THE SCHOOL RULE:

Legal Negligence 101, Part 1: Basic Terms and Principles

by David R. Hostetler, Esq.

This article begins a new "School Rule" series that deals with basic principles, pitfalls, and effective practices to maximize school safety and minimize liability risks. Subsequent columns will address issues such as school facilities, student supervision, athletics and other high-risk activities, negligence in employee hiring and retention, medical and emergency care, volunteer liability, and field trips.

Consider the following "True/False" mini quiz:

1. Schools are generally liable for any injury caused by employees because schools (or their insurers) typically have the funds to pay for any resulting injury.

2. A school may not be liable for injury caused by an employee at school if the employee was engaging in conduct not related to his job duties.

3. Liability waiver forms signed by parents, if properly drafted, provide a high degree of assurance that the school will avoid liability if a student is injured during the activity for which the waiver was completed.

4. In a negligence lawsuit, a key consideration is whether a defendant (or its agent) failed to act reasonably under the circumstances.

5. In some jurisdictions if a plaintiff is only slightly responsible for his injury (e.g., is 10% responsible compared to the defendant's 90% responsibility), the plaintiff will not be entitled to any damages.

[See answers at the bottom of this article.]

Hopefully you passed the quiz or at least have a renewed interest in knowing more about school safety and negligence.

Negligence claims are one of the leading bases for litigation against schools, especially private schools.[1] Ballentine's Law Dictionary defines common law negligence as: "The failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done." So, if you answered "True" to question 4 above, you were right because negligence is essentially the failure to act as a reasonably prudent person in fulfilling a legal duty owed to another person.

Note the critical term, "legal duty." Not every obligation is a legal duty, the breach of which leads to liability. For instance, some states—perhaps most—do not impose a legal duty on a citizen to pull a drowning child from a pool. Morally, such conduct may seem inexcusable if doing so poses little to no risk or difficulty to the potential rescuer. Our civil and criminal law, however, often does not reach as high as morality (nor would we want it to).

Negligence is only one of many types of tort law. A "tort" is a common law[2] term that refers to a violation of a legal right for which one is liable as the "tortfeasor." Torts are typically part of our civil law for which a private party can sue another party for damages or other remedies. Some conduct, however, can subject a person to both civil tort liability and to criminal guilt. Think of the O.J. Simpson cases. Simpson, on one hand, was found not guilty in a criminal murder trial, but on the other hand, was liable in a civil tort lawsuit for wrongful death. The main reason for the seemingly contradictory results was the different standards of proof: proof "beyond a reasonable doubt" in the criminal case, and proof by a "preponderance of evidence" in the civil case—a much easier standard to meet.

Normally, the plaintiff bears the burden of proving a negligence claim against a defendant. The basic facts to be proved (referred to as "elements of the claim" in legalese) are these: (1) a duty owed by the defendant to plaintiff (e.g., a teacher's duty to supervise students); (2) a breach of the duty; (3) an injury to the plaintiff that (4) was caused by defendant's breach of duty. In shorthand, negligence involves a duty, a breach, an injury, and causation. Failure to prove any one of these elements, in most instances, will cause the entire claim to fail.

Negligence cases and their probable outcomes are very much a source of the lawyer's proverbial "it depends" mantra. The reason, as one might guess, is that circumstances and factors vary significantly, affecting any or all of the four elements mentioned above. Therefore, negligence analysis and predictions must often be painted in shades of gray, not in black and white brush strokes.

There are numerous defenses to negligence claims. First and foremost, a defendant will attempt to disprove the existence of one or more of the four elements of proof (i.e., no duty, breach, injury, or causation). In addition there are other special or affirmative defenses such as "assumption of risk," "contributory negligence" (see Quiz question 5 above

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regarding the latter), or varied types of legal immunity or privilege.

These are basic principles of negligence tort claims. In subsequent *School Rule* columns in this series we will address specific contexts, problems, and effective practices.

For now, here are some general practical points:

- Each school should assign to one or more individuals or committees the responsibility for overseeing school safety and legal compliance.
- Confer with your insurance agent(s) to review the sufficiency of your school's insurance coverage for negligence and other safety risks.
- All staff, at least professional staff and faculty, should be regularly trained in legal principles of negligence and other basic legal duties.
- Act reasonably!

Note: Previous *School Rule* columns addressing negligence and safety related issues are available under "School Resources" on the Association's Legal Consulting page (http://www.accsedu.org/marketing_resources/legal_consulting). These include the following: "School Negligence Claims" (July 2011), "Risk Management" (May 2011), "Implementing a Risk Management Plan" (October 2011), "Waivers of Liability" (June 2011).

QUIZ ANSWERS

1. False—this may be why schools are the main parties in such suits but not the legal reason why they can be sued. Instead, schools are typically liable for the conduct of their employees under the doctrine of "respondeat superior" –the master answers for the servant or agent.

2. True—an employer is often not liable when an employee performs acts that are unrelated to his duties; e.g., engaging in child molestation, or damages arising from driving a school van for unauthorized personal reasons.

3. False—such waiver forms, in the author's opinion, do not inherently provide a high degree of assurance, though perhaps a moderate degree. The validity of waiver forms depends on many factors such as whether they are entered into voluntarily, with full knowledge of risk by the signatory, whether the activity is one for which liability can be waived (e.g., extra-curricular vs. curricular matters), and the extent to which the school or its agents is culpable for causing any injury.

4. True—a common term is the "reasonable person" standard; see the article discussion on this point.

5. True—as unfair as this may seem, some states like North Carolina apply a "contributory negligence" standard that works in this way although such states may allow for some exceptions based, for example, on the age and maturity of the injured person. By contrast, in other states, a defendant may still be liable for damages in proportion to the defendant's degree of negligence contributing to the injury (i.e., "comparative negligence").

NOTES

1. Public schools have to withstand many constitutional and statutory claims from which most private schools are exempt. Thus, for example, First Amendment, Due Process and special education lawsuits compete for prominence with negligence claims in the public school sphere. That is one of the benefits of operating a private school.

2. The "common law" is the body of law developed from custom and judicial precedent, as compared to "positive law" that is enacted by legislation or constitutional creation.

The "School Rule" column is offered for educational purposes only, not as formal legal advice for specific problems for which legal counsel should be retained.