The school regulations prohibited third graders from participating in softball games, although it was permissible for fourth graders to do so. Two supervisors were on duty that day but neither saw the accident. The trial court awarded $57,100 in damages and the district appealed.

In upholding the trial court decision in favor of the plaintiff, the Supreme Court held that there was an unqualified duty on the part of school districts to provide supervision of playground activities. In that there were regulations prohibiting third graders from playing softball at noon, the court ruled that the district's failure to enforce its own rules constituted negligence and this negligence was the legal cause of the injury to the plaintiff's son.

GRANT V. LAKE OSWEGO SCHOOL DISTRICT NO. 7, 515 P. 2d 947

Issue:	Inadequate Supervision — Springboard
Level of Court:	State Court of Appeals
Date/State:	1973/Oregon
Decision:	Defendant/Reversed

The plaintiff, a 12-year-old seventh grader, was injured in a physical education class when she jumped off a springboard and struck her head on a low doorway beam. The plaintiff brought suit against the physical education teacher and the school district, alleging negligence in placing a springboard under a low ceiling and doorway, failing to turn the springboard on its side or otherwise making it harmless, failing to warn students of the danger of hitting the low ceiling or doorway and in failing to supervise the students in the use of dangerous equipment. The defendants claim the plaintiff was contributorily negligent in jumping on the board without permission at a time and place when and where it was not supposed to be used, in using the springboard with too much force and in failing to maintain a proper lookout.

On the day of the accident, the plaintiff and other girls in the class were given their first day of instruction in a gymnastics unit. This included a demonstration and instruction on the use of the springboard. The springboard was in the center of the activity room which had a high ceiling. The plaintiff testified that all the girls were doing was jumping off the board and landing on their feet. The plaintiff repeated this task nearly twenty times before the instructor asked the plaintiff and three other girls to take the springboard from the center of the room over to an entrance alcove where the springboard was normally stored and to place it on its side. This area had a low ceiling and was separated from the activity room by a doorway with a seven foot clearance. The students took the springboard to the alcove and left it upright and pointed toward the activity room just behind the doorway. When the teacher's attention turned elsewhere the plaintiff attempted to spring into the activity room by jumping off the springboard. She sustained a head injury when she struck the beam above the door and fell.

The trial court denied the defendant's motion for a directed verdict and the jury found in favor of the plaintiff, awarding $10,500 in damages. Upon a motion by the defense, the judge ordered a judgment notwithstanding the verdict on the grounds that his denial of the motion for a directed verdict was improper. In so ruling, the trial court judge stated the evidence was not sufficient to support any of the plaintiff's allegations of negligence and that the plaintiff was contributorily negligent as a matter of law. The court also stated that the evidence failed to support at least one of the plaintiff's allegations of negligence and, therefore, the jury should not have been allowed to consider all four of the plaintiff's specifications for negligence.

On appeal, the judgment notwithstanding the verdict issued by the trial court was reversed and the jury verdict reinstated. In reversing the trial court judgment, the Court of Appeals ruled that:

1. The child was not barred from recovery by contributory negligence as a matter of law. Her contributory negligence, if any, was in her failure to appreciate the danger of her act, not in her failure to perceive the source of her danger. "She knew the beam was there but jumped anyway, thinking she would miss it. If she knew it was dangerous and proceeded anyway, then she would be guilty of negligence."
2. The evidence was sufficient for jury consideration on all four counts of negligence as the facts are in dispute and the foreseeability of harm in this case was evident.

Since this case was decided, contributory negligence has been replaced by the Oregon Comparative Fault statute. Today, given the same circumstances and a finding of contributory negligence on the part of the plaintiff, recovery would not be barred as a matter of law, unless the contributory negligence of the plaintiff was greater than that of the defendant.

SUMMERS V. MILWAUKIE UNION HIGH SCHOOL DISTRICT NO. 5, 481 P. 2d 369

Issue:	Improper Supervision — Failure to furnish doctor with list of exercises performed in class
Level of Court:	State Court of Appeals
Date/State:	1971/Oregon
Decision:	Plaintiff/Affirmed

The plaintiff was injured while performing a springboard exercise in her physical education class. The evidence showed that, as a freshman, the plaintiff was excused from all physical education for the last half of the year by a doctor's note because of a back condition. During her sophomore year, pursuant to a doctor's note, she was excused from doing sit-ups due to a back disability. These doctor's excuses were part of the permanent records on the plaintiff maintained by the district.

The plaintiff complained of back pain during November and December of her junior year and her mother asked the doctor for advice concerning the back pain. The doctor requested a list of the exercises the plaintiff was required to perform during physical education. The mother relayed this request to the counselor at school on at least four separate occasions.

On the day of the accident, the plaintiff was required to do a springboard exercise which required her to jump from the springboard, touch her toes in the air and land on her feet. As a result of doing the exercise, the plaintiff lost her balance after landing, fell backward and suffered a compression fracture of two vertebrae. The plaintiff's doctor testified that she should not have been doing the springboard exercise and he would have recommended that she not participate in that exercise had he known she was doing so.

There was no dispute that the girl was required to perform the exercise or that the girl had a previous infirm back condition. The district argued that there was no evidence that they knew or should have known that the previous back condition created a hazard of injury to the plaintiff. In upholding the trial court judgment for the plaintiff, the Court of Appeals held that, had it not been for the district's failure to furnish the requested list of exercises, the district would have been advised of the hazard by an excuse from the doctor. The court ruled that a person is bound not only by what he knows but also by what he might have known through the exercise of ordinary diligence. The court held that the injury to the plaintiff resulting from the springboard exercise was, under all the circumstances, reasonably foreseeable.

SHEEHAN V. ST. PETER'S CATHOLIC SCHOOL, 188 N.W. 2d 868

Issue:	Improper Supervision — Teacher absent from playground
Level of Court:	State Supreme Court
Date/State:	1971/Minnesota
Decision:	Plaintiff/Affirmed

The plaintiff, an eighth grade student, was one of 20 girls escorted to an athletic field by their teacher for morning recess. They were directed to sit on a log along the third base line of a baseball field being used by eighth grade boys. The teacher returned to the school building and did not return until after the accident.

Testimony indicated that about five minutes after the teacher left, some of the boys who were waiting to bat began throwing pebbles at the girls. This lasted three to four minutes despite the protests of the girls. As a result of the pebble throwing, the plaintiff was struck in the eye and ended up losing sight in that eye. The plaintiff filed suit on the basis of inadequate supervision and the trial court awarded for the plaintiff. The defendant appealed, asserting a defense of contributory negligence.

The Supreme Court ruled the assertion of contributory negligence at the time of the appeal was improper as no claim to this effect was made during the two years which passed from the accident up to and including the trial from which the appeal originated. In upholding the trial court's finding of negligence for improper supervision, the court ruled that while the defendant is not an insurer of student safety, she is required to exercise reasonable and ordinary care in supervision of students. The Court noted that the courts have not required constant and continuous supervision of every student and have not found defendants negligent, in the temporary absence of supervision, where the inflicted injuries were sudden and without warning and where they occurred in such a manner that supervision would not have prevented them. The Supreme Court held that this was not the case here, as the pebble throwing occurred over a 3-4 minute period of time before the injury was inflicted and the presence of the teacher presumably would have put an end to the activity. The Supreme Court upheld the finding for the plaintiff.

DAILEY V. LOS ANGELES UNIFIED SCHOOL DISTRICT, 470 P. 2d 360

Issue:	Inadequate Supervision — Failure to actively supervise in assigned area of responsibility
Level of Court:	State Supreme Court
Date/State:	1970/California
Decision:	Defendant/Affirmed/Reversed

Parents of a deceased high school student brought a wrongful death suit against two physical education teachers and the school district as a result of a "slapboxing" match which occurred outside of the gym during the lunch hour. The trial court directed a verdict in favor of the teachers and school district and the directed verdict was affirmed by the Appellate Court.

Testimony showed that the two boys approached the gym during their lunch hour, as their next class was physical education. They stopped outside of the gym and engaged in "slapboxing," a form of boxing using open hands rather than fists. The activity was in fun. The plaintiffs' son fell backward during the course of the activity and fractured his skull. He died a few hours later.

The parents claimed the school was negligent in its supervision during the lunch hour. Testimony indicated that according to the building plan, the physical education department had responsibility for the general supervision of the gym area. The department chair, one of the defendants, testified that although the physical education department had supervision duties in the gym area, he had never been told to have a duty roster assigning particular teachers supervision duty on particular days. He testified there was a teacher on duty in the gym office on the day of the accident. The teacher on duty was eating lunch and doing lesson plans. He was not in a position to observe the accident.

The trial court issued a directed verdict for the defendants which required that the evidence, in the light most favorable to the plaintiff, be insufficient to draw any inference of negligence in support of the plaintiff's claims. The Court of Appeals upheld the directed verdict. On appeal, the Supreme Court first looked at the duty owed by school districts to students on school grounds. They held that California law had long imposed a duty to supervise the conduct of children on school grounds at all times and to enforce the rules and regulations designed for their protection. The court noted that lack of supervision or ineffective supervision under California law could constitute a lack of ordinary care on the part of those responsible for supervision.

The court further noted that the student's death as a result of his own conduct would not preclude a finding of negligence on the part of the school district, as adolescents are not adults and should not be expected to exercise the same degree of discretion and judgment as an adult.

