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A Study of Tort Liability for Negligence Applied to Guidance and Student Personnel Workers

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A STUDY OF TORT LIABILITY FOR NEGLIGENCE APPLIED TO GUIDANCE AND STUDENT PERSONNEL WORKERS

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BY

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THESIS

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A STUDY OF TORT LIABILITY FOR NEGLIGENCE APPLIED TO GUIDANCE AND STUDENT PERSONNEL WORKERS

PREFACE

Just a rapid glance at the number of law schools and law libraries, the work of our state and federal legislatures, the lengthy listings in the telephone directories of any large city under the heading "Lawyers," and the backlog of cases pending hearing on the court dockets demonstrates that ours is a legally oriented society. In spite of all this, the area of legal responsibility of school guidance and student personnel workers is an area that until recent years has been given very little consideration by school personnel. It is an area that is uncertain, continually vacillating, and one that has very little legal precedent.

The legal aspects of counseling and personnel services cover a wide field which includes confidentiality, record keeping, disseminating student information, libel and slander, search of student rooms, accessory before the fact, accessory after the fact, and negligence. Because of the extent of each of these topics it will be necessary to delimit this study to tort liability of school employees, especially guidance and student personnel workers, for negligence.

It is the purpose of this report to establish guidance and student personnel work as a profession, to survey the

history and structure of negligence and tort liability for negligence as used in the courts of law, to show the effect of negligence and liability on other professions - medicine, law, theology, accounting - and to parallel this to the counseling profession. The writer is aware that this does not represent any existing law and is certainly not attempting to provide the legal defense for a hypothetical or test case, for only a properly certified attorney can do this. Rather this is an endeavor to explore in length an area that is of interest to the writer and should be of interest to all guidance and student personnel workers, as well as other school employees, making them aware of the fact that some of their actions may have legal repercussions. It is also an attempt to promote concern over the legal problems of the profession, thus cultivating a better understanding of the legal implications of counseling.

A STUDY OF TORT LIABILITY FOR NEGLIGENCE APPLIED TO GUIDANCE AND STUDENT PERSONNEL WORKERS

CHAPTER I

INTRODUCTION

"Historically, the term guidance has been used in the field of education to designate the assistance given to students in the solution of problems that lay outside the area of classroom teaching situations."[1] For the purpose of this paper guidance workers can best be defined as those professionally trained individuals engaged in the field of education whose aid is enlisted by others to help them to understand themselves, to adjust to their environment, and to make their own decisions. This group includes members of counseling centers and special clinics, such as, reading, speech and hearing, and study skills. Student personnel workers are those involved on the high school or college level in special student services outside the academic field, more specifically, housing and food services, student activities, health services, and student discipline. Also included among this group are those engaged in such areas of student services as student records, admissions, financial aids and placement.

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[1] Anthony J. Humphreys and Arthur E. Traxler, Guidance Services, Chicago: Science Research Associates, Inc., 1954, p. 74.

Guidance and student peraonnel work are relatively new profeaaions since Frank Parsons in 1908 organized the Vocational Bureau of Boston. "It is said that this waa the first time on record that the terms 'vocational guidance' and 'vocational counselor' were used."[2] Since that time the areas of guidance and student personnel work have grown immensely. The 1966 American Personnel and Guidance Asaociation convention was the largest convention ever to be held in Washington, D.C.[3] Currently the membership of the APGA is approximately 30,000 guidance and student personnel workers.

Guidance and student personnel services have become a new profeaaion; and that it ia a profeasion cannot be denied.

> Formerly theology, law, and medicine were specifically known as 'the profeaaions'; but aa the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The work implies profeaaed attainments in apecial knowledge aa distinguished from mere skill.[4]

The same court also said that a profeaaional ia one engaged in mental work which is varied in character rather than routine and requires knowledge of an advanced type

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[2] Ibid., p. 6.

[3] The Guidepost, Washington: American Personnel and Guidance Association, VIII, No. 6 (June, 1966), 5.

[4] Aulen v. Triumph Explosive, 58 F. Supp. 8 (1944).

which is acquired by prolonged intellectual study. The professional is also required to exercise discretion and judgment in his work, and the work output is one that cannot be standardized in relation to a given period of time.[5] Profession has also been defined by the courts as a "vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or mental."[6]

Guidance and student personnel work can then be rightfully called legitimate professions and will be referred to as such since they encompass mental and intellectual skill, advanced educational requirements, specialized knowledge, and compensation. The personnel worker recognizes his work as professional and has established professional organizations with recognized codes of ethics. Departments of education have provided positions and opportunities for counselors in many states, the federal government has appropriated funds for training counselors and establishing counseling centers, and states have set up license requirements for counselor certification. Involvement in legislative activities by the American Personnel and Guidance

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[5] Ibid., p. 8.

[6] Maryland Casualty Co. v. Crazy Water Co., 160 S. W. (2d) 102 (1942).

Association serves also to identify guidance and personnel work as a profession:

> The Association serves as a major source of information, research, and expert opinion on guidance and personnel work to the Congress of the United States, to federal, state, and local governments, to independent agencies, to the general public, and to its members.
>
> APGA presents its views in various ways. Testimony is given before Committees of Congress upon request. Formal letters or information are transmitted to the Congress upon invitation. When requested to do so, APGA staff provides expert consultation for Congressional Committee Chairmen, Committee members, and House and Senate Committee Staffs. APGA members, as professional persons, frequently express their individual views to Congress.[7]

The professional status of guidance and student personnel is established, yet it is hindered insofar as it does not enjoy some of the legal privileges granted to other professions. It does not have the immunity of privileged communication that is enjoyed by the legal, medical, and theological professions either by statute, constitution, or case law, even though it is involved in communications with others which by their very nature must remain privileged. Interviews, records, and private discussions between the guidance or student personnel worker and his client must be kept confidential in order that the

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[7] Carl McDaniels, "The Legislative Position of the APGA," Personnel and Guidance Journal, XLIII (April, 1965), p. 833.

counselor may effectively gain the confidence of his client and successfully establish a meaningful relationship. It is not surprising than that concern should arise over the legal responsibilities of the profession.

