

Injuries in School/College Laboratories in the USA

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Keywords

biology, chemistry, college, colleges, engineering, experiment, explosion, first-aid, injury, injuries, laboratory, liability, negligence, medical, physics, school, schools, science, tort, torts, university, universities

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Introduction

Because of my experience in the 1970s and 1980s teaching and supervising laboratories for physics and engineering students, when I was in law school in 1997, I did a comprehensive nationwide search of reported court cases on injuries in school and college laboratories. I was surprised to find few reported cases. As in other areas of tort law, most of the cases are probably settled before trial, so there is no reported opinion of a court. I began writing this essay in November 1999 and a version has been posted at my professional website since 29 Nov 1999. In March 2013, I did a new nationwide search of reported court cases on this topic, and revised this essay — adding more cases,¹ adding longer quotations from cases, and adding more discussion of the legal duty of instructors.²

definitions

In this essay, I use the words *pupil* and *teacher* to refer to people in elementary schools and high schools, and the words *student* and *professor* to refer to people in colleges and universities. Education law makes a distinction between *pupils*, who are children, and *students*, who are adults, as explained in my essay at <http://www.rbs2.com/eatty.pdf>. This distinction is important, because pupils, as children, require more supervision than students, who are adults. I use the word *instructor* to include both (1) teachers in schools, (2) graduate students who are teaching assistants in college, and (3) professors in colleges, regardless of rank. The word *institution* refers to any school, college, or university.

In litigation, the injured person who files the lawsuit (typically a pupil or student in laboratory injury cases) is called the *plaintiff*. The school, college, or instructor — or sometimes their insurance company — is the *defendant*.

¹ See the discussion of cases beginning at page 25, below.

² The discussion of legal duty of care begins on page 6, below.

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at <http://www.rbs2.com/advice.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Common Legal Issues in Lab Injury Cases

Many of the legal issues in cases involving injuries in school or college laboratories occur in every case, so it makes sense to discuss the general legal issues *before* discussing specific cases.

A. four elements of a tort

The injury of a pupil in a school laboratory, or the injury of a student in a college laboratory, may be a tort for which the teacher, professor, school, or college is liable. There are four elements to a tort, *all four* must be present before the court can order a remedy:

1. **Duty.** The defendant must owe a legal duty to the victim. A duty is a legally enforceable obligation to conform to a particular standard of conduct. In the context of this essay, the duty is established by testimony of expert witnesses (e.g., professors, science teachers) about what a competent laboratory instructor — “a reasonable man of ordinary prudence” — *should* have done. In cases where a teacher has no advanced education in science (e.g., a teacher in elementary school), the teacher’s duty is what a “reasonable parent” would have done.³ See the discussion of legal duty at page 6, below.
2. **Breach of the duty.** The defendant failed to conform to the legal duty. The breach can be either an act or a failure to act.
3. **Causation.** The breach was the cause of an injury to the victim. The causation does not need to be direct: defendant’s act (or failure to act) could begin a continuous sequence of events that ended in plaintiff’s injury, a so-called “proximate cause” or legal cause.
4. **Injury.** There must be an injury. In most tort cases, there must be a physical or financial injury to the victim.

³ The “reasonable parent” duty of care is discussed at page 6, below.

More technical detail and citations to authority are given in my essay at <http://www.rbs2.com/torts.pdf> . Most personal injury torts involve either automobile accidents, dog bites, slip and falls, defective products, or medical malpractice. While the basic principles of tort law apply when a pupil or student is injured in a science laboratory at a school or college, this essay discusses some additional issues beyond what is in a typical personal injury case.

B. common issues of negligence

There are some issues that commonly appear in litigation involving injuries in school or college laboratories:

- instructions that do not clearly warn of hazards, but there is no duty to warn of “obvious” hazards⁴
- instructor not present in the laboratory room at the time of the injury
- laboratory instructor preoccupied at the time of the injury (e.g., teaching assistant was doing his/her own homework and ignoring the students; instructor was grading papers)
- assigned experiment was unnecessarily dangerous: the same educational objectives could be obtained with a less hazardous experiment, less toxic materials, etc. This is a complicated risk/benefit analysis.
- teacher might be incompetent to supervise a chemistry or physics laboratory in elementary school or high school. Such a teacher might have minored in history, literature, mathematics, or physical education when he/she was a student. It might be negligent for the school to assign such a teacher to supervise pupils who are doing experiments, since the teacher would be incapable of recognizing a dangerous condition even if he/she saw it. I envision a tort along the lines of negligent entrustment by the principal of the school.
- lack of fire extinguishers, lack of first-aid equipment, etc. See the section on first-aid at page 53, below.
- lack of safety equipment (e.g., goggles or face shield to prevent eye injury, ground-fault interrupters in ac electrical circuits, fume hoods when working with toxic vapors, guards around moving parts to prevent injury to fingers, etc.)

⁴ See, e.g., RESTATEMENT SECOND OF TORTS, § 343A (1965).

C. legal duty of care

The common-law duty of care is stated somewhat opaquely in a legal reference book:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965). In plain English, an instructor needs to “exercise reasonable care” to prevent foreseeable physical injuries in laboratories in schools and colleges, because the “failure to exercise such care increases the risk of such harm” *and also* because the pupil or student relies on the instructor to teach safe laboratory technique(s).

In general, the standard of care in tort cases is what the judge or jury believes a “reasonable man of ordinary prudence” *should* have done.⁵ Historically, the standard of care for teachers in physical injury cases in schools is what a “reasonable parent” would have done, because schools have deprived pupils of the protection of their parents.⁶ I have traced this rule back to *Hoose v. Drumm*, 22 N.E.2d 233, 234 (N.Y. 1939) (“At recess periods, not less than in the class room, a teacher owes it to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances.”). This rule is still good law in New York state. *Stephenson v. City of New York*, 978 N.E.2d 1251, 1253 (N.Y. 2012).