The court ruled that, in light of the building plan assigning general supervision responsibility to the physical education department for the gym area, there was evidence that the department had neglected to develop a supervision duty schedule. There was evidence that the department head had failed to instruct his subordinates on what was expected of them relative to their supervision responsibilities. There was also evidence that the teacher on duty the day of the accident did not supervise at all but rather ate lunch, talked on the phone and did lesson plans. The court noted that neither of the two teachers named as defendants heard or saw anything the day of the accident despite the testimony indicating the activity attracted a crowd of 20-30 people.

Based on the above, the Supreme Court held that there was sufficient evidence from which a jury could conclude that those charged with supervision were negligent in exercising due care in the performance of their duties. Therefore, the trial court improperly directed a verdict for the defendants. The Supreme Court reversed the directed verdict.

CIRILLO V. CITY OF MILWAUKIE, 150 N.W. 2d 460

Issue:	Inadequate Supervision — Teacher absent from gym
Level of Court:	State Supreme Court
Date/State:	1967/Wisconsin
Decision:	Defendant/Reversed

The plaintiff, then a 14-year-old high school student, was injured during a game of keep-away in his physical education class while the physical education teacher was absent. Suit was brought against the defendant alleging negligence in failing to provide rules to guide the class, attempting to teach an excessive number of students and absenting himself from the gymnasium.

Trial court evidence showed that after taking roll, the teacher threw out some basketballs and told the 49 boys in the class to shoot around. The teacher left the class unsupervised at this

point. Before long, a game of keep-away developed which became increasingly rowdy with running, pushing and tripping occurring all over the floor. It was during this "game" that the plaintiff fell and sustained injury. The teacher was absent from the class for 25 minutes.

The defendant denied negligence and alleged contributory negligence on the part of the plaintiff for knowingly participating in the rowdy game in the gym. The defendant asked for and received a summary judgment and the plaintiff appealed.

The Supreme Court noted that the state summary judgment statute only allowed summary judgment for a defendant if the defendant's affidavit presents evidentiary facts which show that his defense is sufficient to defeat the plaintiff. It further stated that, as a drastic remedy, summary judgment should only be used where there is no substantial issue of fact or inferences to be drawn from the facts. The Supreme Court concluded there were substantial issues of fact in question and as such, were proper for jury consideration. The court held that a jury might find negligence in the teacher's extended absence from the class. The court said, "It does not seem inherently unreasonable to expect that teachers will be present in classes which they are entrusted to teach." The court was careful to note, however, that the absence of a teacher does not constitute negligence as a matter of law. The teacher's duty is to use reasonable care. In determining whether a teacher's absence represents a breach of reasonable care, the court suggests a number of factors may bear on this determination, including:

1. The instrumentalities with which the students are working;
2. The age and composition of the class;
3. Past experience with the class; and
4. The reason and duration of the teacher's absence.

The court ruled that only in rare cases is it permissible for a court to hold as a matter of law that the negligence of one party constitutes as least 50 percent of the total, that the apportionment of negligence is almost always for the jury. The court recognized that the age of the respective parties were an important consideration when apportioning negligence.

The defendant claimed to permit recovery for the plaintiff would be to "constitute the defendant an insurer of the safety of Milwaukie school children." This belief was upheld by the trial court. The Supreme Court explained that while it recognized that a teacher was neither immune for liability nor an insurer of student safety, he/she was liable for failure to use reasonable care and to permit recovery where a defendant was negligent was not equivalent to rendering the defendant an insurer of student safety. The Supreme Court reversed the summary judgment for the defendants.

FRANK V. ORLEANS PARISH SCHOOL BOARD, 195 So. 2d 451

Issue:	Supervision — Excessive force in discipline
Level of Court:	State Court of Appeals
Date/State:	1967/Louisiana
Decision:	Plaintiff/Affirmed

The plaintiff brought suit against her son's physical education teacher and the school district as a result of an alleged assault by the teacher which left the boy with a fractured arm.

The teacher had the class in two lines for a basketball lay-up drill. When the plaintiff's son failed to conform to the directions he was ordered to the sidelines. He came back onto the floor as a ball rolled toward him and was again ordered to the sidelines by the teacher. The boy later came onto the floor a third time, at which time he was reprimanded by the teacher. From this point, the testimony at the trial court indicated two irreconcilable versions of how the injury occurred.

The teacher testified he escorted the boy to the sidelines and after arriving there, the boy attempted to strike him, at which time he grabbed the boy's arms to restrain him. He then claimed the boy struggled to get free and as a result, fell to the floor and injured his arm. The boy claimed the teacher chased him around the sidelines and when he caught up with him, the teacher lifted him off the ground, shook him against some folded bleachers and then dropped him to the floor, at which time he injured his arm.

The court took notice that the teacher was 34 years old, stood 5'8" and weighed 230 pounds. The boy was 14-years-old and stood 4'9" and weighed 101 pounds. The trial court found for the plaintiff and awarded $8,500 in damages. The Court of Appeals affirmed the trial court stating, "It taxes our credulity to believe that Henderson, in good faith, actually believed that his physical safety was endangered by a blow from Reginald." The court ruled that the teacher went beyond that degree of physical effort necessary to either protect himself or to discipline the boy and that this lack of judgment on the part of the teacher in disciplining and thereby injuring the student, subjects both the teacher and the district to liability. The court dismissed the motion of the school district, claiming that if negligent, the teacher was acting outside of the scope of his employment.

BROOKS V. BOARD OF EDUCATION OF THE CITY OF NEW YORK, 189 N.E. 497

Issue:	Supervision — Failure to properly match students for competition
Level of Court:	State Court of Appeals
Date/State:	1963/New York
Decision:	Plaintiff/Affirmed/Affirmed

The plaintiff was injured in a lead-up game to soccer, known as line soccer. The class was divided into two teams with one on one side of the gymnasium and the other on the opposite side. The boys on each side were randomly given a number. When their number was called, the students would run to the center and attempt to kick the ball through the other team's line. When the plaintiff's number was called he encountered the boy from the other side whose number corresponded with his. The other boy was much taller and heavier than the plaintiff. As a result of this encounter, the plaintiff was kicked in the head and suffered a cerebral concussion and was hospitalized for four days.

The trial court awarded $2,500 in damages for the plaintiff in ruling the defendant negligent in supervising the game as a result of making no attempt to match the boys according to height and weight. The defendant appealed, claiming the plaintiff assumed the risk. The Supreme Court, Appellate Division, ruled the defendant did not request such a ruling at the trial court and was not entitled to do so here. The Supreme Court affirmed the trial court's finding of a prima facie case of negligence. The New York Court of Appeals affirmed the decision of both the lower court.

Equipment, Grounds and Facilities

Physical educators owe a duty to their students of conducting their classes in a safe learning environment. In providing a safe learning environment, a number of responsibilities come into existence.

Physical educators must share in the responsibility to check, on a regular basis, the grounds, facilities and equipment used in delivering the physical education program to students. Any dangerous condition found to exist within the grounds or facilities should be reported immediately and measures taken to correct the condition before allowing the participation of students in or on them. The mere reporting of a dangerous condition is not enough to relieve the physical educator of liability in the event of a mishap. It would be a serious mistake to continue to use an area or facility while waiting for corrective measures to be taken. If the condition represents a significant risk to the safety of students, given the activity in which they are engaged, the instructor would be well advised to either alter the activity or make arrangement to use or share another facility. Likewise, worn, broken or defective equipment should be either repaired or replaced immediately. Continued use of such equipment while awaiting repair or replacement would be a serious error and one hard to justify before a court.

A number of activities including soccer, softball, floor hockey, wrestling and gymnastics require some degree of safety equipment in order to assure reasonably safe participation by all students. Age, skill and experience will all play a role in determining the level of risk and the type and amount of safety equipment needed. Lack of funds would be a poor argument to use in justifying the failure to supply students with such equipment.

While product liability has become a major concern for manufacturers of athletic and physical education equipment, it also has some implications for physical educators at the building level. As suppliers of equipment to students, school districts and teachers need to take care in not supplying equipment which is dangerous for its intended use. It is going to become increasingly important that those responsible for ordering equipment pay attention to the design of that equipment and the track record and reputation of the companies from whom they order. This is a relatively new area of concern for people at the building level, but has the potential for real risk.

An attractive nuisance is an instrumentality, agency or condition on one's premises which may be reasonably apprehended to be a source of danger to children of tender years and which may be reasonably expected to attract them to the premises.[7] Some of the equipment used in physical education programs could very conceivably fall into the category of attractive nuisances. This is especially true today with the advance of the community school movement and the increased use of school facilities by outside youth groups. Gymnastics apparatus, hurdles and portable goals are examples of apparatus which could fall into the category of attractive nuisances, as they are often left out rather than stored during their seasons of use. Physical educators, and their school districts, would be prudent to secure this equipment in some manner so as to make it either inaccessible or unusable by children visiting the premises. The following courts have dealt with the various issues relating to equipment, grounds and facilities and offer a number of policy implications for physical educators.

GORE V. BETHLEHEM AREA SCHOOL DISTRICT, 537 A. 2d 913

Issue:	Equipment — Portable chinning bar
Level of Court:	Commonwealth Court of Pennsylvania
Date/State:	1988/Pennsylvania
Decision:	Defendant/Affirmed

The plaintiff, an elementary student, was injured when a removable chin-up bar, located in a doorway between the gym and equipment room, became dislodged and struck the plaintiff in the mouth. The trial court granted summary judgment for the school district, dismissing the action on the grounds of school district immunity. In Pennsylvania, school districts are immune from liability for instruction and supervision. Immunity of school districts is only denied when there is negligence allowing school property to be unsafe for activities for which it is regularly used. The court agreed with the district that the "portable chinning bar" did not constitute real property and immunity was, therefore, granted.