There has been much question among the members of the guidance and student personnel profession concerning their legal rights and responsibilities in recent years. This is evidenced by the number of articles that have been published in professional journals, books, and papers regarding the legal aspects and problems of the profession; and a number of conferences and speeches have embraced the subject at meetings of professional organizations. In 1962 in Philadelphia, Martha Ware presented a speech entitled "Freedom to Refrain" to the Pennsylvania Asaociation of Women Deans and Counselors in which she discussed the confidentiality of the counselor regarding student records. As early as 1954 Thomas M. Carter in the November issue of the Personnel and Guidance Journal expressed his concern over the professional immunity and privileged communication of the counselor. "Some Legal Implications for Personnel Officers" by Douglas Parker was published in the Journal of the National Association of Women Deans and Counselors warning personnel workers of possible liability for some of their actions; and Inez Livingston in the Personnel and Guidance Journal in January, 1965, asks the queation "Is the Personnel Worker Liable?" Justin Smith spoke about the confidentiality of records and student rights at the

American Personnel and Guidance Association convention in Minneapolis in 1965, and several sessions of the 1970 convention in New Orleans were devoted to the legal problems of the guidance and student personnel worker.

The guidance and student personnel worker should be concerned about all the legal aspects of his profession, but since this is a study of tort liability for negligence attention will be focused on this facet. There is very little judicial precedent regarding the subject of legal liability for negligence of the guidance and student personnel worker, with few cases ever brought before the courts of law; and almost no legislation relating to people in these areas has been developed in federal or state statutes. But this does not grant any protection from liability to individuals engaged in the profession of guidance and student personnel work when their actions are alleged to be directly responsible for the injuries incurred by others. Guidance and student personnel workers, teachers, and other school employees, as well as doctors, lawyers, and accountants are individually responsible for their own acts. If another is injured as a direct result of the negligence of a guidance or student personnel worker, the individual guidance or student peraonnel worker may be held liable if a cause of action can be shown to exist.

Having defined the areas of guidance and student personnel work and having established these occupations as

professions with very little legal precedent, the question now arises of the responsibility of the guidance and student personnel worker for his negligent actions. The following chapters will explore the theory of tort liability for negligence as it began in common law, as it is today, and how it is related to the areas of guidance and student personnel work.

CHAPTER II

NEGLIGENCE

Tort as defined by Black, a noted authority in law, is a private or civil wrong or injury independent of contract.[8] This is to say that a tort is a wrongful act for which a legal action may lie. The person who commits the tortious act (defendant) is obliged under law (liable) to the injured party (plaintiff). Unlike a crime for which the state will prosecute, the civil action for a tort is initiated by the injured party.

"Until the middle of the eighteenth century, it (tort) was in common use in England and America as a synonym for 'wrong'. Gradually its usage was restricted to the technical vocabulary of the lawyer. It is now defined as any wrongful act, other than a breach of contract, which may serve as the basis for a suit for damages."[9]

A tort committed against another person may be done intentionally or it may be the result of negligence. Those torts which are willful or intentional include assault, battery, false imprisonment, defamation of character, trespass

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[8] Henry Campbell Black, Black's Law Dictionary, St. Paul, Minn.: West Publishing Company, 1951, p. 1660.

[9] Thomas Edward Blackwell, College Law: A Guide for Administrators, Washington: American Council on Education, 1961, p. 9.

to land, trespass to chattels, invasion of the right of privacy, release of information, fraud and conversion. When a tort is willful or intentional the one who commits the act (tortfeasor) knows or is uaually certain that his action will cause injury to another. Intentional torts, however, are not the subject of this paper and will not be discussed in further detail.

Negligence, which is the main theme, may be defined as an act or omission which unreasonably does or may affect the rights of others. It is "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do."[10] Negligence does not require intent on the part of the actor. It is sufficient that the commission or omission occurred even through carelessness or thoughtlessness. Negligence in itself does not constitute the tort, but negligence becomes a tort when a person performs an act or neglects to perform an act that unreasonably results in the proximate cause of another's injury.

The definition of negligence tells us that one can be liable for an act or for the omission of an act that affects the rights of others and results in harm. "Intention as well

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[10] Black, op. cit., p. 1184.

as action may be negligence."[11] It makes no difference if the negligence is active or passive or if the injury arose through the nonfeasance, the malfeasance, or the misfeasance of the wrongdoer.[12] Nonfeasance is "the omission to do something, especially what ought to have been done;"[13] malfeasance is "the doing of an act which a person ought not to do;"[14] and misfeasance is "the doing wrongfully and injuriously of an act which one might do in a lawful manner."[15] The court also says that either misfeasance or nonfeasance or a combination of both may be considered negligence.[16] "Negligence is want of ordinary care and may consist in doing something which ought not to be done, or in not doing something which ought to be done."[17]

As guidance and student personnel workers and as individuals we have a negative duty of not doing willful harm as well as a positive duty to avoid injury to another. We,

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[11] Public Service Co. of N. H. v. Elliott, 123 F (2d) 2 (1941).

[12] Gindele v. Corrigan, 22 N. E. 516 (1889).

[13] Webster's New Collegiate Dictionary, Springfield, Mass.: G. & C. Merriam Company, 1953, p. 571.

[14] Ibid., p. 508.

[15] Ibid., p. 538.

[16] Daurizio v. Merchant's Dispatch Transportation Co., 274 N. Y. S. 174 (1934).

[17] Lepotsky v. Chapman, 10 Ohio Law Rep. 560 (1911).

therefore, must be as concerned with doing nothing in a situation that calls for action, as well as with an overt act which becomes the reason for another's suffering. When to act or when to refrain from acting is often a difficult decision. The difference between misfeasance and nonfeasance is obvious in theory, but in practice it is not always easy to say when conduct is active or pasaive.[18]

There is no distinction made in early common law between negligence and the other torts. It came into its own in the nineteenth century and ia best summed up as follows:

> "Negligence was scarecely recognized as a separate tort before the earlier part of the nineteenth century. Prior to that time, the word had been used in a very general sense to describe the breach of any legal obligation, or to designate a mental element, usually one of inadvertence or indifference, entering into the commission of other torts. Some writers once maintained that negligence is merely one way of committing any particular tort, just as some courts, for example, still speak occasionally of a negligent 'battery.' But for more than a century, it has received more or less general recognition of an independent basis of liability . . . . Today problems and principles, as well as distinct questions of policy, arise in negligence cases."[19]

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[18] Francis H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability," University of Pennsylvania Law Review, LVI, (April, 1908), p. 220.

[19] B. Smith Young and William M. Prosser, Torts: Cases and Materials, Brooklyn, N. Y.: The Foundation Press, 1957, p. 206.

In addition to being a separate tort, negligence may also be a violation of some statute that requires or prohibits action and that waa established for the purpose of protecting individuals or property, as well as the careless or negligent performance of a contract.[20] Thua, a tort may be a crime against the state and one who is tried in a criminal court may also be sued for damages in a civil court. A person may be tried by the state for manslaughter in the death of another through the negligent operation of an automobile, but he may also face civil action for the tort by the decedent's heirs and be required to pay damages.