An instructor with superior knowledge (e.g., a Ph.D. degree in chemistry) is legally required to use that superior knowledge when supervising others.⁷ In other words, a professor with a Ph.D. in chemistry can be held to a higher standard of care than an elementary school teacher with a bachelor's degree in education. Surprisingly, there are few reported judicial opinions about laboratory injuries that discuss how to apply a higher standard of care to professors with superior knowledge. While a professor in a university may have a higher duty of care than a teacher in a school, judges commonly hold that students in colleges — especially graduate students — need *less* supervision than pupils.

⁵ See, e.g., RESTATEMENT SECOND OF TORTS, § 283 (1965); PROSSER & KEETON ON THE LAW OF TORTS, § 32 (5th ed. 1984).

⁶ RESTATEMENT SECOND OF TORTS § 320, comment *b* (1965); *Pratt v. Robinson*, 349 N.E.2d 849, 852 (N.Y. 1976); *Mirand v. City of New York*, 598 N.Y.S.2d 464, 468 (N.Y.A.D. 1993), *aff'd*, 637 N.E.2d 263, 266 (N.Y. 1994); *Hansen v. Bath & Tennis Marina Corp.*, 900 N.Y.S.2d 365, 367 (N.Y.A.D. 2010).

⁷ See, e.g., RESTATEMENT SECOND OF TORTS, § 289(b) (1965). See also § 290, comment *f*.

C.1. instructor's duty to supervise

As general rules, one can say:

1. younger people need more supervision than older people. For example, fourth-grade pupils doing chemistry experiments should be closely supervised. On the other hand, a laboratory for chemistry majors in their final year of undergraduate college might have little supervision, just a faculty member who is readily available for questions.
2. more supervision is needed when materials or equipment are more dangerous.⁸ For example, a chemistry laboratory (i.e., where there are flammable, explosive, or poisonous materials) needs more supervision than an electronics laboratory, where the highest available voltage is only 30 volts.

Because younger people need more supervision than older people, I have grouped the cases at pages 25-52 into three sections: (1) pupils, (2) undergraduate students, and (3) graduate students.

It is well established law that the failure of an instructor to supervise pupils/students can be negligent conduct by the instructor. See e.g., *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836 (10thCir. 1941); *Brooks v. Board of Education of City of New York*, 222 N.Y.S.2d 184 (N.Y.A.D. 1961), *aff'd without opinion*, 189 N.E.2d 497 (N.Y. 1963); *Dailey v. Los Angeles School Dist.*, 470 P.2d 360, 364-365 (Calif. 1970); *Rupp v. Bryant*, 417 So.2d 658, 666-668 (Fla. 1982); *District of Columbia v. Royal*, 465 A.2d 367, 369 (D.C. 1983); *Johnson v. School District of Millard*, 573 N.W.2d 116, 119 (Neb. 1998).

One of the best reviews of a teacher's duty to supervise pupils is in a dissenting opinion of an Arizona Supreme Court case involving an injury in a high-school auto mechanics class.

Courts have for many years grappled with the problem of establishing a fair and reasonable standard for determining the extent of responsibility of teachers in the public schools when students under their supervision have sustained injuries arising from the alleged negligence of the teachers. Mindful of the vital function teachers serve in the education and molding of youth, courts have been reluctant to hold teachers liable in the fear that this function might be substantially impaired. Yet there are conflicting interests involved in such cases where negligent injury is alleged. As was succinctly noted by Judge Conway in his dissent in *Ohman v. Board of Education*, 300 N.Y. 306, 90 N.E.2d 474 (1949): "Parents do not send their children to school to be returned to them maimed because of the absence of proper supervision or the abandonment of supervision". 300 N.Y. at 311, 90 N.E.2d at 476 (1949).

....

⁸ This is a general principle of tort law. See, e.g., RESTATEMENT SECOND OF TORTS, §§ 293, 298 (1965).

An examination of the cases and commentaries discloses that three basic duties arise from the teacher-student relationship: (1) the duty to supervise; (2) the duty to exercise good judgment; and (3) the duty to instruct as to correct procedures, particularly (but not exclusively) when potentially hazardous conditions or instrumentalities are present. These basic duties must coexist with the whole purpose for the teacher-student relationship, viz. education.

The relationship of a public school teacher to his pupil is in some respects in loco parentis. Having the right to control and supervise the pupil, there is a correlative duty to act as a reasonable and prudent parent would in like circumstances. Proehl, *Liability of Teachers*, 12 VANDERBILT L.REV. 723, 740 (1959). The rationale of in loco parentis does not however apply in determining liability for a negligent tort against the pupil. In most jurisdictions the parent is not liable for negligent tort against his child, but the public school teacher may be.

The problem lies in determining what criteria should be used to meet the standard of care necessary to be exercised by the public school teacher. If the probability of harm can be foreseen, the public school teacher should take such measures as are reasonable and prudent to prevent an injury to the student. As the gravity of the possible harm increases due to conditions or circumstances to which the student is subjected, the apparent likelihood of its occurrence need be correspondingly less. No one can deny that few sectors of public and private existence are safe from risks to life and limb; the schoolyard, the classroom, the shop class, the chemistry laboratory certainly have their dangers and their risks. Teachers presumptively endowed with superior skill, judgment, intelligence and foresight, must fulfill the strong duties arising from their public position by exercising care commensurate with the immaturity of their charges and the importance of their trust. [citation omitted]

The characteristics of children are proper matters for consideration in determining what is ordinary care with respect to them, and there may be a duty to take precautions with respect to those of tender years which would not be necessary in the case of adults. *Shannon v. Butler Homes, Inc.*, 428 P.2d 990, 995 (Ariz. 1967).

However, age of the injured plaintiff is not the controlling element to tip the balance between liability and non-liability.

Moriss v. Ortiz, 437 P.2d 652, 656-658 (Ariz. 1968) (Lockwood, J., dissenting).

A general rule of law is that a person who supplies a dangerous item (i.e., chemical, equipment) has a legal obligation to “exercise reasonable care to inform [the user] of its dangerous condition or of the facts which make it likely to be dangerous.” RESTATEMENT (SECOND) OF TORTS, § 388 (1965). However, this duty does not apply if the user “realizes its dangerous condition”.