No discussion of the safety of equipment, instruction, and supervision took place because of the decision on immunity. This case, nonetheless, sounds a warning for Oregon physical educators. Portable equipment such as this is very common in Oregon schools, especially elementary schools where space is at a premium. In the same manner as gymnastics equipment and universal gyms, equipment such as portable chinning bars need to be checked regularly and students need to be instructed on how to check the equipment themselves to insure that it is secure and safe for use. Closer supervision of activities often becomes necessary when using any equipment of this type which are not permanent fixtures.

AUSMUS V. BOARD OF EDUCATION, CITY OF CHICAGO, 508 N.E. 2d 298

Issue:	Failure to Provide Safe Equipment — Too large of a bat and lack of catchers gear
Level of Court:	Appellate County of Illinois
Date/State:	1987/Illinois
Decision:	Defendant/Reversed and Remanded

The plaintiff, a third grade elementary student, was injured when struck in the face by a wooden bat swung by a female classmate during a softball game in their physical education class. Suit was filed against the school board and the physical education teacher. The plaintiff charged negligence for providing unsafe equipment by:

1. Furnishing class members with a regulation size and weight wooden bat which was too heavy to be safely held and swung by children of the age and experience of the plaintiff;
2. Failing to provide less dangerous equipment such as a plastic bat, lighter wooden bat, an aluminum bat;
3. Failing to provide a helmet or face mask to protect the child acting as the catcher;
4. Failing to provide a backstop or other markings to indicate the areas within and behind which were safe for batting and catching; and
5. Failing to provide adequate medical and first aid equipment for use by school personnel in attending to injuries.

The trial court granted the board's motion for dismissal on the grounds that Illinois state law confers upon districts and teachers the status of "in loco parentis." This status affords school districts and teachers the same status as parents and like parents, makes them liable only for willful and wanton misconduct and not mere negligence. The plaintiff appealed.

On appeal, the Appellate Court of Illinois reversed the dismissal and remanded the case for jury consideration. In so ruling, the court held that the "in loco parentis immunity" of school districts and its employees, does not extend to the failure to provide safe equipment and that failure to furnish any equipment does not absolve any liability for failure to provide effective equipment. The court held that school districts have an affirmative duty to furnish equipment to prevent serious injuries.

ALBAN V. BOARD OF EDUCATION OF HARFORD COUNTY, 494 A. 2d 745

Issue:	Improper placement and safeguards for handicapped student in regular class
Level of Court:	State Court of Appeals
Date/State:	1985/Maryland
Decision:	Defendant/Affirmed

The plaintiff, an eighth grade mentally handicapped student enrolled in a regular physical education class, received serious injuries when she attempted a maneuver on the Swedish box. The plaintiff's IEP call for placement in the regular physical education program. The parents of the injured student filed suit claiming the district was negligent in placing their daughter in the regular physical education class with no special safeguards to protect her from injury.

The trial court awarded a directed verdict for both the school district and the teacher. The court held that the IEP was designed to provide a mix of special education and regular classes and that, once the IEP had been formulated and approved by the parents, the student was to be treated as a normal participant in the eighth grade physical education class. The court further held that absent the exhaustion of administrative remedies (i.e. a due process hearing) provides by statute for challenging placements, the questions of placement could not properly come before the court.

In its ruling, the trial court noted that the plaintiff, once part of the regular class, enjoyed the same remedies for injury sustained in class as did the rest of the students in class. The district and its teacher were obligated to meet the standard of reasonable care in the conduct of the physical education class. In their action, however, the parents only charged negligent classroom placement and not negligent conduct of the class; therefore, the Court of Appeals upheld the lower court ruling for the defendants.

Oregon physical educators would be well advised to keep all activities within the ability of individual students. Individualized instruction for all students, not just those on specific IEPs, is sound educational practice. If physical educators teach to the masses and have the same expectations for everyone in a given class, they leave themselves vulnerable in the event of an accident. While the actual placement of the above student was improperly before the court, the appropriateness of a particular exercise for the individual student, and the standard of reasonable care on the part of the teacher, could certainly have been challenged.

MCINNIS V. TOWN OF TEWKSBURY, 473 N.E. 2d 1160

Issue:	Unsafe grounds — Inadequate sand in long jump pit
Level of Court:	State Court of Appeals
Date/State:	1985/Massachussets
Decision:	Plaintiff/Reversed and New Trial Ordered

The plaintiff, then 12-years-old, was injured in his physical education class while performing the running long jump. After receiving instructions from the gym teacher, the plaintiff attempted the exercise, and upon landing in the pit, fractured his ankle. Testimony indicated that while the pit was normally filled with 12-14 inches of sawdust, there were only two to three inches of sawdust on the day of the accident. The plaintiff charged negligence on the grounds of insufficient instructions and inadequate supervision as well as unsafe facility conditions. The lower court found for the plaintiff and awarded $40,000 in damages to the injured student and $20,000 to the father. The town appealed.

On appeal, the Appellate Court ruled that while expert testimony was not necessary to find the jumping pit unsafe, it was necessary to establish the inadequacy of instructions and supervision. In noting the lower court's decision not to allow expert testimony and the fact that the instructions to the jury merged the issues of instruction, supervision, and facilities, the Court of Appeals reversed the lower court decision and ordered a new trial.

DUNNE V. ORLEANS PARISH SCHOOL BOARD, 463 So. 2d 1267

Issue: Facilities — Gym unlocked when not in use
Level of Court: State Supreme Court
Date/State: 1985/Louisiana
Decision: Plaintiff/Affirmed/Reversed

The plaintiff, a nine-year-old boy, attended a dance recital in the auditorium of the high school with his parents. During the time he was there, he wandered out of the auditorium and across the hall into the unlocked and unsupervised gymnasium where three other boys were playing on a set of gymnastic rings. The boys invited Kevin to play on the rings and, since they were seven feet off the floor and out of reach of the plaintiff, one of the boys brought over a chair for him to stand on. After standing on the chair and grabbing the rings, one of the boys pulled the plaintiff by his feet back toward the bleachers as far as he could go. Despite the pleas of the plaintiff, the boy released him and the rope swung out as far as it could go, at which point the plaintiff "flipped off," falling to the floor and injuring his head and shoulder.

Testimony and evidence during the trial indicated that when not in use, the ropes were secured by a separate rope to a point on the wall above the collapsible bleachers, about 12-15 feet off the floor. The evidence did not show who removed the ropes from the secured position, but the principal testified that the removal was usually accomplished by use of a pole. Testimony claimed that while all of the outside doors to the gym and the building were kept locked, it was impractical to keep the doors from the gym to the hallway locked because the gym was not only used during the school day for classes, but after hours by athletic teams and community groups as well. The trial court found for the plaintiff.

The Court of Appeals upheld the conclusion of the trial court that had the doors been locked, the accident would not have occurred and that the failure to lock the doors was a cause-in-fact of the accident.

On appeal to the Supreme Court, the court noted that while the unlocked doors may have been a cause-in-fact of the accident, such a finding was not sufficient by itself to assign liability. The Supreme Court framed the critical issue in this case as the duty owed by the school board. The court took notice that no expert testimony was offered indicating that the gymnastic rings were inherently dangerous or represented an unreasonable risk of harm in normal use. Given the precautions to secure the rings mentioned by the principal, the court ruled that the scope of the board's duty did not encompass the risk, that a small child would be enticed by older boys to stand on a chair and grab the rings, which had been removed from their secured position, and then be forced to swing on the rings against his will, an act outside the normal use of the rings. The Supreme Court, therefore, reversed the Court of Appeals decision and dismissed the plaintiff's action.

PELL V. VICTOR J. ANDREW HIGH SCHOOL, AND AMF, INCORPORATED, 462 N.E. 2d 858

Issue: Equipment — Safety warnings not visible and lack of safety harness for gymnastics
Level of Court: State Appellate Court
Date/State: 1984/Illinois
Decision: Plaintiff/Affirmed

The plaintiff, a high school student, was permanently paralyzed by severing her spine as a result of a fall during the performance of a somersault off of a mini-tramp during her physical education class. The plaintiff filed suit against the school district, the high school, and the manufacturer of the mini-tramp, AMF, Inc.

Evidence and testimony showed that the mini-tramp was sold to the school district with a heat-laminated caution label affixed to the bed which cautioned against misuse or abuse of the equipment and requested users to carefully read all instructions and inspect before using and replace any worn, defective or missing parts. The label further cautioned of the dangers of activities involving motion or height, use by untrained or unqualified participants, and unsupervised use. When the mini-tramp was assembled by a faculty member of the school, the bed was placed so that the warning label was facing down. Printed warning, on the frame was covered by frame pads.

The plaintiff testified she took a few running steps up to the mini-tramp, jumped onto the bed and began a somersault. Midway through her somersault, she felt a sharp pain in her knee and was unable to properly complete the skills and collapsed onto a nearby mat. Two instructors were present at the time of the accident with the closest one observing the somersault from a distance of ten feet away. No safety harness or spotter were used.