A tort action may also grow out of a breach of contract if any injury occurs, but the breach itself cannot be a tort. "An action as for a tort or an action aa for a breach of contract may be brought by the same party on the same state of facts."[21] Only when the defendant fails to perform a legal duty which results in injury to the plaintiff while he fails to fulfill a contract will a cause of action lie in either a tort or contract court. It is, however, with the civil action for the tort with which we will be primarily concerned.

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[20] Walker v. Klopp, 157 N. W. 962 (1916).

[21] Louisville and Naahville R. R. Co. v. Spinks, 30 S. E. 968 (1898).

The criterion necessary for determining negligence is that of the reasonable man and ordinary care. The court attempts to define ordinary care in Hill v. City of Glenwood.

> There is no precise definition of ordinary care, but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence.[22]

The standard then is always that care which a reasonable man would use if he were in a like or similar situation. But the question now arises of who is a reasonable man and how is this determined.

> The Common Law of England (predecessor of our legal system) has been laboriously built upon a mythical figure--the figure of 'The Reasonable Man' . . . . He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen . . . . The Reasonable Man is always thinking of others; prudence is his guide and 'Safety First' . . . is his rule of life . . . . He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound.[23]

A reasonable man is one who exercises a standard of care dictated by the circumstances in which he is involved.

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[22] 100 N. W. 523 (1904).

[23] A. P. Herbert, Misleading Cases in the Common Law, New York: G. P. Putnam, 1930, pp. 12-15.

Whether or not one has acted as a reasonable man will be determined by a judge and a jury in a court of law and will be dependent upon the elements involved in the legal test of a tortious act. Thus, negligence constitutes a question of fact to be decided upon in each case.

Before liability can attach, however, there are three elements in every tort action that must exist in order for there to be a cause of action. These are the existence of a legal duty toward the injured person; a breach or violation of the duty; and damage as the direct and proximate result of the breach.[24] The absence of any of the three elements of negligence is fatal to a claim.[25]

Duty requires that a standard of conduct be adopted, and that this conduct not violate the rights of another. The existence of a legal duty toward the injured party is upheld in such cases as Palsgraf v. Long Island Railroad Company when the court said that "there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others."[26] Again in

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[24] City of Mobile v. McClure, 127 S. 832 (1930).

[25] Howard v. Fowler, 207 S. W. (2d) 559 (1947).

[26] 162 N. E. 99 (1928).

Belt v. City of Grand Forks, N. D., the court ruled that "'Negligence' being failure to perform a duty, there can be no negligence, in absence of duty."[27] In other words, before negligence can be found a relationship must exist between the injured party and the person committing the injury, and this relationship must be one in which the commission of a wrong by one becomes the invasion of the right of the other. "If the defendant was negligent but did not have a duty to the plaintiff, defendant's negligence does not make him liable for judgment for he was under no duty to the plaintiff."[28] The decision of whether or not a duty is owed is also a question of law to be decided upon by the court.

The second element of a tort that must be decided upon if there is to be a cause of action is whether or not there exists a breach in the duty that the defendant owes to the plaintiff. For a breach to exist, the one alleged to have committed the wrong must have failed to conform to the standard of conduct that was required of him. To establish the negligence, the plaintiff must show that the defendant failed to use the proper care in performing his duty.

The third element of a tort is present when the injury is the direct result of the negligent party's breach

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[27] 68 N. W. (2d) 114 (1955).

[28] William L. Prosser, Handbook of the Law of Torts, St. Paul, Minn.: West Publishing Company, 1964, p. 146.

of duty. If the duty to the plaintiff did in fact exist, and if a breach of that duty did occur by an act or a failure to act on the part of the defendant, and if the injury incurred by the plaintiff is a violation of the plaintiff's rights and the direct result of the defendant's negligence, the defendant may indeed be liable. It is not sufficient that the injury occurred. Not only must the plaintiff's rights be violated, but there must be a reasonably close connection between the wrong occurring to the plaintiff and the conduct of the defendant. As stated by the court in White v. Schnoebelehn " . . . there must be a negligence and harm and they must have a causal connection."[29]

The right to recover in a tort action rests on an additional factor--that of damage. "Damage is an essential part of a cause of action for negligence and must be alleged."[30] Plaintiff must have suffered an actual injury rather than having merely been placed in a position to suffer possible injury without actually being damaged. "Nominal damages to vindicate a technical right cannot be recovered in a negligence action where no loss has occurred. The threat of future harm not yet realized is not enough."[31] When the possibility of danger

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[29] 18 A. (2d) 186 (1941).

[30] Wells v. Poland, 198 N. E. 764 (1935).

[31] Prosser, op. cit., pp. 146-47.

exists the wronged party may take measures to prevent the actual danger from occurring in another court, but he is not entitled to the right of recovery from the negligent party in a tort action. "Where negligent conduct threatens irreparable damage to property rights, a court of equity may act by injunction to prevent the harm before it occurs."[32] Again the court in White v. Schnoebelehn says, "The possibility that injury may result from an act or omission is sufficient to give the quality of 'negligence' to the act or omission; but possibility is insufficient to impose any liability or give rise to a cause of action . . . . there is no cause of action unless and until there has been an injury."[33]

The main test of negligence is foreseeability. Could the wrongdoer anticipate that his act or failure to act might produce harmful results? "Where a course of conduct is not prescribed by mandate of law, foreseeability of injury to one to whom duty is owed is of the very essence of negligence, and if injurious consequences are not foreseen as a result of the conduct, then that conduct is not negligent."[34]

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[32] Young and Prosser, op. cit., p. 207.

[33] 18 A. (2d) 186 (1941).

[34] Cleveland v. Danville Traction and Power Co., 18 S. E. (2d) 915 (1942).

There are no rules for negligence and for determining if conduct was proper or negligent except the criterion of the reasonable man. If an ordinarily prudent person would or should have foreseen that his actions, or his failure to act, would lead to injury to another, his conduct would be considered negligent. Should he have foreseen the likelihood of harm as the result of his act? Was he afraid the damage or injury might occur? Could he have stopped it? Did he reasonably guard against the expected danger? "Where it should be apparent to a reasonable and prudent person that to pursue a certain course of conduct is likely to produce results injurious to others, the pursuit of such a course of conduct is negligence and it is not necessary that the precise or particular result be foreseen."[35] "If a defendant could not reasonably foresee any injury as the result of his acts, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence and no liability."[36]

When an occurrence is unusual, extraordinary, and improbable, legally there is no liability. One cannot be liable for failing to anticipate an improbable danger.

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[35] McClelland v. Interstate Transit Lines, 6 N. W. (2d) 384 (1942).

[36] Logan v. Hennepin Avenue M. E. Church, 297 N. W. 334 (1941).