A person who supplies a dangerous item to someone who is likely to create an “unreasonable risk of harm” is legally liable for the harm. The someone could be likely to misuse the dangerous item because of his “youth, inexperience” or because he “lacks the training and experience” for safe use. RESTATEMENT (SECOND) OF TORTS, § 390 (1965) and comment *b*.

In addition to the legal duty to supervise and instruct pupils/students in a laboratory, there is also a legal duty to provide first-aid to injured pupils/students, as described at page 53, below.

C.2. “special relationship” between instructor and pupil/student

Nonlawyers may wish to jump to page 17, below, and skip the technical legal discussion of “special relationship”.

The applicable rule of law is “special relations giving rise to duty to aid or protect”:

One who is required by law to take[,] or who voluntarily takes[,] the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty [“to take reasonable action to protect them against unreasonable risk of physical harm”] to the other.

RESTATEMENT (SECOND) OF TORTS, § 314A(4) (1965). Section 314A(1) says a common carrier is an example of a special relationship. Section 314A(2) says an innkeeper has “a similar duty to his guests.” See also illustration 7 showing a pupil in kindergarten is a beneficiary of a special relationship. There are numerous court cases in some states that hold that a teacher has a special relationship to his/her pupils.⁹

Traditionally, the teacher-pupil and professor-student relationships were both considered “special relationships” in tort law, which meant that instructors had a legal duty to protect their pupils/students from foreseeable harms. The teacher-pupil relationship definitely remains a “special relationship”.¹⁰ But, since the late 1970s, professors no longer are “in loco parentis” to their students, and so the special relationship between professors and students has generally eroded. However, the professor-student relationship might still be a “special relationship” if the student *relied* on the professor’s superior judgment or if the college *controlled* the student, as explained at page 15, below. The current state of the law for professor-student relationships is confusing, and the confusion is increased by sloppy use of language by judges (e.g., referring to a pupil as a student).

⁹ See, e.g., *Pratt v. Robinson*, 349 N.E.2d 849, 852 (N.Y. 1976) (“It is clear that a school district does have a special relationship to its students, as that term is used in the negligence context, a relationship analogous to that between carriers and their passengers or innkeepers and their guests”); *Bartell v. Palos Verdes Peninsula School District*, 147 Cal.Rptr. 898, 901 (Cal.App. 1978) (“The established duty of a school district to supervise its playgrounds is therefore grounded upon the special relationship between the school and its attending students.”); *Resetar v. State Board of Education*, 399 A.2d 225, 242, n.8 (Maryl. 1979) (in dictum: “A teacher occupies a special relationship with his students, assuming significant responsibility for their welfare and guidance while under his supervision.”); *Eversole v. Wasson*, 398 N.E.2d 1246, 1248 (Ill.App. 1980) (“We deem the complaint to set forth a special relationship between plaintiff [a high school pupil] and the School District requiring it to protect him. The allegation of count II stated a liability of the defendant School District for any liability of defendant [teacher].”).

¹⁰ See, e.g., *Christensen v. Royal School Dist. No. 160*, 124 P.3d 283, 287 (Wash. 2005) (“... the established Washington rule that a school has a ‘special relationship’ with the students in its custody and a duty to protect them ‘from reasonably anticipated dangers.’ Consequently, the protective custody of teachers is mandatorily substituted for that of the parent. [citations to two cases omitted]”); *Suarez v. Pacific Northstar Mechanical, Inc.*, 103 Cal.Rptr.3d 168, 173 (Cal.App. 2009) (“Examples of these traditional special relationships include that between common carriers and their passengers; that between innkeepers and their guests; and that between school district and its students.”).

There is a dearth of published judicial opinions that discuss the “special relationship” between professors and students in the context of injuries in laboratories. However, there are many cases involving physical injuries to students in other contexts that discuss the “special relationship”. Note that some of these cases involve harm perpetrated by a third-party, which is generally¹¹ distinguishable from injuries in a laboratory.

cases finding no duty by colleges

In an early case rejecting duty by colleges, a student named Rawlings consumed alcohol at a picnic organized by the sophomore class at Delaware Valley College. On the way back to campus from the picnic, the intoxicated Rawlings lost control of the car he was driving, and Bradshaw, a passenger in the rear seat of Rawlings’ car, was rendered quadriplegic. Note that both the picnic and the injury occurred off campus, and there were no faculty present at the picnic. Bradshaw sued both Rawlings, the College, the distributor of the beer that was consumed, and the municipality. At trial, Bradshaw won a million-dollar verdict against the College, the distributor, and the municipality. All three defendants appealed. In a frequently cited opinion, the U.S. Court of Appeals observed:

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life. For example except for purposes of purchasing alcoholic beverages, eighteen year old persons are considered adults by the Commonwealth of Pennsylvania. As a result of these and other similar developments in our society, eighteen year old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country.

Bradshaw v. Rawlings, 612 F.2d 135, 138-139 (3dCir. 1979) [three footnotes omitted], *cert. denied*, 446 U.S. 909 (1980). The U.S. Court of Appeals held that there was no “special relationship” that would impose a duty on the College to regulate the off-campus drinking or

¹¹ I say “generally” because the *Sprague* case involved a third-party who accidentally spilled bacteria on plaintiff, and the *Jay* case involved a student who fought a fire in a chemistry laboratory that was caused by a third-party.

driving of a student. *Bradshaw* at 141-143. Because the College had no duty, it had no liability for the injuries of Bradshaw.

In a bizarre case, a group of students at California Polytechnic State University, illegally consumed alcoholic beverages on campus, then drove in automobiles off campus. The students engaged in an illegal speed contest on city streets, collided, and rendered Cynthia Baldwin (one of the students) quadriplegic. She sued the University and two dormitory advisors. The trial court dismissed the litigation and an appellate court affirmed. Each of the students were under 21 y of age, and were *not* adults. The California appellate court followed *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979) to hold the defendants had no duty. The California appellate court wrote:

The transfer of prerogatives and rights from college administrators to the students is salubrious when seen in the context of a proper goal of postsecondary education the maturation of the students. Only by giving them responsibilities can students grow into responsible adulthood. Although the alleged lack of supervision had a disastrous result to this plaintiff, the overall policy of stimulating student growth is in the public interest.