The plaintiff settled out of court with the school district for $1.6 million and the trial court found for the plaintiff in her case against AMF and awarded damages of $3.4 million. AMF appealed on a number of grounds. The Appellate Court ruled that warnings must be adequate to perform their intended function. The court stated that the warnings could be judged inadequate if they do no specify the risk presented by the product, they are inconsistent with how a product would be used, if they do not provide the reason for the warning, or if they do not reach the foreseeable users. The court ruled that the evidence was sufficient to warrant a jury conclusion that the warnings were ineffective. In so ruling, the court stated:

1. The warnings did not specify the risk of severe spinal cord injury which could result in permanent paralysis if somersaulting off the mini-tramp without a spotter or safety harness.
2. Warnings were inadequate because their location was inconsistent with the equipment's use.
3. AMF was familiar with recommendations by the United States Gymnastics Safety Association that warning labels should explain the reason for the warning and be clearly visible to a mini-tramp user.

The Appellate Court ruled against AMF's defense contributory negligence stating it is not available as a defense in strict liability tort action. It did note that comparative fault is applicable to strict liability cases but only insofar as the defenses of misuse and assumption of risk are concerned. Comparative fault will not bar recovery but will operate to reduce the plaintiff's recovery by their degree of fault. The court found no sufficient evidence to support either misuse or assumption of risk on the part of the plaintiff. The trial court's determination of negligence by AMF was affirmed.

BERMAN V. PHILADELPHIA BOARD OF EDUCATION, 456 A. 2d 545

Issue: Equipment — Lack of mouth guards and other safety equipment in hockey

Level of Court: Superior Court
Date/State: 1983/Pennsylvania
Decision: Plaintiff/Affirmed

The plaintiff, then an 11-year-old fifth grade student, turned out for an after-school intramural hockey program run by the school physical education specialist. During the course of a game, the plaintiff faced an opposing player who made a backhand shot. In making his shot, the opposing player's follow-through motion caused the blade of the hockey stick to hit the plaintiff in the mouth. As a result of being struck, the plaintiff had three maxillary and two mandibular teeth severed, causing severe pain and extensive dental treatment. Plaintiff brought action against the school board for negligence based on their failure to provide necessary safety equipment. The court found for the plaintiff, awarding $83,190 to the child and $1,810 for the parents.

The school board appealed on two grounds. First, they claimed there was insufficient evidence to support a finding of negligence based on the fact that the Amateur Hockey Association of the United States had no regulations requiring any kind of mouth guards for participants of amateur ice or floor hockey. The school board contended, therefore, that no standard of care was established upon which a finding of negligence could stand, that without a regulation to the contrary, the teacher was not required to furnish mouth guards. They contended that the teachers's general instructions, officiating games and calling penalties were sufficient actions to satisfy a reasonable standard of care. The school board's second contention in appealing the trial court decision, was that the plaintiff assumed the risk and was contributorily negligent.

Testimony showed that the physical education teacher was well aware of the potential for mouth injuries and had, in fact, requested the purchase of safety equipment two or three times during the program's first year, but to no avail. Testimony showed that students were instructed at the beginning of each season that slapshots, raising the hockey sticks above the waist and checking were prohibited. Students were equipped with hockey sticks composed of wooden shafts and plastic blades but no helmets, face masks, mouth guards, shin guards or gloves were provided.

The superior court ruled that the duty to provide for the safety and welfare of students participating in the hockey program was breached by the school board. Notwithstanding the fact that there were no rules or regulations requiring mouth guards in effect at the time of the accident, the instructor was well aware of the potential for mouth injuries and had requested the board for appropriate safety equipment. The court noted that an 11-year-old has a rebuttable presumption of being incapable of contributory negligence. Pennsylvania requires that any rebuttal of this presumption must review the child's conduct in light of the behavior of children of similar age, intelligence and experience. Noting that the plaintiff's only experience and knowledge of hockey was obtained in the school program and that no previous serious injuries had occurred in the program, the court ruled the plaintiff incapable of contributory negligence. As to assumption of risk, the court ruled that by reason of his young age and lack of intelligence, experience and information, the plaintiff did not appreciate the dangers of floor hockey. On the basis of the above arguments, the superior court affirmed the trial court judgment of negligence.

While the defenses of contributory negligence and assumption of risk employed by the school board in this case do not exist under Oregon law, the concepts could be argued under Oregon's comparative fault statute. On the basis of the presented evidence, it is unlikely that any fault would have been assigned to the plaintiff had this case been tried in Oregon.

TIELMAN V. INDEPENDENT SCHOOL DISTRICT No. 740, 331 N.W. 2d 250

Issue: Equipment — Pommels removed from gymnastic horse
Level of Court: State Supreme Court
Date/State: 1983/Minnesota
Decision: Defendant/Affirmed in Part, Reversed in Part and Remanded

The plaintiff's daughter suffered permanent injury to her right leg as a result of vaulting over a vaulting horse from which the pommels had been removed. The injured girl testified that as a result of doing a vault as instructed, she caught one of her fingers in one of the half-inch diameter holes left by the removed pommels, causing her to fall to the floor off to the side of the horse. The plaintiff also testified that insufficient matting around the horse was provided.

Suit was brought against the teacher and school district as well as the manufacturer of the vaulting horse. As to the manufacturer, the plaintiff alleged negligence in failing to warn of the dangers posed by the holes when the pommels were removed. Evidence was introduced showing that the prevailing custom among physical educators was to use vaulting horses with exposed holes. As a result of certain evidentiary rulings, the only evidence introduced on plaintiff's behalf was the testimony of the injured girl. The trial court issued a directed verdict in favor of all the defendants.

The Supreme Court identified the major issues in this case as whether the evidence was sufficient to allow the jury to infer negligence without the benefit of expert testimony. The court stated there was no question of the standard of care owed. The school owed a duty to its students to use reasonable care, to inspect its equipment and to protect its students from unreasonable risk of harm. The court ruled that expert testimony in this case was not necessary, that a jury was capable of deciding whether a teacher of ordinary prudence would use a vaulting horse despite the exposed holes. The court also pointed out that prevailing custom would not prevent the jury from finding the conduct below the standard of reasonable care. The court held that, where reasonable minds might differ as to whether the teacher should have reasonably foreseen the injury, the question is one for the jury.

The Supreme Court reversed the directed verdict on behalf of the physical education teacher and school district and remanded the case for a new trial. As to the manufacturer, the Supreme court affirmed the directed verdict of the trial court, concluding there was insufficient evidence to find negligence on behalf of the manufacturer.

WILKINSON V. HARFORD ACCIDENT AND INDEMNITY COMPANY, 411 So. 2d 22

Issue: Facilities — Non-safety glass in gym area
Level of Court: State Supreme Court
Date/State: 1982/Louisiana
Decision: Defendant/Defendant/Reversed

The plaintiff's son, then a 12-year-old seventh grader, was injured when he fell through a plate glass window in the lobby outside of the gymnasium. On the day of the accident, the physical education class was involved in relay races on the east half of the basketball court, the side nearest to the lobby. The class was divided into six teams of five with two teams competing at a time. At the conclusion of each race, the boys were instructed to sit along the east wall of the gym and await their next turn. The boys were permitted to go to the lobby to get water at the drinking fountains but were instructed not to linger or engage in horseplay. Following one of the races, the plaintiff's son, David, and the other members of his team went to the lobby to get a drink. While there, they decided to have David and another boy race to determine the order in which they would compete in the next relay. They were to race from the north water fountain to the south glass panel and back. There was a floor-to-ceiling glass panel at each end of the lobby. During their race, David pushed off the glass panel with both hands as he attempted to turn. He fell through the glass panel as it broke and he suffered multiple cuts on his arms and legs and was bleeding severely. The physical education teacher administered first aid and David was taken to the hospital for further treatment.

The plaintiff filed suit on behalf of his injured son against the physical education teacher and school district for negligence. Evidence showed that a non-safety glass panel at the other end of the lobby, identical to that through which the plaintiff's son crashed, had been broken several years previously when a visiting coach walked into it. It had been replaced with safety glass. The trial court rendered judgment for the defendant. In dismissing the plaintiff's suit, the court stated there was no finding of negligence against the physical education teacher and that although negligence on the part of the school district was shown, the plaintiff was denied recovery due to the contributory negligence of the injured boy. The Court of Appeals affirmed the trial court decision.

The Supreme Court framed the issues as whether the physical education teacher was negligent in his supervision of the class and/or the school board in maintaining a plate glass window in the lobby of the gym and if either or both were negligent, whether plaintiff's action is barred by the contributory negligence of the injured boy.

The court supported the finding of the lower courts of no negligence on the part of the physical education teacher. As to the school board, the court ruled that the board had actual and constructive knowledge that the maintenance of plate glass in the lobby of the gym was dangerous and represented an unreasonable hazard to the children under its supervision. The board was, therefore, held liable. The court noted that in determining the contributory negligence of a 12-year-old boy, his conduct must be evaluated on the basis of his maturity and capacity to evaluate circumstances and that he must only exercise the care expected of his age, intelligence and experience. The court ruled that the plaintiff's son was not contributorily negligent, stating that the race in the lobby was merely an extension of the races being conducted in the gym, the conduct of the injured boy was normal under the circumstances, and that the boy had no way of knowing that the glass panel contained plate glass rather than safety glass. The court ordered the case remanded to the Court of Appeals for the assignment of damages. On remand, the Court of Appeals awarded $20,560 in total damages.

SUTPHEN V. BENTHIAN AND THE VERNON, TOWNSHIP BOARD OF EDUCATION, 397 A. 2d 709

Issue:	Equipment — Lack of protective equipment in floor hockey
Level of Court:	Superior Court, Appellate Division
Date/State:	1979/New Jersey
Decision:	Dismissed/Reversed

The plaintiff, a tenth grade student, was struck in the eye by a flying hockey puck while playing floor hockey in his physical education class. The accident resulted in a retinal detachment and eventual removal of the eye. The plaintiff and plaintiff's father sued the physical education teacher and the school district alleging negligence in requiring him to participate in the hockey game with an excess number of players on each team, in a playing area that was too small for the purpose, and without providing him with, and requiring him to use, proper protective equipment during the contest.