Remote possibilities cannot constitute negligence. "Failure to guard against a remote possibility of accident or one which could not, in the exercise of ordinary care, be foreseen, does not constitute 'negligence.'"[37]

Negligence must be determined in each case. It is "a fact which must be proved and will never be presumed, and proof of the occurrence of an accident does not raise a presumption of negligence." The burden of proof always lies with the plaintiff and his attorney since the civil action for a tort is always initiated by the injured party. He must show why the injury occurred or the reason for the accident. The burden of furnishing proof of the existence of negligence is on the party who asserts or alleges it, and the burden of proof does not shift during the trial.[39] Once the plaintiff has established the case and presented the essential facts in a negligence action, the defendant, if he denies the negligence must show that he had used proper care. The decision to determine the responsibility for the alleged negligence is a function of the judge and the jury in a court of law and will be decided upon by them.

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[37] Rothstein v. Monetter, 17 N. Y. S. (2d) 369, 372 (1940).

[38] Grugan v. Sholl Hotels Finance and Exchange Corp., 18 A. (2d) 30 (1941).

[39] Corpus Juris Secundum, New York: American Law Book Company, LXV A, p. 460.

Negligence is a distinct tort for which a civil action will lie. It is the failure to meet the standard of care required of a reasonable and prudent man under like or similar circumstances. If one's conduct falls short of this standard and results in injury to another he is liable in tort to the injured party. The necessary elements for a cause of action for negligence include duty, breach, proximate cause and damage. Foreseeability is the test of negligence and the action initiated by the plaintiff must be decided on in a court of law by a jury and a judge.

CHAPTER III

NEGLIGENCE AND GUIDANCE

Probably the most classic case in the courts of law involving the tort liability for negligence of the guidance and student personnel worker was that of Bogust v. Iverson.[40] Here the defendant, a full-time director of student personnel services and a professor of education, was charged with negligence by the parents of a deceased student. The student who was under the direct guidance and supervision of the defendant was in need of professional guidance and committed suicide when the defendant terminated interviews with her. The acts of negligence alleged by the parents were the defendant's failure to offer proper guidance, failure to secure psychiatric care for the deceased, and failure to confer with the parents of the deceased, which prevented them from acquiring the proper care necessary for their daughter. The Superior Court of Wisconsin affirmed the decision of the circuit court which ruled in favor of the counselor defendant.

Three points were brought out in the court's reasoning of the case. First, the court decided that the

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[40] 10 Wisc. (2d) 129, 102 N. W. (2d) 228 (1960).

defendant was not a person qualified as a medical doctor or a specialist in mental disorders, and as such could not be charged with the same degree of care as a person trained in medicine or psychiatry. "To hold that a teacher who had had no training, education, or experience in medical fields is required to recognize in a student a condition, the diagnosis of which is in a specialized and technical field would require a duty beyond reason."[41]

Secondly, the complaint stated that the defendant was negligent in his failure to secure proper medical care for the deceased and his failure to notify her parents. The court ruled that to hold that the defendant was negligent, it must be alleged that the defendant knew that the deceased would commit suicide. But there was no allegation of fact that the defendant, as a reasonably prudent man, could have been aware of such tendencies on the part of the deceased. "The law does not require anyone in the exercise of reasonable care to take measures against a danger which a person's mental condition does not suggest as likely to happen."[42]

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[41] Frederick C. Seibold, Wisconsin Reports: Cases Determined in the Supreme Court of Wisconsin, Mundelein, Ill.: Callaghan and Company, 1961, p. 133.

[42] Ibid., p. 139.

Thirdly, the court stated that the defendant had no obligation to continue interviews with the deceased. There was no allegation that the interviews benefited the deceased, that the defendant had a duty to continue them, or that their termination was the cause of the student's death or in any way placed her in a worse situation. "One who gratuitously renders service to another, otherwise than by taking charge of him when helpless, is not subject to liability for discontinuing the services if he does not thereby leave the other in a worse position than he was in when the services were began."[43] Since no duty was found existing in this case one of the elements of a cause of action in tort for negligence is not present.

"This case aroused much concern among those engaged in guidance and counseling and among their fellow members of the teaching profession. This concern was expressed in a brief amicus curiae (friend of the court) submitted in the case by the National Education Association.

> The implications of this case for the future of guidance programs in the schools and colleges of this country became clearer with the realization that, at the present time, there are approximately 25,000 full or part-time counselors employed by the schools and colleges in the fifty states. Any one of them might have been the defendant in this case.

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[43] Ibid., p. 135.

> To establish a precedent that a cause of action is stated by the facts pleaded here would create an occupational hazard of indeterminate proportions for each of these individuals and would, in effect, undermine the effectiveness of a part of the public educational program that needs to be greatly strengthened at the present time."[44]

Bogust v. Iverson is only one case on record, but there are other circumstances where persons engaged in the practice of guidance and student personnel work may find themselves faced with legal responsibilities and liabilities for negligence. Inez Livingston points out that "it is not uncommon for a personnel worker, especially a residence hall advisor, to use his personal car to take home or to take to the hospital a student who is ill."[45] Neither is it uncommon for guidance and student personnel workers to offer to students rides to and from meetings, in inclement weather, or to out-of-town conferences in their personal cars. If an accident occurs and the student is injured in any of these cases, the guidance and student personnel worker is responsible and may be liable in a tort action for negligence regardless of the circumstances.

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[44] Martha L. Ware, Law of Guidance and Counseling, Cincinnati, Ohio: W. H. Anderson Company, 1964, p. 163.

[45] Inez B. Livingston, "Is the Personnel Worker Liable?", Personnel and Guidance Journal, XLIII, (January, 1965), p. 473.

Guidance and student personnel workers may be called upon to act in a situation where a student has already been injured or is already ill. What is the responsibility of the guidance or student personnel worker in such a case? "If the personnel worker administers or prescribes any treatment he is liable for damages if the treatment should cause the student to be in a more serious condition than before the treatment."[46] On the other hand there may be a duty on the part of the guidance or personnel worker to act in the event of an emergency. Since negligence constitutes an act or an omission, failure to render the proper first aid in the event that a doctor or other medically trained individual is not immediately available, may be considered an omission. This may lead to an action in tort for negligence which might provide the guidance or student personnel worker with liability if he did not act as a reasonably prudent person would have acted in a similar circumstance. In this case the failure to do something could be alleged to be negligence. Emergency, however, depends on all the circumstances involved and the amount of injury incurred.