Baldwin v. Zoradi, 176 Cal.Rptr. 809, 818 (Cal.App. 1981).

Danna Beach was a 20 y old student who was enrolled in a biology class in 1979 that required her to participate in three weekend field trips. On one trip, she voluntarily consumed alcohol, became intoxicated and disoriented, fell off a cliff, and was rendered quadriplegic. She sued the University and her professor. The trial court dismissed the litigation, and the plaintiff appealed. The Utah Supreme Court held there was no “special relationship” that would have established a duty for the professor or the University to supervise the plaintiff. *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986).

In a case involving a student sexually assaulted in college dormitory, the Kansas Supreme Court wrote:

We hold the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties. The in loco parentis doctrine is outmoded and inconsistent with the reality of contemporary collegiate life.

There are, however, other theories under which a university might be held liable.

Nero v. Kansas State University, 861 P.2d 768, 778 (Kan. 1993)

In 2003, the U.S. Court of Appeals in Iowa wrote in a case involving a 19 y old woman who became intoxicated at a party in a college dormitory and was sexually assaulted:

In fact, since the late 1970s, the general rule is that no special relationship exists between a college and its own students because a college is not an insurer of the safety of its students. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 138-40 (3dCir. 1979) (holding that the time in which colleges and universities “assumed a role In loco parentis” no longer exists and as a result no special “custodial duty” between a college and its students exists); *Booker v. Lehigh Univ.*, 800 F.Supp. 234, 237-41 (E.D.Pa. 1992) (finding no special relationship); *Nero v. Kansas State Univ.*, 253 Kan. 567, 861 P.2d 768, 778 (1993) (same); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59-61 (Colo. 1987) (en banc) (same); *Eiseman v. Nw York*, 70 N.Y.2d 175, 518 N.Y.S.2d 608, 511 N.E.2d 1128, 1136-37 (1987) (same); *Beach v. Univ. of Utah*, 726 P.2d 413, 415-16 (Utah 1986) (same); *Rabel v. Illinois Wesleyan Univ.*,

161 Ill.App.3d 348, 112 Ill.Dec. 889, 514 N.E.2d 552, 560-61 (1987) (holding that the responsibility of a university “is to properly educate” its students, not to act as their custodian); *Baldwin v. Zoradi*, 123 Cal.App.3d 275, 284-91, 176 Cal.Rptr. 809 (Cal.Ct.App. 1981) (finding no special relationship); cf. *Garofalo*, 616 N.W.2d at 654 (analogizing the lack of a custodial relationship between a university and its students to the lack of a custodial relationship between a national fraternity chapter and its members).FN6

[FN6.] However, the rule is not absolute, and in very limited circumstances, courts have found such a relationship. See *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1368 (3d Cir. 1993) (holding that there is a distinction between the relationship of a college and its students and the relationship of a college and its student-athletes); *Schieszler v. Ferrum College*, 236 F.Supp.2d 602, 609 (E.D.Va. 2002) (finding in general that no university/student relationship exists, but in this specific case in which a college had repeated warnings that a student had emotional problems, had made threats of suicide, and had required the student to sign a statement that “he would no longer hurt himself,” a special relationship did exist); see also *Furek v. Univ. of Delaware*, 594 A.2d 506, 521-22 (Del. 1991) (finding a duty in the context of fraternity hazing); *McClure v. Fairfield Univ.*, 35 Conn. L. Rptr. 169, available at 2003 WL 21524786, at *4 (Conn.Super. 2003) (holding that the rule of *Bradshaw* and *Beach* is not absolute and that a university had a duty to its students under RESTATEMENT [SECOND OF TORTS] § 322).

Freeman v. Busch, 349 F.3d 582, 587-588 (8thCir. 2003).

Cited with approval in *Webb v. University of Utah*, 125 P.3d 906, 911, ¶19 (Utah 2005).

Note that, even if a college has no duty under a “special relationship” theory, the college may have a duty under RESTATEMENT SECOND OF TORTS § 323. See, e.g., *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 (Mass. 1983); *Furek v. University of Delaware*, 594 A.2d 506, 520 (Del. 1991).

cases finding a duty by colleges

In affirming a jury verdict for woman student who was raped in a college dormitory, the Massachusetts Supreme Court said:

Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.

Mullins v. Pine Manor College, 449 N.E.2d 331, 336 (Mass. 1983). Although this case is thirty years old in May 2013, it is still good law in Massachusetts.

A student was severely injured during a fraternity hazing incident in 1980 and he sued the University of Delaware, the fraternity, and Donchez, the fraternity member who injured him. A jury awarded \$30,000 to plaintiff. The jury had ordered the University to pay 93% of the damages, but the trial judge ordered Donchez to pay 100% of the damages. The Delaware Supreme Court reversed the trial court’s determination that the University was not liable. The Delaware Supreme Court wrote:

It seems equally reasonable to conclude that university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties' relationship, particularly if such supervision advances the health and safety of at least some students. *Furek v. University of Delaware*, 594 A.2d 506, 518 (Del. 1991). Because the University knew that harmful hazing was occurring on its campus, but failed to stop that hazing, the University was liable. The Court said:

In sum, although the University no longer stands in loco parentis to its students, the relationship is sufficiently close and direct to impose a duty under RESTATEMENT § 314A. *Mullins v. Pine Manor College*, 449 N.E.2d at 336. The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property. That duty extends to the negligent or intentional activities of third persons. Because of the extensive freedom enjoyed by the modern university student, the duty of the university to regulate and supervise should be limited to those instances where it exercises control. *Furek v. University of Delaware*, 594 A.2d 506, 522 (Del. 1991).

A graduate student in psychology was sexually assaulted off campus during an internship that the college required for graduation. She sued the college for negligence. The trial court granted summary judgment for the college, but the intermediate appellate court reversed.