The following facts were not disputed in this case:

1. School authorities were aware, from the time the plaintiff entered kindergarten, that he had a sight deficiency in his right eye.
2. The gym, at the time of the accident, was divided in half with the hockey game being played on one-half of the court.
3. No protective equipment for the facial areas or the eyes were provided and that while safety glasses were available if requested, no such request was made by the plaintiff.

The defendants moved for summary judgment at the trial court, contending they were immune from liability under the New Jersey Tort Claims Act and that they owed no duty to the plaintiff. They claimed immunity based on assertions that their acts were discretionary and thus immune from suit. The trial court granted summary judgment for the defendants.

The Appellate Court reversed the trial court judgment and remanded the case for trial. The court ruled that the conduct of the teacher was clearly not the type of high-level policy decision contemplated by the section of the Tort Claims Act dealing with discretionary duties.

In holding the summary judgment to be entirely unwarranted, the Appellate Court stated the case clearly presented several questions of fact for determination by a jury, including:

1. Whether the floor hockey game sponsored by the defendants was an activity having more than the basic elements of risk, due to the nature of the game;
2. Whether participation in this activity required the wearing of protective equipment;
3. Whether, in the circumstances, the supervision was adequate;
4. Whether defendants were negligent in leaving to the plaintiff the decision to wear or not to wear a face mask;
5. Whether the defendants were negligent in allowing the plaintiff, who they knew had defective vision in one eye, to participate in a potentially dangerous activity without protective equipment;
6. Whether defendants had given the plaintiff adequate prior instruction in the skills and dangers of floor hockey; and
7. Whether defendants were negligent in organizing and sponsoring the floor hockey game in a small area of the gym and with an excess number of players on each team.

The court dismissed the defendant's claim that no duty was owed, asserting that such a claim was without any merit.

ARDOIN V. EVANGELINE PARISH SCHOOL BOARD, 376 So. 2d 372

Issue:	Maintenance of Grounds — Concrete slab in playing area
Level of Court:	Court of Appeals
Date/State:	1979/Louisiana
Decision:	Plaintiff/Affirmed

Plaintiffs, individually, and on behalf of their son, filed suit against the school board as a result of injuries suffered by the boy when he tripped over a slab of concrete protruding from the ground. The boy was participating in a softball game during his physical education class. While running between first and second bases, the boy tripped over the protruding edge of concrete located within the baseline. As a result, he injured his knee.

Testimony indicated the concrete, which was embedded in the ground, was approximately 12 inches by 12 inches and 8 inches thick. It protruded between a half and a full inch above ground. The teacher testified that before playing on the field, she and her students would often inspect the field.

The court ruled that the school district had, or should have had, constructive knowledge of the hazard and should have foreseen the potential for injury and taken steps to eliminate the hazard. The Appellate Court upheld the trial court's award of $12,000 general damages for the child and $1,895 to the father for medical expenses.

THOMAS V. ST. MARY'S ROMAN CATHOLIC CHURCH, 283 N.W. 2d 254

Issue:	Facilities — Glass panels adjacent to gym entry way
Level of Court:	State Supreme Court
Date/State:	1979/South Dakota
Decision:	Plaintiff/Affirmed

The plaintiffs, father and son, sued St. Mary's Catholic Church for $151,950 for injuries sustained by the boy during a basketball game between St. Mary's and Chester High School. The plaintiff was a member of the Chester varsity team.

Evidence showed that when the gymnasium was built in 1957, the church approved the installation of four glass panels in a sidelight panel adjacent to the entry way into the gym. Two of the panels had been previously broken and replaced with plywood. During the varsity game on the night of the accident, the plaintiff, in the course of a full court press, deflected the ball away from a St. Mary's player and lunged for the ball as it was going out of bounds. He successfully tapped the ball back into the playing area but his forward momentum carried him through one of the glass panels in the sidelight which was located within six feet of the court boundary line. The plaintiff suffered a severed artery and extensive lacerations on both arms. He was hospitalized for one week and had both arms in casts for two months. His right arm was in a sling and his left arm in a brace for eight months.

Testimony indicated the plaintiff's athletic endeavors were affected. Coaches testified that prior to the accident, the plaintiff was an all-conference quarterback on the football team but could no longer play that position due to a loss of dexterity in his hands. He could not handle a baton or play softball as effectively because of a loss of grip in his hands. Employers testified he could not do heavy work for a full year after the accident and that he had difficulty handling light tools. He encountered difficulty in doing intricate work with his hands. It was necessary for him to be treated by a doctor for over three years. Testimony indicated that the plaintiff neither realized the glass was breakable nor was he warned of the inherent danger of the glass panels located so close to the playing court.

St. Mary's denied liability on the grounds that it exercised due care, the plaintiff was contributorily negligent, and the plaintiff knew the dangerous condition and assumed the risk. In upholding the trial court, the Court of Appeals ruled that St. Mary's failed to exercise due care in protecting the plaintiff from the hazard of ordinary window glass placed in close proximity to the court. St. Mary's breached its duty to maintain its premises in a reasonably safe condition for use in a manner consistent with its purpose. The court ruled that the plaintiff had the right to assume that those in charge had inspected and taken necessary precautions to assure the safety of the players. It was not the plaintiff's duty to inspect the facility. There was no evidence to suggest that the plaintiff knew or should have known the dangers that the glass presented. The court explained that even if the danger was obvious, St. Mary's still owed a duty to invitees, such as the plaintiff, to warn and take other precautionary measures to protect them. The court, therefore, ruled that the plaintiff could not be charged with assuming the risk. The court held that the defendant could not rely on contributory negligence as a bar to recovery because, based on the evidence, it could not be concluded that the plaintiff was contributorily negligent or even if he were negligent, that it amounted to more than slight in comparison to that of St. Mary's. The court, therefore, held that application of comparative negligence was proper.

SHORT V. GRIFFITTS, 255 S.E. 2d 479

Issue:	Maintenance of Grounds — Broken glass on track
Level of Court:	State Supreme Court
Date/State:	1979/Virginia
Decision:	Defendants/Reversed and Remanded

The plaintiff brought action against the county school board, athletic director, baseball coach and the buildings and grounds supervisor for injuries sustained when he fell on broken glass while running laps on the school track. The plaintiff alleged that the individual defendants had a duty to establish procedures for the maintenance of the track and to supervise and instruct the custodial staff of the school to insure that the premises were maintained in a safe condition. The plaintiff further alleged that the defendants breached this duty by failing to inspect the premises, failing to discover the dangerous condition present on the track and failing to warn the plaintiff of the dangerous condition.

The trial court sustained the defendant's plea of sovereign immunity and dismissed the case. On appeal, the Supreme Court held that the issues of duty, breach of duty and proximate cause were all issues of fact and as such were questions for the jury. The Supreme Court limited its decision to the issue of sovereign immunity. The court ruled that while the school board was immune to liability, the athletic director, coach and supervisor of buildings and grounds could not assert sovereign immunity as a defense. The holding of the trial court was reversed and the case remanded for trial.

EVERET V. BUCKY WARREN, INC., 380 N.E. 2d 653

Issue: Equipment — School supplies unsafe helmet to hockey player
Level of Court: State Supreme Court
Date/State: 1978/Massachusetts
Decision: Plaintiff/Affirmed in Part/Reversed in Part

The plaintiff, a 19-year-old member of the hockey team at a preparatory school, was hit in the head by the puck while attempting to block a shot. The puck penetrated into the gap of the helmet formed where the helmet sections came together. As a result, the plaintiff suffered a fractured skull which required that a plate be inserted into the plaintiff's skull. The insertion of the plate caused headaches that will continue indefinitely.

The plaintiff alleged negligence on the part of the helmet manufacturer, retailer of the helmet and the school. The plaintiff also alleged that the manufacturer and retailer were liable on strict liability theory. The trial court entered judgments, notwithstanding the jury verdict, in favor of all three defendants on the negligence counts, holding that as a matter of law, the plaintiff assumed the risk and entered an $85,000 judgment for the plaintiff in the strict liability claim against the manufacturer and retailer of the helmet. The trial court applied for a direct Appellate review. On review, the Supreme Court upheld the judgments on strict liability and reversed the judgments on negligence with instructions.

Evidence at the trial court indicated that the helmet being worn by the plaintiff was a three-piece helmet with a loose method of linking the three pieces, resulting in gaps of 1/2 to 3/4 of an inch where no plastic covered the head. The helmet was characterized as "somewhat unique." At the time, and for some time prior to the accident, one piece helmets without gaps were available.

The Supreme Court held that as a supplier, the school was required to use reasonable care not to provide equipment which it knew or had reason to know was dangerous for its intended use. The court also held that the coach, as a person with substantial experience in the game of hockey, could be held to a higher degree of care and knowledge than would an average person. The court concluded the jury could have found that the coach knew, or should have known, of the availability of one-piece helmets. The coach conceded in his testimony that the one-piece helmets were safer than the one used by the plaintiff. The Court of Appeals, therefore, ruled that there was sufficient evidence to permit the jury to decide whether the supplying of the helmet by the school, through its coach, was negligent conduct. The court ruled there was no basis for a finding of either assumption of risk of contributory negligence on the part of the plaintiff.