Other questions of liability for negligence may and do arise in the life of a guidance and student personnel worker. Suppose a student is injured while acting in

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[46] Ibid., p. 473.

accordance with advice given by a guidance or student personnel worker? What liability would attach if a student is injured in the pursuance of some action which was given approval by the guidance or personnel worker, or in the pursuance of some action requested by the guidance or personnel worker? Will negligence be charged if a guidance or personnel worker should have given advice but did not and the student was injured?

Suppose a guidance or personnel worker, or any other school employee for that matter, fails to keep facilities in proper repair when they are placed under his supervision? What results if a student is injured in a university- or college-owned building which has not been sufficiently provided with safety equipment and proper precautionary aids, or if guidance and student personnel workers have failed to alert students to an oncoming danger? Insecure furnishings, unmarked plate glass windows, untacked carpets and mats, hazardous walks and stairways, and failure to provide necessary information required in case of fires and other natural disasters can all lead to possible injury which can and may result in a cause of action for negligence. Liability might also attach in the absence of proper supervisory personnel at college- or university-sponsored programs and activities.

All of the above factors need to be given consideration. None of the questions can be given a positive or negative

answer without first applying to them a definite set of facts. Then, the standard of care of the reasonable and prudent man in the same or similar circumstances will apply as it is determined by the judge and jury in the court. Must we wait for an occurrence or for some mishap before allowing our actions proper review and consideration and perhaps be confronted with a court case? Then it will be too late to examine the facts and to say that we were not aware of the possible consequences of our negligent acts. Ignorance of the law cannot be used as an excuse.

In a recent case at the University of Cincinnati the father of a minor student named three university officials, including student personnel workers, in a damage suit in connection with the disappearance of his daughter from a college residence hall. The alleged charges included the university's failure to provide protection as to the girl's health, safety and morals. We may argue that it is not the responsibility of the schools and universities to insure the health, safety and morals of its students and that we are in an age where the doctrine of in loco parentis is not being recognized as a function of the schools and universities, and yet legally we are being asked to account for actions which fail to provide circumstances regulating student conduct which could result in student injuries.

This will not be an attempt to discuss the theory of in loco parentis or to advocate its acceptance or its reversal. The situation in Cincinnati, however, has left the university and its officials open to a cause of action for negligence. How will the courts decide? Will the alleged facts be shown to be negligence? Can the university officials meet the test of the reasonable and prudent man? Should the university have foreseen the consequences? Did they neglect a duty which resulted in an injury? All these questions can only be decided on by the courts, now that the case has been brought before them. Whatever the verdict, the case should make us aware of the possibility of suit where the actions of the guidance and student personnel worker are alleged to be negligent.

The Wisconsin courts in Bogust v. Iverson in which the defendant student personnel worker was alleged to be negligent in a tort action for the death of the plaintiff's daughter did not find the defendant liable. The court felt that under the circumstances the defendant had no duty to the plaintiff. Guidance and student personnel workers are daily faced with situations that could lead to a similar cause of action, and a case of alleged negligence is now pending in the Ohio courts. The question of whether or not Bogust v. Iverson has set a precedent for the guidance and student personnel worker and whether the Ohio

courts will again rule in favor of the defendant remain to be answered. We must wait for the decision of the courts.

CHAPTER IV

WHO IS LIABLE?

A number of doctrines under common law, upon which our present legal system is based, granted freedom from liability for negligence on the part of both the public and private schools. It was the general principle in common law that the State, as a sovereign, is not liable in tort for damages for any injuries resulting from the negligence of its officers, agents, and employees. It is believed that the common law doctrine of state sovereignty provided its immunity to all arms of the state and had its founding in 1783 in the English common law case of Russell v. Men of Devon.[47] The principle here is often referred to in terms of the "king can do no wrong" and was later interpreted and accepted as the "state can do no wrong" and carried over into American jurisprudence.

This principle of state sovereignty extending to all agencies of the state included the school districts.

> The overwhelmingly recognized general rule regarding school tort liability is that the schools are quasi-corporations created as an agency of the state to execute the purely governmental function of providing a free

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[47] 100 Eng. Rep. 359, 2 T. R. 667 (1788).

> and public education for the residents of the state. As such they are imbued with the state's immunity from tort liability in the absence of a clear statute imposing such liability.[48]

In Livingston v. Regents of New Mexico College[49] the court prohibited recovery for damages resulting from tort liability on the ground of state sovereignty even though the board of regents carried comprehensive liability insurance. The doctrine of sovereign immunity for the schools had its basis in Illinois in the case of Kinnare v. City of Chicago.[50]

This doctrine of state sovereignty together with the doctrine that school districts do not have sufficient money with which to pay liability claims provided the basis for the school district's immunity from tort liability for negligence. The reasoning behind the public funds theory was the belief that school districts are supported by taxes, and the taxpayers money cannot be used for the purpose of satisfying legal judgments. In Thomas v. Broadlands[51] the court of Illinois allowed the doctrine of public funds to be the decisive factor in its judgment in favor of the schools.

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[48] Robert Stroup, "School Tort Immunity," North Dakota Law Review, XLIII, (Summer, 1967), p. 783.

[49] 328 P. (2d) 78 (1958).

[50] 49 N. E. 536 (1898).

[51] 109 N. E. (2d) 636 (1952).

There are many who have found fault with the principle of state sovereignty and public funds, however, and school districts are finding it more and more difficult to protect themselves from legal and financial responsibility for negligence. In the past few years the principle of governmental immunity has been reversed in many states. The doctrine as it existed in common law is now undergoing much study in the courts with the tendency toward its abolishment. Judicial decree as well as legislative statutes are abrogating the principle of school district immunity. "Criticism of the rule has not gone unheeded for the governmental immunity doctrine has been revoked in many states by the courts and legislatures."[52] Illinois was the pacesetter for abrogating the tort immunity doctrine with its 1959 decision in Molitor v. Kaneland Community Unit School District.[53] Other states soon followed the precedent set by Illinois. "Michigan in 1961, Wisconsin and Minnesota in 1962, and Arizona in 1963 abolished immunity of school districts."[54] "New York, California and Washington abrogated the immunity doctrine though constitutional amendment or appropriate

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[52] Stroup, op. cit., p. 787.

[53] 163 N. E. (2d) 89 (1959).

[54] Edmund E. Reutter, Jr., Schools and the Law, Dobbs Ferry, New York: Oceana Publications, Inc., 1964, p. 109.

legislation."[55] "Comprehensive tort liability statutes now exist in Alaska, California, Hawaii, Illinois, Iowa, Minnesota, Nevada, New York, Utah, and Washington."[56] School districts are now subject to the same liability for tort as are private individuals or corporations.