This case involves an adult student injured during an off-campus, but school related activity, i.e., a university-mandated internship program at a site specifically approved and suggested by the university. The relationship between Nova [Southeastern University] and [Plaintiff] can be characterized in various ways, but it is essentially the relationship between an adult who pays a fee for services, the student, and the provider of those services, the private university. The service rendered is the provision of an educational experience designed to lead to a college degree. A student can certainly be said to be within the foreseeable zone of known risks engendered by the university when assigning such student to one of its mandatory and approved internship programs. See *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992). We need not go so far as to impose a general duty of supervision, as is common in the school-minor student context, to find that Nova had a duty, in this limited context, to use ordinary care in providing educational services and programs to one of its adult students. The "special relationship" analysis is necessary in this case only because the injury was caused by the allegedly "foreseeable" acts of a third party. *Gross v. Family Services Agency*, 716 So.2d 337, 339 (Fla.App. 1998). The intermediate appellate court concluded:

In conclusion, we hold that appellant has stated a cause of action in negligence against Nova based on her allegations that the university assigned her, without adequate warning, to an internship site which it knew was unreasonably dangerous and presented an unreasonable risk of harm. *Gross*, 716 So.2d 337, 340 (Fla.App. 1998).

The intermediate appellate court then certified a question to the Florida Supreme Court, which approved the intermediate appellate court's decision and wrote:

Although Nova is correct that the school-minor student special relationship evolved from the in loco parentis doctrine, the district court recognized that any duty owed by Nova to Gross was not the same duty a school and its employees owe to a minor student. The district court further recognized a different relationship existed between the university and its adult students, a relationship which does not necessarily preclude the university from owing a duty

to students assigned to mandatory and approved internship programs. [footnote omitted] In *Rupp v. Bryant*, 417 So.2d 658, 666-668 (Fla. 1982)], we said the extent of the duty a school owes to its students should be limited by the amount of **control**¹² the school has over the student's conduct. Here, the practicums were a mandatory part of the curriculum that the students were required to complete in order to graduate. Nova also had the final say in assigning students to the locations where they were to do their practicums.

As Nova had **control**¹³ over the students' conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the Hohfeldian correlative duty [footnote omitted] of acting reasonably in making those assignments. In a case such as this one, where the university had knowledge that the internship location was unreasonably dangerous, it should be up to the jury to determine whether the university acted reasonably in assigning students to do internships at that location.

... There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.

Nova Southeastern University, Inc. v. Gross, 758 So.2d 86, 89-90 (Fla. 2000).

I think the Florida Supreme Court was precisely right when it identified "control ... over the student's conduct" as the key factor. Simultaneously, the student reasonably relied on the college for her physical safety, as discussed at page 15, below.

In 2006, the California Supreme Court wrote in a case involving a community college student who was hit in the head with a baseball:

Public schools have a duty to supervise students [citations omitted], a duty that extends to athletic practice and play [citations omitted]. Although with the demise of the in loco parentis doctrine, colleges and universities do not owe similarly broad duties of supervision to all their students (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1031-1032, 4 Cal.Rptr.3d 385; *Crow v. State of California* (1990) 222 Cal.App.3d 192, 209, 271 Cal.Rptr. 349; *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 287-291, 176 Cal.Rptr. 809), that development has not limited the recognition that colleges and universities owe special duties to their athletes when conducting athletic practices and games.FN3

[FN3.] *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435-436, 52 Cal.Rptr.2d 812 (college instructor has duty not to increase risks inherent in participation in sport); *Kleinknecht v. Gettysburg College* (3dCir. 1993) 989 F.2d 1360, 1372 (college owes duty to student-athlete to have timely medical care available); *Stineman v. Fontbonne College* (8thCir. 1981) 664 F.2d 1082, 1086 (same); *Davidson v. University of North Carolina* (2001) 142 N.C.App. 544, 543 S.E.2d 920, 926-928 (university owes duty of care to members of school-sponsored intercollegiate team); see also Comment, Malpractice During Practice: Should NCAA Coaches Be Liable for Negligence? (2002) 22 Loyola L.A. Ent. L.Rev. 613, 625-635; Comment, Do Universities Have a Special Duty of Care to Protect Student-Athletes from Injury? (1999) 6 Vill. Sports & Ent. L.J. 219, 224-229; Comment, The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes (1996) 7 Marq. Sports L.J. 329, 338-342; Whang,

¹² Boldface added by Standler.

¹³ Boldface added by Standler.

Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student–Athletes (1995) 2 Sports Law. J. 25, 39–44.

Avila v. Citrus Community College Dist., 131 P.3d 383, 389 (Cal. 2006)

reasonable reliance on college

In 2005, the Utah Supreme Court wrote:

¶ 24 The hypothetical possibility that a special relationship can be created between an instructor and a student in a higher education setting flows from the fundamental reality that despite the relative developmental maturity of a college student compared to, say, a preschooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience. This is a phenomenon that should, and certainly does, at least unconsciously guide all decisions made by instructors relating to the selection of an environment for learning.

¶ 25 The harder question is to determine how much loss of autonomy a student must sustain and how much peril must be present to establish a special relationship. We are not prepared to endorse the State's position that every college student is responsible for his own protection in any school-related activity, regardless of the risk. The experience of courts in other jurisdictions gives us ample reason to leave open the possibility that a special relationship may emerge from the university-student relationship. For example, universities have been held liable for school-related accidents involving assaults in student dormitories and fraternity hazing incidents. *Furek v. Univ. of Delaware*, 594 A.2d 506 (Del. 1991); *Mullins v. Pine Manor Coll.*, 389 Mass. 47, 449 N.E.2d 331 (1983). Some have also rejected university liability if the student assumed what was a clearly identifiable and obvious danger. See *Breheeny v. Catholic Univ. of Am.*, No. 88–3328–OG, 1989 WL 1124134, at *1–3, 1989 U.S. Dist. LEXIS 14029, at *3–8 (D.D.C. Nov.22, 1989) (the plaintiff sued the University after fracturing her ankle in an intramural touch football game. *Id.* at *1, 1989 U.S. Dist. LEXIS 14029, at *3–4. The plaintiff admitted the field was drenched and muddy from a prior rain storm. *Id.* at *2–3, 1989 U.S. Dist. LEXIS 14029, at *7. The court held that “[t]here are situations in which the danger is so patent or well known that, as a matter of law, a participant assumes the risk.” *Id.* at *3, 1989 U.S. Dist. LEXIS 14029, at *8. The court found the plaintiff had knowledge and appreciation of the risk and voluntarily assumed that risk, and therefore, the university was not negligent, *id.* at *4–5, 1989 U.S. Dist. LEXIS 14029, at *14). But see *Brigham Young Univ. v. Lillywhite*, 118 F.2d 836, 841–43 (10th Cir. 1941) (where the court concluded the university instructor was negligent to a student for her injuries sustained by the instructor's failure to properly supervise students conducting experiments in the chemistry lab). One method to aid us in approaching the autonomy question is using the special relationship factors set out in *Day v. State*, 1999 UT 46, 980 P.2d 1171. In *Day* we squarely faced the question of special relationship formation:

A special relationship can be established (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental **reliance**¹⁴ by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

[*Day v. Utah*, 980 P.2d 1171, 1175–1176 (Utah 1999) at] ¶ 13.

¹⁴ Boldface by Standler.

¶ 26 The third *Day* factor, that a special relationship may be created “by governmental actions that reasonably induce detrimental reliance by a member of the public,” is relevant here. *Id.* A directive received in connection with a college course assignment is an act that would engage the attention of the prudent student. There are practical reasons for this. Students want to please their instructors. They want to succeed in their studies. They believe that the instructors have command of the subject matter and the environment in which it is taught. Many of these directives would be logical candidates to induce the kind of detrimental **reliance**¹⁵ we contemplated in *Day*.

Webb v. University of Utah, 125 P.3d 906, 911-912, ¶¶24-26 (Utah 2005).

Quoted in *Cope v. Utah Valley State College*, 290 P.3d 314, 319, ¶14 (Utah App. 2012).

The emphasis on reliance is *not* new, reliance is specifically mentioned in RESTATEMENT (SECOND) OF TORTS § 323 (1965), quoted above. What may be new in *Webb* (and *Day*) is the inclusion of reliance with the “special relationship” that is described in RESTATEMENT (SECOND) OF TORTS § 314A.

In 1985, Judge Stephan in an intermediate appellate court in Missouri wrote in a case having nothing to do with educational institutions:

Ordinarily, there is no duty to protect against the intentional criminal conduct of a third person. The duty arises only where there is a “special relationship” or “special circumstances.” A “special relationship” exists when one entrusts himself to the protection of another and reasonably relies on the other to provide a place of safety. The innkeeper-guest relationship is one example of a special relationship. [citations to three cases omitted] *Reed v. Hercules Construction Co.*, 693 S.W.2d 280, 282 (Mo.App. 1985) (Stephan, J., for a unanimous court). Quoted with approval in *Lane v. Kentucky*, 956 S.W.2d 874, 878 (Ky. 1997) (adding “common carrier-passenger, school-student” to innkeeper-guest example).

I think Judge Stephan in Missouri observed a crucial reason *why* the law recognizes some “special relationships”. There are two classic examples of “special relationships”: (1) passenger on a common carrier, (2) guest in a hotel. A passenger on a common carrier *must* rely on the carrier, which has complete control over the transportation. Similarly, a guest in a hotel *must* rely on the hotel for security and safety, because the guest can not alter the premises to improve security or safety — the hotel has complete control of security and safety. I suggest that it is this combination of control and reliance that creates a “special relationship”. The Florida Supreme Court, in *Nova Southeastern University, Inc. v. Gross*, 758 So.2d 86, 89 (Fla. 2000), recognized the importance of the college’s *control* of student conduct.

In cases involving pupils in schools, courts have spoken of the school’s custody of pupils as creating a duty similar to parents. But custody is just another way of expressing control by the school. Furthermore, pupils (and their parents) reasonably rely on the school for physical safety of the pupils.

¹⁵ Boldface by Standler.

By analogy with passengers on common carriers and guests in hotels, when an instructor in college *assigns* or *requires* a student to do something, the student reasonably relies on the instructor for physical safety and there should be a “special relationship” between instructor and student. But when a college student does something unassigned or independently, then the college should have no “special relationship”. Because college students are legally adults, the college does *not* owe a duty to *continuously supervise*, and to *continuously control*, everything students do.

C.3. OSHA regulations

It is common in personal injury cases to look at statutes or governmental regulations to determine the standard of care that the defendant should have used. In the USA, the Occupational Safety and Health Administration (OSHA) sets standards for use of hazardous materials and equipment.

The OSHA statute applies to any “employer” who is engaged in a business affecting commerce, except employees of either the federal or state government, or political subdivision of a state. 29 U.S.C. § 652(5). Don’t let “business affecting commerce” fool you: educational institutions can be a business under the broad powers of the commerce clause of the U.S. Constitution. The OSHA statute applies to nonprofit organizations, including private educational institutions. 29 C.F.R. Ch. 17, § 1975.4(b)(4). For example, the University of Pittsburgh, despite being funded by the State of Pennsylvania and despite the fact that 1/3 of the trustees of the University were appointed by state officials, is *not* a political subdivision of a state, and must obey OSHA regulations.¹⁶ Public high schools (i.e., operated by the state or a political subdivision of a state) and universities totally controlled by state or federal government are probably exempt from OSHA regulations.

But, even if a school or university is exempt from OSHA regulations, the OSHA regulations could still be cited as evidence of a relevant standard of conduct in a tort case against a school or university. Furthermore, in the case of students majoring in science, engineering, or medicine, nearly all of these students will work in an OSHA-regulated environment after graduation, so it is arguably part of their education to teach them OSHA-approved safety practices.

¹⁶ 1980 OSH Dec.(CCH) ¶24240.

C.4. other sources of standards for duty of care

Journals for teachers/professors in various areas of science or engineering sometimes (e.g., JOURNAL OF CHEMICAL EDUCATION or THE PHYSICS TEACHER) sometimes contain discussions of safety in student laboratories. Such articles on safety could also be used as a basis for the opinion of an expert witness on the proper standard of care for the defendant.