SHEARER V. PERRY COMMUNITY SCHOOL DISTRICT, 236 N.W. 2d 688

Issue: Equipment — Universal gym
Level of Court: State Supreme Court
Date/State: 1975/Iowa
Decision: Defendant/Affirmed

The plaintiff, a 14-year-old high school student, lost his front two teeth when a portion of a universal gym became disengaged from the rest of the apparatus and struck him in the mouth. The injury took place on March 25, 1971. On March 28, 1973, the plaintiff filed suit against the school district and both the manufacturer and distributor of the exercise machine for $25,000 in damages. The plaintiff alleged negligence, breach of implied warranty and strict liability.

The district denied liability and later filed a motion for summary judgment claiming the plaintiff had not complied with the notice requirement of the Tort Claims Act. The statutory notice requirement mandated that claims against public bodies be commenced within three months unless notice of claim was served within 60 days. If the notice was properly served, the law required that the action be commended within two years. The plaintiff filed no such notice but asserted the school district, through its agents and employees, had actual notice of the injury and that the time for bringing the action should be extended to two years pursuant to the above statute. The trial court granted summary judgment for the defendant ruling that actual notice of the injury by the teacher and other agents of the school district and verbal notice to the superintendent did not fulfill the statutory requirements of notice.

The Supreme Court affirmed the lower court decision, ruling that notice of the injury by the district, its agents and employees, did not meet the statutory requirement of presenting notice of a tort claim. The court also held that the notice statute did not violate the due process and equal protection clauses of the United States Constitution as claimed by the defendants.

SEARS V. CITY OF SPRINGFIELD, 303 So. 2d 602

Issue: Unsafe Grounds — Open ditch on school grounds
Level of Court: State Court of Appeals
Date/State: 1974/Louisiana
Decision: Plaintiff/Affirmed

During lunch recess, the plaintiff, a 12-year-old student, broke his leg when he fell into an open ditch on the school grounds while playing tag football. Evidence showed that the accident happened within a few days after school opened and that the plaintiff was new to the school. Students were playing on a field approved for such use. The testimony showed that the plaintiff, running full speed to tag the receiver, was unable to stop after tagging the receiver and fell into the ditch. Evidence indicated the ditch was anywhere from 5-10 feet deep in that area of the school grounds and was at least partially concealed by weeds and grass. There were no barriers nor any posted warnings.

The trial court awarded the plaintiff $5,000 in damages and the district appealed. The Court of Appeals ruled it found no error in the conclusion of the trial court that the school district was negligent in permitting the ditch to remain unguarded and without barriers at the very edge of the playground, nor with the conclusion that the negligence of the district was the proximate cause of the plaintiff's injuries. The court found no merit in the defendant's plea of contributory negligence as it was evident that the plaintiff neither knew of the existence of the ditch, nor the dangerous condition of the ditch which was allowed to remain. The decision of the lower court was affirmed.

BOUILLON V. HARRY GILL COMPANY AND LITCHFIELD, PUBLIC SCHOOL DISTRICT NO. 12, 301 N.E. 2d 617

Issue: Equipment — Pole vault standards
Level of Court: State Appellate Court

Date/State: 1973/Illinois
Decision: Defendant/Affirmed

A 12-year-old seventh grader was seriously injured while pole vaulting and brought a suit alleging negligence and strict product liability against the manufacturer of the pole vault standards and the school district. The plaintiff was injured when, after missing a vault at six feet, the right standard fell into the pit, hitting the plaintiff in the back of the head. One of the steel pins used to support the cross bar pierced the back of his head causing serious injury.

In their strict liability action against the manufacturer, the plaintiff argued the base was not heavy enough to properly support the standard and that the use of steel for the pins which support the cross bar was unsafe. Against the district, the plaintiff alleged negligence in failing to set the standards on a smooth and even base so as to not make them wobbly and in failing to properly supervise by not providing a spotter in case one of the standards should fall.

Testimony was conflicting during the trial on a number of points including:

1. The proper and safe weight for the base of the standards;
2. The proper material to be used in making the pins to support the cross bar;
3. Whether the standards were set on rough, unlevel, cracked and weathered concrete blocks;
4. Whether or not wooden pegs were taped to the standards and somehow contributed to them falling; and
5. Whether the circumstances require supervision to the point of having a spotter watch for falling standards.

The trial court awarded for the defendants and the plaintiff appealed, contending the evidence supporting his claim were uncontradicted.

The Appellate Court upheld the lower court on both the negligence and strict liability claims. In so holding, the court ruled the testimony during the trial was quite contradictory and that the disputed facts were properly placed before the jury for their consideration.

STANLEY V. BOARD OF EDUCATION OF CITY OF CHICAGO, 293 N.E. 2d 417
Issue: Unsafe equipment — Untaped bat
Level of Court: State Appellate Court
Date/State: 1973/Illinois
Decision: Plaintiff/Affirmed

An eight-year-old boy brought suit against the Board of Education for injuries received in a summer recreational program conducted by the school district, on school grounds, under the supervision of a district physical education teacher. At the time of the accident, a number of activities were going on including a game of fast pitch which involved trying to hit a softball, thrown at a target on the wall, with a bat. Four older boys were playing fast pitch within 30 feet of where the plaintiff was playing. During the course of the fast pitch game, the bat slipped out of the hands of the batter, ricocheted off the wall and hit the plaintiff in the head.

Trial court evidence indicated that there were at least three or four games of fast pitch going on and that because someone had already lost control of a bat once, the plaintiff had moved to a different area of play. The older boys asked the plaintiff to move, which he did, but after the game was underway, the plaintiff drifted back to within 30 feet of the game.

Testimony claimed the supervisor was 1,000 feet away at the time of the accident. The bat being used in the game was not taped and the knob was partially worn down. The trial court awarded $40,000 to the plaintiff and the defendant appealed.

The Appellate Court, in reviewing the lower court's decision, considered the expert testimony which acknowledged that an untaped bat with a worn knob represented defective equipment and that the supervision under the circumstances was inadequate. The defendant claimed the failure to supervise was not the proximate cause of the accident. The Appellate Court, in affirming the judgment for the plaintiff, held that it was not prepared to say that an adequate amount of supervision would have prevented the accident in this case.

CLARY V. ALEXANDER BOARD OF EDUCATION, 199 S.E. 2d 738
Issue: Facilities — Glass panel close to court boundry
Level of Court: State Court of Appeals
Date/State: 1973/North Carolina
Decision: Defendant/Affirmed

The plaintiff, a 17-year-old high school basketball player, was severely injured while running windsprints during basketball practice when he collided with a glass panel just beyond the end boundary of the court. The trial court granted the defendant's motion for a directed verdict, at the close of the plaintiff's evidence, on the basis of contributory negligence on the part of the plaintiff.

The evidence indicated that the plaintiff was well aware of the gym facilities and of the glass panels at the end of the court, as this was his fourth year as a member of the basketball team. Testimony indicated that the plaintiff had run windsprints, like those on the day of the accident, numerous times during each of the previous three years as a member of the team. It also indicated that the plaintiff was aware of the need to stop or run into "something." Yet, on the day of the accident, the plaintiff ran full speed until he reached the end line, only three feet from the glass panels. The Court of Appeals upheld the ruling of the trial court that a reasonable person, using ordinary care, would have slowed down prior to reaching the end line. It upheld the finding of contributory negligence on behalf of the plaintiff and, therefore, as a matter of law, barred recovery without considering the negligence of the Board of Education in the construction and operation of the school gymnasium.

The above result would obviously not be the same under Oregon law. Notwithstanding the contributory negligence on the part of the student, the courts in Oregon would be obligated to examine the negligence of the district as well and then apportion the damages amongst the parties. This assumes that the student would be found less than 50 percent at fault which, given the above circumstances, would more likely than not be the finding.

DRISCOL V. DELPHI COMMUNITY SCHOOL CORPORATION, 290 N.E. 2d 769
Issue: Inadequate locker room facilities
Level of Court: State Court of Appeals
Date/State: 1972/Indiana
Decision: Defendant/Affirmed

The plaintiff, a high school student, was injured as a result of falling while running to shower after class. The evidence indicated that a boy's and girl's class shared a gym with 45 girls in the girl's class. The boy's and girl's classes were separated by a canvas curtain. Physical education classes were 55 minutes in length with five minutes allowed for passing between classes. Activity was normally stopped five minutes prior to the end of the period to allow time for the students to undress, shower, dress, comb their hair and exit for their next class. The girls were required to shower but only six shower stalls, each accommodating two girls, were available, thereby only allowing 12 girls to shower at a time. The record showed that being tardy to their next class three times counted against their grade and that they faced disciplinary action if they were not out of gym on time. The locker room was very crowded because of the class size and many girls had to share lockers and dress in the restroom area of the locker room. When told to leave the gym floor, the girls were required to go around the far end of the curtain and to wait until the boy's class was dismissed before crossing the floor to the locker room entrance.

On the day of the accident, the girls' teacher dismissed the class in the usual manner. The girls, as usual, began to run toward the curtain. After two or three steps, the plaintiff's feet became entangled with those of another student, causing her to fall with several other girls then piling onto her. The fall broke the plaintiff's left femur and cracked her right elbow. She spent considerable time in both the hospital and home in bed. It was several months before she fully recovered.

The plaintiff brought suit, alleging the teacher and the school district to be negligent for permitting too many girls to be in a gym class, in failing to provide adequate shower facilities and in failing to provide sufficient time for 45 girls to shower in six stalls. The trial court granted judgment for the defendants at the conclusion of plaintiff's case and the plaintiff appealed.