The same trend toward reversing immunity for tort liability for negligence took place even earlier in the private schools. Under the "trust-fund" doctrine charitable and educational institutions were protected against charges of negligence. It was considered unjust for the direct beneficiary of a charity to further deplete the funds available for charitable use by any claim for compensation in a tort action. But it was not always easy to determine who was a recipient of the charity. A student paying full tuition might not be considered a direct recipient and could be eligible to recover damages in a tort action if injured through the negligence of the educational institution or one of its agents or employees. "Prior to 1942 only two or three courts had rejected the immunity of charities outright."[57] The case of President

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[55] Chester M. Nolte, "Minnesota Joins Growing List of States Abrogating Historic Immunity Doctrine," American School Board Journal, CXLVII, (December, 1963), p. 13.

[56] Stroup, op. cit., p. 790.

[57] Prosser, op. cit., p. 787.

and Directors of Gerogetown College v. Hughes[58] set a precedent by reversing the charitable immunity doctrine. "By 1955, the courts of only twelve states--Arkansas, Idaho, Kentucky, Maine, Massachusetts, Mississippi, Oregon, Pennsylvania, South Carolina, West Virginia, Wisconsin and Wyoming--were still recongizing the doctrine of complete immunity for charitiea."[59]

> The primary reasons advanced for abandoning immunity doctrines are that neither those who organize a charitable institution nor the courts have authority to put charities beyond the pale of the law applicable to all, and that protection of life and limb by organized society is of greater importance to mankind than any species of charity, and is superior to rights of property.[60]

Thus, the historic defenses are becoming less and less available either to private and endowed schools or to public schools, and the schools are indeed being held liable for negligence in a tort action.

The doctrines of charitable immunity and state sovereignty, even when they were at their peak in providing freedom from tort liability to schools, did not always protect the individual employee against liability for injury sustained by others through his negligence. Negligence suits were brought directly against the individual

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58 130 F. (2d) 810 (1942).

59 Blackwell, op. cit., p. 151.

60 American Jurisprudence, Rochester, New York: Lawyers' Cooperative Publishing Company, XV, p. 176.

involved and these individuals were held liable in tort for their negligent actions.

Even though some states will still recognize the principles of sovereign immunity and charitable immunity as applicable to schools, due care is the personal responsibility of all. Negligence is not excused and individuals may still be sued and held liable for their actions when they result in injury to another.

> One of the basic ends of the law of torts is to place the ultimate liability for negligent injury on the person or persons who are primarily responsible for the injury inflicted. So, as a general rule, every person who is legally responsible is liable for his own negligence which is the proximate cause of any injury to another, or of damage to property. Liability for one's negligence is the rule, and all concepts of immunity are really exceptions to the rule.[61]

In Grosso v. Witteman[62] the court stated that a teacher may be liable for injury to students caused by his failure to use reasonable care. Where duty, breach and proximate cause are alleged to exist, a case can be established against a teacher, guidance or student personnel worker or other school employee and the court will determine if liability will ensue.

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[61] Corpus Juris Secundum, New York: American Law Book Company, LXV, p. 1034.

[62] 62 N. W. (2d) 386 (1954).

> The teacher's liability for damages resulting from his negligent act in and about the school rests on the same principles as his liability as a private person, removed from the school. The same standard of care applies, that of a reasonable and prudent person acting under like circumstances . . . . The same rule with respect to actual causation, foreseeability, and proximate cause govern the case, and the defenses available to the teacher are no more or less extensive than those available to any other defendant.[63]

The number of teachers and other school employees who have been sued in recent years is on the rise and the amount of money being awarded for damages resulting from negligence of school employees in tort actions is also increasing.

It has been established that guidance and student personnel work are professions and that the guidance and student personnel worker is a professional, and that there is little legal precedence for the profession. Thus, it will be necessary to show the effect of tort liability for negligence on other professionals and relate these to the guidance and student personnel worker. Will the court use the same yardstick and the same standard of care for the professional as it does with any other individual?

The standard of care is that of the reasonable and prudent man in like or similar circumstances. This shows

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[63] Paul O. Proehl, "Tort Liability of Teachers," Vanderbilt Law Review, XII (1959), p. 723.

that the exercise of due care is an individual responsibility, but the exercise of utmost care is a professional responsibility.[64] In Dorris v. Warford[65] the court says that one who employs a professional man may expect from him the same ordinary care and skill as one may expect from any other member of the profession, not as one may expect from any other individual.

Guidance and student personnel workers including deans, residence hall counselors, housing officers, activities and athletic directors are all employees of the school and are subject to the same liability for negligence as others engaged in their profession, and must exercise the same standard of care as do those others in the same profession. "Professional personnel are held legally to a standard commensurate with their professional training."[66]

The professional is an expert. Professional responsibility then requires an expert standard of care. The physician, lawyer and accountant are considered professionals and the court requires the expert care and diligence exercised by members of their profession. In Cochran v. Harrison Memorial Hospital the court held that "before a

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[64] "School Laws and Teacher Negligence," N.E.A. Research Bulletin, XL, (October, 1962), p. 75.

[65] 100 S. W. 312 (1907).

[66] Reutter, op. cit., p. 74.

physician or surgeon could be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of the medical practice in his community forbids in such cases, or he must have neglected to do something required by that standard."[67] The judge and jury still decide whether the alleged negligence exists, but often they must turn directly to the profession for assistance in helping them to determine what is negligent conduct and whether the defendant exercised due care. This is expressed by the court in Adkins v. Ropp.

> . . . the general rule in malpractice cases is that, in determining whether the physician and surgeon has exercised ordinary skill and care . . ., the jury must be guided solely by the testimony of physicians and surgeons because of the scientific nature and character of the questions involved in such cases, and the jury cannot set up standards of skill and care of its own.[68]

Again in MacKenzie v. Carman the court says:

> The law thus requires a surgeon to possess the skill and learning which is possessed by the average member of the medical profession in good standing, and to apply that skill and learning with ordinary reasonable care. He is not liable for a mere error of judgment, provided he does what he thinks is best after a careful examination. He does not guarantee a good result, but he promises by implication to use the

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[67] 254 P. (2d) 755 (1953).

[68] 14 N. E. (2d) 727 (1938).

> skill and learning of the average physician, to exercise reasonable care, and to exert his best judgment in the effort to bring about a good result.[69]

As to the standard of care applied to members of the legal profession the court in Humboldt Building Association Company v. Drucker's Executors declared that "the attorney is liable to his client for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in like matters of professional employment."[70] And in the City of Grand Forks v. State the court in discussing the liability of the professional accountant said, "Defendants represented themselves as expert accountants, which implied that they were skilled in that class of work. In accepting employment as expert accountants, they undertook and the plaintiff had the right to expect, that in the performance of their duties they would exercise the average ability and skill of those engaged in that branch of skilled labor."[71]

Having viewed the court's stand on the medical, legal and accounting professions and their standard of care in negligence cases, and the court's acceptance of guidance and student personnel work as a profession one can then

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[69] 92 N.Y. Supp. 1063 (1905).