Further, standards imposed by accrediting bodies may be relevant in developing a standard of care for colleges and universities. For example, the Accreditation Board for Engineering and Technology (ABET) accredits undergraduate programs in engineering. ABET specifically reviews and evaluates each department, unlike the general accreditation of an entire college by a regional accrediting organization.

C.5. sloppy safety

My experience, both as a full-time physics student for ten years and as a professor of electrical engineering for another ten years, is that universities are remarkably sloppy about safety considerations in their laboratories. This sloppy attitude comes from several sources:

- the macho image of a male scientist or engineer who heroically ignores danger
- the safety equipment is an inconvenience that is not essential to the experiment
- the school's or university's lack of money for purchase of safety equipment

When safety equipment is purchased, it tends to disappear (probably due to petty theft), so safety equipment needs to be continually replaced. Alternatively, students majoring in physics, chemistry, biology, engineering, or medicine could be required to purchase their own safety equipment and bring it with them to the laboratory as a condition of entry.

I was a full-time physics student in universities for ten years (1967-77) and a professor of electrical engineering for another ten years. I worked with 120 V ac electrical circuits since I was a high school student in 1965 who was doing theater lighting. I did high-voltage laboratory experiments during 1971-90, working at voltages up to 40 kV. In all of these years of work, I have only been shocked twice: once in high school and once during my first year of graduate school. It is possible to work safely with hazardous materials.

C.6. hazards inherent in science ?

The defendant may claim that use of hazardous materials and equipment is inherent in some laboratory procedures, for example:

- use of scalpel and other sharp instruments during dissection in biology lab
- bites by animals (e.g., rat, rabbit, monkey) in a biology or medical laboratory
- skin injury from acids or strong alkaline solutions in chemistry lab
- explosions or fires in chemistry lab
- cuts from broken glassware in chemistry lab
- electrocution in physics or electrical engineering lab
- poisonous materials in chemistry or biology lab
- infectious materials in a microbiology lab, medical school, nursing school, etc.
- radioactive materials in a physics lab
- x-ray machine in medical and dental schools

Obviously, some hazards are inherent in laboratory procedures, but these hazards are not an excuse for injuries. Instead, the existence of these hazards require that teachers/professors use appropriate caution when designing laboratory experiments, and when supervising pupils/students in the laboratory room. For example, a teacher/professor might be able to modify an experiment so that it is less hazardous, without impairing the educational experience for pupils/students.

One may wonder if a pupil/student who is taking a required introductory biology or chemistry class in order to graduate from high school or college should be required to risk life and limb in a laboratory. It is one thing for professional scientists to take such risks with their own lives, it is another thing for teachers/professors to require that pupils/students take such risks, especially when the introductory science class is on the periphery of the pupil's/student's knowledge. On the other hand, society seems to have no problem with requiring pupils and students to participate in athletic activities, which carries a greater risk of physical injury, but absolutely no intellectual benefit.

The situation is somewhat different with a student who concentrates in some area of science or engineering, or with a student in medical school, who — as part of their education — must learn how to work safely with hazardous materials.

D. proximate cause

Because there are so few reported laboratory injury cases, it is sometimes necessary for judges to look to cases where one pupil injures another pupil, but the plaintiff blames the teacher for negligent supervision. There is a long line of cases — especially in New York state — that establish the rule:

A school district's alleged lapse in supervision is not a proximate cause of an accident where that accident occurs in so short a span of time that even the most intense supervision could not have prevented it.

Tanenbaum v. Minnesauke Elementary School, 901 N.Y.S.2d 102, 103 (N.Y.A.D. 2010) (citing *Janukajtis v. Fallon*, 726 N.Y.S.2d 451, 454 (N.Y.A.D. 2001); *Convey v. City of Rye School Dist.*, 710 N.Y.S.2d 641, 646 (N.Y.A.D. 2000)). This rule of law applies to injuries caused by sudden, spontaneous, impulsive, unanticipated acts by other pupils. *Bottorf v. Waltz*, 369 A.2d 332, 334 (Pa.Super. 1976); *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994); *Stevens v. Des Moines Independent Community School Dist.*, 528 N.W.2d 117, 118-119 (Iowa 1995). This rule of law does *not* apply to a situation like using a flammable liquid near open flame for several minutes, where there is time for a teacher to recognize the hazard and intervene.

E. school/college *not* an insurer

One of the most frequently used phrases in judicial opinions in tort cases is a statement that “the [defendant] is not an insurer.” A partial list of state supreme courts who have written “a [school, college, or university] is not an insurer” includes:

- *Taylor v. Oakland High School Dist. of Alameda County*, 83 P.2d 948, 951 (Calif. 1938) (“The above holding does not make school districts insurers of the safety of children on the premises.”);
- *Read v. School Dist. No. 211 of Lewis County*, 110 P.2d 179, 181 (Wash. 1941) (“Schools are not insurers of safety of those who participate in their athletic activities. [citation omitted] Before liability can be imposed upon school districts there must be a showing of fault on the part of the district or its agents.”);
- *Taylor v. Oakland Scavenger Co.*, 110 P.2d 1044, 1049 (Calif. 1941) (“Neither did [the trial court] make the school district an insurer of the safety of its pupils, for it expressly instructed the jury that the district was not an insurer of the pupils and that the school authorities were required to exercise only ordinary care.”);

- *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3dCir. 1979) (“Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today’s college administrations has been notably diluted in recent decades.”), *cert. denied*, 446 U.S. 909 (1980). Cited with approval in *University of Denver v. Whitlock*, 744 P.2d 54, 59 (Colo. 1987); *Smith v. Day*, 538 A.2d 157, 159, n.2 (Vt. 1987); *Alumni Ass’n v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990); *Nero v. Kansas State University*, 861 P.2d 768, 774 (Kan. 1993); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 312 (Idaho 1999); *Freeman v. Busch*, 349 F.3d 582, 587 (8thCir. 2003).
- *Norman v. Turkey Run Community School Corp.*, 411 N.E.2d 614, 617 (Ind. 1980) (“It should be emphasized here, however, that schools are not intended to be insurers of the safety of their pupils, nor are they strictly liable for any injuries that may occur to them.”);
- *Furek v. University of Delaware*, 594 A.2d 506, 522 (Del. 1991) (“The university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property.”);
- *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994) (“Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; ...”); *Stephenson v. City of New York*, 978 N.E.2d 1251, 1253 (N.Y. 2012) (same).