The Court of Appeals ruled that no showing was made by the evidence that the girls' gym teacher had anything to do with the fixing of the class size nor did the evidence show who in fact fixed the class size and whether that individual had any practical choice in the matter. The court ruled no liability could be assessed in this case based on class size. The court also held that the evidence failed to show that anyone who might have been held liable under the doctrine of respondent superior had any power or duty to provide a greater number of shower facilities and that the district was, therefore, not liable for their alleged failure to provide adequate facilities. The court noted that the third contention was the only specification of negligence which might have some support in the evidence.

The court noted the girls felt obligated to run in order to make it to their next class on time and that a reasonable inference existed that the physical education teacher might have, on occasion, been able to release the girls a little earlier to give them additional time to shower and dress. However, the court concluded that it would not be reasonable to assume that her power to increase this time was limitless. The court stated no evidence was provided regarding state and local policy of imposed activity time requirements. The court clearly stated that it did know a boy's class was in session between the girls and their dressing room and that any attempt to send them prior to the boy's class having been dismissed would involve obvious danger of collisions with members of the other class. The court held that the suggestion of holding the teacher negligent for not subjecting the girls to that hazard to avoid the necessity of running, would be improper. The court ruled that there were grave doubts as to whether any interpretation could be put on the evidence to suggest that the plaintiff or any of her classmates were subjected to any unreasonable risk of injury. (The Court of Appeals found that the trial court did not err in granting judgment for the defendants and the lower court judgment was affirmed.)

Oregon physical educators would be wise to not count on this outcome as precedent in Oregon schools. With Oregon's framing of negligence theory, particularly with respect to legal cause and the standard of substantial factor, Oregon physical educators would be prudent to carefully examine the interaction of class size, facility arrangement, class requirements, shower facilities, scheduling and their potential impact on liability of Oregon programs. Locker room facilities are perhaps the most dangerous in our buildings and represent a significant liability problem. Even in the above jurisdiction, the outcome may have been different had the girl fallen after entering the locker room facility rather than outside the facility on the gym floor.

CAPPEL V. BOARD OF EDUCATION, UNION FREE SCHOOL, DISTRICT NO. 4, NORTHPORT, 337 N.Y.S. 2d 836

Issue:	Attractive Nuisance — Field hockey goal cage
Level of Court:	Supreme Court, Appellate Division
Date/State:	1972/New York
Decision:	Defendant/Reversed and New Trial Granted

The plaintiff, five-years of age, was injured while playing on a school playground when other children attempted to lift a field hockey goal cage and dropped it. Evidence showed that the cage was constructed of heavy galvanized steel pipe, was about seven feet tall and twelve feet wide, was located in the middle of the playing field of a junior high school where neighborhood children were welcome to play, and was not fastened to the ground in any way. Testimony indicated that the cage was easily tipped over. On the day of the accident, the children had previously tipped the cage over prior to attempting to lift it.

The trial court dismissed the complaint at the end of the plaintiff's case. The Supreme Court reversed this decision and ordered a new trial. In granting the new trial, the court held that the evidence was sufficient for presentation of the case to the jury. The court held that the school district owed a duty to keep the school grounds in a reasonably safe condition. Invoking the doctrine of attractive nuisance, the court said the duty of the district included consideration of the known propensities of children to climb about and play. The court held that in this case, the duty owed to children who could reasonably be anticipated to come onto the school grounds and play on the cage, was greater than that owing to a mere licensee.

Administration of First Aid

Teachers of physical education should possess an understanding of the injuries common to the activities which they teach as well as the first aid required for those injuries. First aid is temporary emergency care, not treatment. It is important that physical educators not put themselves in a position of diagnosing or treating injuries and/or illnesses.

Head injuries represent a special problem for physical educators. All too often, teachers put themselves in a precarious position by not taking head injuries seriously. All head injuries should be considered serious and whenever any doubt exists as to the extent of injury, medical help should be summoned immediately. A common sense look at the cause of the injury should provide some clue as to whether or not immediate medical help is prudent. In any case, parents should be notified of all head injuries, whether they appear serious or not.

Physical educators should assume an active role in helping to develop a detailed building plan for dealing with serious injuries. The plan should be clearly communicated and accessible in written form to all staff and should outline procedures to be followed as well as all staff responsibilities.

Due to increased opportunity for injuries to occur in the physical education setting, physical education departments, together with the health services coordinator, should develop guidelines for AIDS prevention. This is not only important for self protection during the administration of first aid but also to prevent the potential spread of AIDS amongst other class members after injuries have occurred. Wrestling is a prime example of a potential problem area with respect to AIDS.

While charges of improper first aid are not nearly as frequent as those for improper instruction and supervision, the following three court cases point to the importance of observing the preceeding guidelines.

BARTH V. BOARD OF EDUCATION OF CITY OF CHICAGO, 490 N.E. 2d 77

Issue:	Delay in medical treatment for head injury
Level of Court:	Court of Appeals
Date/State:	1986/Illinois
Decision:	Plaintiff/Affirmed

The plaintiff, then an 11-year-old sixth grader, received a head injury as a result of a collision with another boy during a morning recess kickball game supervised by the physical education teacher. After falling to the ground, both boys were assisted off the field by the physical educator. The plaintiff felt sick to his stomach and dizzy. A teacher aide escorted the boys to the principal's office where they arrived approximately five minutes after the accident. Both boys sat on a bench with the plaintiff, still crying, holding his head and stomach. A red mark became noticeable on the side of the plaintiffs head where the blow occurred.

Five minutes after arriving in the office, the secretary called the homes of both boys to inform the parents of the accident. Unable to reach the plaintiff's mother at home, the secretary called her at work and left a message for her to call the school. The plaintiff's mother returned the call approximately 15 minutes later, by which time the plaintiff's color was bad and his eyes were glassy. Told that he had injured his head and appeared to be sick, the mother ordered the secretary to take the boy to the hospital and that she would arrive in approximately an hour from work but the boy's brother would meet him at the hospital. The secretary then left an aide in charge while she went to find the assistant principal and inform her of the accident and of her actions. The boy was now nauseous and had vomited three times. The secretary called 911, now 25 minutes after the accident, and requested an ambulance. By the time the assistant principal returned to the office, the boy had lost color and was nodding his head up and down and complained of being tired. When the ambulance had not arrived 30 minutes later, 911 was called again. Being told the message was recorded and being handled the school waited 15 more minutes and still no ambulance. A third call to 911 was made and the assistant principal requested to talk to the fire department directly. An ambulance was dispatched within a couple of minutes and arrived at the school two minutes later. The ambulance which took the boy had been parked at the hospital, which was directly across the street from the school. The boy arrived at the hospital an hour and a half after the accident. The boy was transferred to another hospital 1 hour and 20 minutes later and was operated on shortly after arrival to remove a blood clot from the brain.

The doctor testified he removed a hematoma the size of an orange from the top of the boy's head. He also testified the hour delay in transporting the boy to the hospital allowed the hematoma to grow from the size of a walnut to the size of an orange. If the hematoma had been removed an hour earlier, the doctor testified the boy probably would have had a mere seven to ten day hospital stay.

Six years after the accident, the plaintiff's left side was still severely weak, he required a cane, his intellectual function was impaired, and he experienced severe headaches.

Under Illinois law, teachers and school districts are immune from liability for actions within the scope of their employment unless those actions constitute malfeasance or willful, wanton

misconduct. The trial court found both the district and the city, and its 911 operator, guilty of willful and wanton misconduct. The Appellate Court upheld the trial court judgment and the plaintiff was awarded $2,550,000.

The message presented by this case is clear. All head injuries should be considered serious unless shown to be otherwise. Where a serious head injury is suspected, prompt medical attention is absolutely essential Any prolonged wait invites disastrous and sad consequences.

WELCH V. DUNSMUIR JOINT UNION HIGH SCHOOL DISTRICT, 326 P. 2d 633

Issue:	First Aid — Improperly moving injured student
Level of Court:	Supreme Court, Appellate Division
Date/State:	1970/New York
Decision:	Plaintiff

The plaintiff was injured during a football scrimmage with another high school. After being hit, while carrying the ball, the plaintiff fell forward and a tackler fell on top of him. After the hit and tackle, the plaintiff was unable to get to his feet.

The coach suspected a neck injury. He had the plaintiff attempt to grip his hand, which he was able to do. Eight team members then moved the plaintiff off the playing field. A team doctor was present but did not come out onto the field. After arriving at the sideline, the plaintiff was no longer able to move either his hands or feet. He is now a permanent quadraplegic.

Expert testimony indicated that, given the existing circumstances, it was probable that additional spinal cord damage occurred after the initial injury as a result of improperly moving the plaintiff. The coach was found negligent by the court for not waiting for the doctor before moving the injured student and the doctor was found negligent for failing to act promptly. The court awarded $325,000 in damages.

The defendants appealed the lower court decision on a number of procedural grounds. The Supreme Court upheld the finding of negligence but amended the damages to $207,000.

MOGABGAB V. ORLEANS PARISH SCHOOL BOARD, 239 So. 2d 456

Issue:	Improper First Aid for heat stroke
Level of Court:	State Court of Appeals
Date/State:	1970/Louisiana
Decision:	Dismissed/Reversed

The parent of a deceased high school student brought a wrongful death suit against the school board, the head and assistant football coaches, the principal, superintendent, insurance company and the supervisor of the health safety and physical education division.