[70] 64 S. W. 671 (1901).

[71] 141 N. W. 181 (1913).

parallel the standard of care required of all professionals to that of the guidance and student personnel worker. If the guidance or student personnel worker is found to be negligent according to the standards of his profession he will undoubtedly be judged by the expert standard of care required of a reasonable and prudent guidance or student personnel worker in the same or similar circumstances. Any non-compliance with this standard that results in negligence and injury will bring upon the guidance or personnel worker a liability in tort that could prove to be personally, financially and professionally embarrassing.

The doctrines of immunity for state and charitable institutions and organizations are slowly disappearing from the courts, and schools and school districts are now liable in tort actions for their negligence and for the negligence of their employees and agents. In addition to the liability of the schools and school districts the exercise of due care is an individual responsibility for which the individual will be liable, and the standard of care of the reasonable and prudent man applies to all individuals. The standard of care required of all professionals, however, exceeds the standard expected of any other individual. A professional is an expert who is required to meet the same expert standard of care as are all other members of his profession. The proper standard of care will still be determined by a

judge and jury, but the profession itself will be asked to give them proper direction.

CHAPTER V

PROTECTION AGAINST LIABILITY

To avoid liability in tort for negligence all that is rqquired of a guidance and student personnel worker is that he exercise the proper care that is required of a reasonable and prudent guidance or student personnel worker. The law does not require the guidance or student personnel worker to guarantee that his actions will not be the cause of injury to another; all that he muat do ia exercise the necessary amount of due care so that another will not be injured through any fault of his. Extraordinary diligence is not necessary against pure accidents that can and do happen despite precautions, and clairvoyance regarding foreseeability is not within the realm of reasonableness. The applications of basic common sense and good judgment are the only necessities to prevent occurrences of situationa which might lead to a cause of action and liability for negligence. The beat way to protect against suit and liability ia through the exercise of ordinary care, the application of an adequate safety program personally and professionally, and the practice of foresight, not hindsight, with regard to one's actions.

In the event that the guidance or student personnel worker does become involved in a tort case for negligence, some of the following defenses are available to him. These are the same defenses that are available to any individual, and muat be applied to the alleged facts in each circumstance.

A denial of negligence or a statement of no negligence on the part of the defendant regarding the alleged facts can be brought by the guidance or student personnel worker. The defendant must show that he was not negligent, that he acted as a reasonable and prudent man, that he used proper care and that he took all reasonable precautions. The defendant's actions are put to the jury for a decision.

The defendant can show that one of the elements of a tort action is not present. If there is no duty, no breach, or no proximate cause and no damage there cannot be a cause of action for negligence.

An intervening cause may negate a cause of action for negligence. It has been established that there must be an unbroken causal connection between the negligence and the injury or damage suffered. Any event which breaks the natural sequence between the defendant's action and the plaintiff's injury will be considered an intervening cause. Whether the intervening cause was responsible for the plaintiff's injury or whether it was set in motion by the defendant's negligence will need to be determined by the jury. It cannot always be safely assumed that the intervening

cause is a reliable criterion for nonliability.[72]

An act of God could be responsible for the injury incurred by the plaintiff. Where there is no human intervention in a circumstance that leads to injury and where the injury results from the direct, immediate and exclusive operation of natural forces completely uncontrolled by man, the defendant may plead that the injury was the result of an act of God. When there is no act of negligence on the part of the defendant and no amount of foresight could have prevented the injury the defendant is innocent of any causality.

No possibility of foreseeability on the part of the defendant could mean no cause of action. An unavoidable accident which could not have been prevented, an unusual occurrence which would probably not have happened, or a remote possibility which would not be due to any lack of reasonable care on the part of the defendant cannot be adjudged to be negligence. When one cannot reasonably foresee the possibility of injury an action cannot lie for an involuntary accident. The court demands ordinary care but it does not require over-protection or extra-caution.

A statute of limitations may expel a cause of action for negligence from the courts. The statute of limitations

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[72] Gibson v. Garcia, 216 P. (2d) 119 (1950).

designates the amount of time between the accident or occurrence causing the injury and the filing of the claim for damages by the plaintiff. Each state individually determines the statute of limitations regarding tort actions and one would need to consult the laws of the respective states.

Some states continue to recognize the principles of sovereign immunity and charitable immunity which would provide the defense for an action in tort on the part of the schools and/or school employees. These doctrines are fast disappearing, however, and upheld in only a small percentage of the courts. Chapter III discusses the principles of sovereign immunity and charitable immunity in detail.

Contributory negligence on the part of the plaintiff may cause him to lose his case in a tort action. It is "such negligence on the part of the plaintiff as to make the injury the result of the united, mutual, concurring and contemporaneous negligence of the parties."[73] When one's own negligence contributes to his injury he cannot recover damages from the defendant. Even though the defendant was negligent in his actions, there is a lack of due care on the part of the plaintiff which constitutes contributory negligence on the part of the injured plaintiff. The contributory negligence, however, muat be shown to be the

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[73] G. F. Shroyer, "Personal Liabilities of Industrial Arts Inatructors," Industrial Arts and Vocational Education, LIII, (November, 1964), p. 22.

proximate cause of the injury and either have caused the injury or contributed to the negligence of the defendant to cause the injury.[74]

Comparative negligence might be said to be an extension of the doctrine of contributory negligence, but it is not as widely acceptable and is available only in those states having specific statutes recognizing it. Comparative negligence exists when both parties have mutually contributed to the injury and instead of the plaintiff being unable to recover damages from the defendant, both parties are apportioned for the damages. Damages are pro-rated on the amount of negligence attributed by each party on the basis of degrees of guilt.[75] The courts in the states recognizing contributory negligence feel that it is fairer to divide the damages between all the negligent parties, rather than having the plaintiff accept full responsibility and lose his claim.

The doctrine of assumption of risk holds the belief that the plaintiff voluntarily assumed an obvious risk which was inherent in the type of activity in which he participated. This kind of situation often occurs in the areas of athletics or sports-related activities. When the student knows that there is a possibility of an injury

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[74] Willis v. Schlagenhauf, 188 A. 702 (1936).

[75] Grosso v. Witteman, 62 N. W. (2d) 386 (1954).

occurring he is assumed to have realized the danger or risk and he knowingly and willingly enters into the activity. "The doctrine rests on two premises: First, that the nature and extent of the risk are fully appreciated; and second, that it is voluntarily incurred."[76] There is no liability where the risk is normal, but the burden of proving assumption of risk lies with the defendant. The court in Hunn v. Windsor Hotel also distinguished between the assumption or risk doctrine and that of contributory negligence. "The doctrines of contributory negligence and assumption of risk are not identical . . . . The essence of contributory negligence is carelessness; of assumption of risk, venturousness."[77]

Any case in tort involving negligence must go for its ultimate decision before a court of law and be decided upon by a judge and a jury. Every person is liable for his own actions in the event of negligence and personal legal liability does exist for all cases of proven negligence. Negligence and liability for it should be the concern of all guidance and student personnel workers. If adjudged negligent by the court in a tort action, the guidance and student personnel worker, or any other individual, faces liability for damages attributed to his negligence. Liability for negligence results in a definite financial loss,

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[76] Hunn v. Windsor Hotel, 193 S. E. 57 (1937).

[77] Ibid., p. 57.

and the guidance or student personnel worker must satisfy these judgments and suffer this loss himself. He can protect himself from this burden, through liability insurance. Group or individual insurance is available in many states to protect school employees from the financial harshness that could be incurred from an action in tort for negligence. It must be stated that liability insurance does not affect the question of liability, but merely provides for the payment of judgments. The insurance does not constitute a waiver of a tort action and cannot be used as a defense for negligence.[78]

Liability for negligence can be avoided by the guidance and student personnel worker by exercising due care and applying the standard of the reasonable man to all actions. If a cause of action should arise, certain defenses are available to all defendants in a negligence suit and these can be drawn upon by the guidance and student personnel worker. These include a denial of negligence, a missing element in a tort action, an intervening cause, an act of God, the absence of foreseeability, a statute of limitations, the doctrines of sovereign immunity and charitable immunity, contributory negligence, comparative negligence, and the assumption of risk. Liability is

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[78] Supler v. School District, 182 A (2d) 536 (1962).

determined by a judge and jury and if found liable, the defendant must satisfy the judgment from his own resources unless he has liability insurance. This insurance is available in most states to all guidance and student personnel workers on an individual or group basis.

CHAPTER VI

SUMMARY AND CONCLUSIONS

This paper has been an attempt to acquaint persons who are engaged in the professions of guidance and student personnel work with the law of tort and liability for negligence in order that they may have a better understanding of the possible results of their negligent actions on both a personal and a professional level. The status of the guidance and student personnel worker as a professional has been established and the history of tort liability for negligence has been reviewed. Negligence being the failure to act as a reasonable and prudent man in a like or similar circumstance provides one with a duty to exercise due care in all actions which could result in an injury to others. An individual who does not use prudence and take proper care is liable for all injuries to others which are incurred as a result of his negligence.

Anyone is in a position to incur liability. Liability of all kinds has been increasing over the years, and although the guidance and student personnel worker has been involved in a relatively few number of cases to date, this does not insure him of freedom from liability. At one

time the guidance and student personnel worker might have come under the protection of the schools and school districts and might not have been subject to liability in tort for negligence by virtue of the sovereign immunity and charitable immunity doctrines, but the courts now feel that these doctrines are unfounded and that every person is liable in tort for his own negligence. The professional person in addition to exercising the ordinary standard of care of the reasonable and prudent man, must also meet the standard of care of the reasonable and prudent professional, and the profession itself must direct what that standard will be. Thus, the guidance and student personnel professions should set up the standard of the reasonable and prudent guidance and personnel worker. To an extent this has been approached by the American Personnel and Guidance Association in its Code of Ethics.

A number of defenses are available to a guidance and student personnel worker if he becomes involved in a tort action for negligence. The circumstances surrounding each case will lead to its determination of liability. The alleged facts of each cause of action must meet all the necessary elements of a tort action as well as the test of foreseeability, and these facts must be brought before the court to be judged. If a court action arises for an individual, be he guidance or student personnel worker or ordinary

citizen, it can have serious repercussions even though liability does not attach. Involvement in a court case can be costly in time, money and position whether or not the judge and jury have ruled in favor of the guidance or student personnel worker and adjudged him liable or free from liability.

The financial burden can be a heavy one if one enters into a court case. One undergoes considerable expense in attorney's fees, costs for investigating the case, court costs, depositions and witness expenses without even considering the possibility of being adjudged liable. A liability ruling will also bring all the additional expenses of a retrial if an appeals case is initiated. It might be wise, financially, to obtain liability insurance, but it is necessary to keep in mind that this insurance covers only the legal judgment. It does not always meet the other expenses of a cause of action and it will never excuse liability.

Timewise, almost as much is expended as is involved financially. Time for meeting with lawyers, time for collecting evidence, and time in court, to say nothing of the time spent waiting for the actual trial to come before the courts provides the guidance or student personnel worker with an additional burden to his already busy schedules.

The loss of time and money is only a minor consideration when one looks at the possible damage to the personal

and professional reputation of the guidance or student personnel worker who becomes involved in a tort action for negligence. An individual guidance or student personnel worker can discredit himself and his school. Regardless of the court's decision the fact that he was in any way involved in a cause of action for negligence may forever remain in the minds of others and be damaging to him as an individual, as a school employee, and as a member of the guidance or student personnel profession.

Since the profession has little or no basis for tort liability and almost no history of case law, attorneys specializing in the defense of guidance and student personnel workers involved in liability for negligence are practically nonexistent. The question is how adequately will one be able to find a defense if a cause of action arises. As the profession continues to grow, so will the legal problems continue to increase, and the number of opportunities for causes of action in tort for negligence will follow this same trend. This should not mean, however, that the guidance and student personnel worker need operate under the constant fear that a possibility of a court case for negligence will arise. His best defense will be to use prudence in all his activities, not only during the professional day, and to be informed about the law of tort and the actions of the courts.

Although there are many demands on the time of the guidance and student personnel worker one needs to become acquainted with the entire area of legal implications and consequences of the profession. In order to do this, more unity is needed among the profession to educate all its members regarding the legal problems of the profession and to initiate concern over the possibilities of court actions. To accomplish these objectives, it will be necessary to analyze the constitutions and laws of the states regarding schools, to become familiar with judicial decisions affecting the guidance and student personnel worker, to review the rules and regulations and the policies of the schools toward the prevention of possible causes of action, to attempt to legalize any and all defenses should a cause of action arise, and to influence the courts and legislatures toward understanding the guidance and student personnel professions. There is no evidence that the courts and legislatures have outwardly denied acceptance of the guidance and student personnel worker as a professional nor have they prohibited the legal protection required by the profession, but it does seem necessary that the members organize themselves to insure their status.

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