The plaintiffs alleged negligence in failing to provide all necessary and reasonable first aid to their son, who became ill at football practice around 5:20 p.m. and was put on a school bus and returned to the high school shortly thereafter. The boy was laid on the floor and covered with a blanket and unsuccessful attempts were made to give him salt water. His mother was called at 6:45 p.m. and she called a doctor who arrived at 7:15 p.m. The boy was immediately taken to a hospital for treatment, but his condition worsened and he died at 2:30 a.m. The cause of death was listed as heat stroke.

A doctor who treated the boy testified that covering the victim with a blanket was the improper thing to do and that time was of the essence in cases of heat stroke and quick treatment was necessary. The doctor said that had he received immediate and proper first aid, his death would have been much more unlikely.

The trial court dismissed the case without a written reason. The Court of Appeals reversed the dismissal, ruling that the two coaches who were present were negligent in denying the boy immediate medical assistance and in applying improper first aid. The court held that the evidence supported the premise that it was more likely than not that the boy would have survived with reasonable and prompt medical attention. The court ruled the evidence failed to support claims against the other defendants and held the two coaches and school board negligent. The court awarded each of the parents $20,000 plus medical and funeral costs.

MISCELLANEOUS ISSUES

Permission Slips, Waivers and Releases

In conjuction with the many special events and outings in which physical educators involve their students, parents are often asked to sign permission slips, waivers and releases. While these signed forms serve a sound administrative function, it is important that physical educators understand that they in no way relieve them of liability for their negligent actions.

Permission slips, waivers and releases represent good administrative procedures as they allow for assurance that both student and parent are aware of the intended activity and that permission for participation has been granted. They do, however, lack validity in court. A minor may not legally enter into a contract and, therefore, any waiver signed by a minor releasing a teacher or coach from liability will not stand up in court. A parent may not legally waive the liability of a teacher or coach for injuries suffered by their minor child. The parent, by signing, may relinquish their right to recover damages but that does not prevent the injured minor from initiating a suit on their own behalf.

Transportation

While transportation is not a formal duty of physical educators, they nonetheless often find themselves in the position of transporting students to and from special events and extracurricular activities. This practice raises a number of concerns.

Whenever possible, the transporting of students should be accomplished using school district vehicles, preferably school buses, which are driven by qualified licensed drivers. Whenever private vehicles are used, a number of precautions must be observed in order to effectively manage the risk and liability involved in the transportation of students.

Casual arrangements for using parents and volunteers, as well as teachers, to transport students can be a risky business. Before using private vehicles for transportation, careful examination should be made of the vehicle to be used in order to assure that it is well maintained and safe to operate. The driver's record should also be carefully looked at in order to screen out those with a reckless background. Vehicles should not be overloaded. Each student should have a seat as well as a seat belt. If the possibility of hazardous winter weather exists, the vehicle should carry chains or be equipped with snow tires. Each vehicle should be adequately insured with personal injury protection (PIP) coverage.

The standard in transportation cases will again require the care of a reasonably prudent person. Teachers and districts which choose to arrange for volunteer transportation will be held accountable not only for the vehicles they actually operate, but in most circumstances, those operated by volunteers as well.

SUMMARY

The information and case studies presented within this concept paper make it abundantly clear that physical educators have a number of responsibilities to uphold as they carry out their duties in delivering sound physical education programs to students. Due to the nature of the activities engaged in, physical education is a curriculum area of elevated risk for students and physical educators need to be vigilantly aware of this.

Risk is inherent to many of the activities included in physical education and, in providing exciting and challenging programs to students, it is impossible to eliminate the presence of this risk. It is imperative, however, that teachers effectively manage the risk which is inherent to their programs. In summarizing the legal concepts, case studies, and duties of physical educators which have been presented, the following list of guidelines is offered for the reasonably prudent, careful and professional Oregon physical educator. Employment of these guidelines should contribute to not only lowered risk of injury but to more positive and successful experiences for students.

The Reasonably Prudent, Careful and Professional Oregon Physical Educator:

1. Enforces all established rules of the school and class
2. Develops comprehensive class and locker room rules and procedures
3. Is aware of the health status of all students under his/her charge
4. Develops unit plans for each unit of study to insure that proper progressions and safety are built into each activity unit
5. Develops daily, written lesson plans, allowing for adequate warm-up, instruction, and practice, with classroom management and safety considerations included
6. Provides detailed plans for substitutes in the event of being absent. Lesson plans should provide substitutes with adequate information to safely and effectively carry on class in the absence of the regular teacher and should include important information on those students with behavior and health problems as well as adequate instructions for the activity itself.
7. Analyzes his/her teaching methods for the safety of his/her students
8. Carefully matches students in any activity involving potential contact, giving consideration to age, size and experience in the activity
9. Keeps activities within the ability levels of individual students
10. Provides adequate instruction before requiring student participation in any activity, including verbal instructions as well as demonstrations
11. Provides adequate safety instruction prior to any activity
12. Gives proper instructions with consideration given to safety; for example, does not instruct students to participate in bare or stocking feet because they forgot tennis shoes
13. Teaches only those activities with which he/she is familiar and qualified to teach
14. Assigns only qualified personnel to conduct and supervise activities
15. Does not coerce students to perform
16. Allows adequate time for showering and dressing at the end of class
17. Provides supervision required within the scope of his/her employment
18. Does not unnecessarily absent him/herself from classes while they are in session, giving consideration to age and composition of the class, past experience with the class, the nature of the activity and the equipment being used by students and the reason and duration of the absence
19. Does not allow students to engage in unreasonably dangerous activities

20. Does not attempt to instruct or supervise an excessive number of students in activities involving elevated levels of risk

21. Regularly inspects equipment and facilities used by students

22. Does not use defective, overly worn or broken equipment

23. Does not conduct classes in hazardous or dangerous areas

24. Does not generally use equipment for purposes for which it was not intended

25. Provides adequate safety equipment in those activities where appropriate, such as soccer, hockey, gymnastics and football

26. Does not modify factory purchased equipment

27. Purchases equipment of high quality; does not supply students with equipment which is dangerous for its intended use

28. Properly secures and/or stores all equipment when not in use

29. Is familiar with injuries and the first aid required for injuries which are common to the activities being taught and performs the proper act in the event of injury

30. Considers all head injuries as serious and follows established procedures for first aid, notification of parents and securing medical attention

31. Does not diagnose or treat injuries

32. Keeps an accurate record of all accidents and actions taken as well as a file of all medical information provided by parents or doctors

33. Requires a doctor's note giving permission to resume activity following a serious illness or injury

34. Together with the administration, develops a building plan for dealing with serious injuries

35. Uses school district vehicles to transport students

36. Refrains from physical discipline and punishment

Note: Careful practice of a physical education teacher will include but is not limited to the 36 statements above.

GLOSSARY OF TERMS

The following definitions are taken from *Black's Law Dictionary*:

Abrogate: To annul, cancel, repeal or destroy. To annul or repeal an order or rule issued by a subordinate authority; to repeal a former law by legislative act or by usage.

Comparative Negligence: Under comparative negligence statutes or doctrines, negligence is measured in terms of percentage and any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death, recovery is sought.

Contributory Negligence: The act or omission amounting to want of ordinary care on part of complaining party, which, concurring with defendant's negligence, is proximate cause of injury.

Directed Decision: In a case in which the party with the burden of proof has failed to present a prima facie case for jury consideration, the trial judge may order the entry of a verdict without allowing the jury to consider it, because, as a matter of law, there can be only one such verdict.

Governmental Immunity: The federal, state and local governments are not amenable to actions in tort except in cases in which they have consented to be sued. The federal government under the Federal Tort Claims Act has waived its immunity in certain cases in the same manner and to the same extent as a private individual under like circumstances. Most states have also waived governmental immunity to various degrees at both the state and municipal governmental levels.

Hold Harmless: Contractual arrangement whereby one party assumes that liability inherent in a situation, thereby relieving the other party of responsibility.

Implied Warranty: A promise arising by operation of law, that something which is sold shall be merchantable and fit for the purpose for which the seller has reason to know that it is required.

Indemnify: To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of anticipated loss falling upon him.

In Loco Parentis: In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities.

Invitee: A person is an "invitee" on land of another if (1) he enters by invitation, express or implied, (2) his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land and (3) there is mutuality of benefit or benefit to the owner.

Judgment Notwithstanding the Decision: A judgment entered by order of court for the plaintiff (or defendant) although there has been a verdict for the defendant (or plaintiff). A judgment rendered in favor of one party notwithstanding the finding of a verdict in favor of the other party.

Licensee: A person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor.

Plaintiff: A person who brings an action; the party who complains or sues in civil action and is so named on the record.

Remand: The sending by the Appellate Court of the cause back to the same court out of which it came, for purpose of having some further action taken on it there.

Strict Liability: A concept applied by the courts in product liability cases in which the seller is liable for any and all defective or hazardous products which unduly threaten a consumer's personal safety.

Summary Judgment: Rule of Civil Procedure 56 permits any party to a civil action to move for a summary judgment on a claim, counterclaim or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law.

Tort: A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.

NOTES

1. Herb Appenzeller, Physical Education and the Law. (Charlottesville: Michie Co., 1978) 1.

2. Don E. Arnold, Legal Considerations in the Administration of Public School Physical Education and Athletic Programs (Springfield: Charles C. Thomas, 1983) 4.

3. Henry Campbell Black, Black's Law Dictionary, 5th edition (St. Paul: West, 1979).

4. 1 Torts (Oregon CLE, 1981).

5. ORS 18.470.

6. Cirillo V. City of Milwaukie, 150 N.W. 2d 460.

7. Black.

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