These statements in judicial opinions that a defendant is “not an insurer” mean that an injury does *not* automatically produce a judgment in tort for money damages. The plaintiff must *prove* all three of the following elements: (1) the defendant had a **duty**, (2) the defendant **breached** the duty, *and* (3) the breach was the legal **cause** of the injury.

I emphasize for clarity that an injury to a pupil or student does *not* automatically indicate that the defendant is legally responsible for the injury. Before a plaintiff can recover damages, the plaintiff must demonstrate to the court that the defendant was negligent (i.e., both defendant had a legal **duty**, *and* defendant **breached** that duty) and the breach was the **cause** of the injury. However, the level of proof is only preponderance of evidence, i.e., at least 51% probability.

F. immunity

Even if a defendant (e.g., instructor, school, or college) was negligent and caused an injury to a plaintiff (e.g., pupil or student), the plaintiff will not be awarded damages by the judge in a state where the defendant has *immunity*. There are three types of immunity: (1) sovereign immunity applies to agencies of a state or federal government, (2) governmental immunity applies to agencies of a city or county government, and (3) charitable immunity applies to nonprofit organizations, such as private schools and private colleges.

1. sovereign immunity

The conventional wisdom is that the ancient doctrine of sovereign immunity, which holds that people can not sue the federal or state government, was imported from England (i.e., “The King can do no wrong.”). Scholarly reviews show that courts in the USA during the 1800s gave sovereign immunity a much greater force than it held in England. Further, the Revolutionary War (1775-1783) was fought to escape from the divine right of kings and to assert a government in which the people say what their rights are, although courts in the USA seem to have forgotten this history. See, e.g., *Molitor v. Kaneland Community Unit*, 163 N.E.2d 89 (Ill. 1959); *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Calif. 1961); *Mayle v. Penn. Dept. Highways*, 388 A.2d 709 (Pa. 1978); see also Prosser & Keeton, TORTS, § 131 (5th ed. 1984).

The modern trend is to abolish sovereign immunity. The Illinois Supreme Court in 1959, the California Supreme Court in 1961, and the Pennsylvania Supreme Court in 1978 all abolished the doctrine of sovereign immunity. The legislatures of each state reacted in terror at the possible obligation of the state to pay large money damages as a result of negligence by state employees: the legislatures quickly enacted statutory immunity for those states in a Tort Claims Act, thus overruling these Courts’ broad pronouncements and giving the state immunity in some specific circumstances.

The federal government in the USA and most states have a statute — typically called a Tort Claims Act — that permits tort claims against the government, under certain conditions. The federal statute, which was first enacted in 1940, is codified at 28 USC § 2671 et seq. In Massachusetts, the relevant statute is in chapter 258, which was first enacted in 1978. The following principles are noteworthy:

1. Local governments, which operate public schools, are generally not sovereigns. If a judgment against a school district would be paid from state funds, then the school district may qualify for sovereign immunity.
2. Governments can be sued under a Tort Claims Act for injury caused by negligence or intent, but not for exercise of discretionary power. For the federal government, see 28 U.S.C. § 2680. In Massachusetts, the relevant statute is in chapter 258, § 10.

3. A potential plaintiff under some state Tort Claims Acts must give notice to the state within a time much shorter than the statute of limitations for torts. For example, see N.J.Stat. 59:8-8 (90 day limit); N.Y. Education Law § 3813(1)(three month limit); Mass.Stat. ch. 258 §4 (must present claim to public employer within two years of injury). These examples were correct at the end of 1998, but may change in the future.
4. Students at military academies operated by the U.S. Government probably can *not* sue for injuries, under the holding in *Feres v. U.S.*, 340 U.S. 135 (1950).

The subject of sovereign immunity is a complicated area of law, which not only varies among the states, but is also changing with time as states generally follow the modern trend to abolish this immunity. Therefore, it is important that you consult an attorney who is licensed to practice in your state, to learn the current law for your state.

2. governmental immunity

Traditionally, governmental immunity was common law (made by judges). As judges began to abolish governmental immunity, state legislatures reacted by restoring some immunity in statutes. See e.g., *Ayala v. Philadelphia Board Edu.*, 305 A.2d 877 (Pa. 1973) (abolishing governmental immunity in Pennsylvania, which was then enacted by the legislature).

In Illinois, a state statute gives teachers the status of parent or guardian. A parent or guardian is not liable for injuries to a child, except for wilful and wanton misconduct of the parent/guardian. Therefore, the effect of this Illinois statute is to require plaintiff to show that a teacher behaved in a wilful and wanton way toward a pupil, before the plaintiff can get past a summary judgment motion by the teacher. See *Kobylanski v. Chicago Board of Educ.*, 347 N.E.2d 705 (Ill. 1976); *Nielsen v. Community Unit School Dist.*, 412 N.E.2d 1177, 1178 (Ill.App. 1980).

In Texas, a state statute bars torts against any teacher who acts within the scope of their official duties, except when the teacher uses excessive force when punishing a student. *Hopkins v. Spring Ind. Sch. Dist.*, 736 S.W.2d 617 (Tex. 1987); *Barr v. Bernhard*, 562 S.W.2d 844 (Tex. 1978); *Duross v. Freeman*, 831 S.W.2d 354, 356 (Tex.App. 1992)(“... it is troubling from a public policy standpoint that our corporate citizens have unfettered access to the courts for redress of perceived tortious grievances, but children, whose well-being has been entrusted to fiduciaries known as parents and teachers do not have access because of *Barr* and *Hopkins*.”); *Wagner v. Alvarado Ind. Sch. Dist.*, 598 S.W.2d 51 (Tex.App. 1980).

The subject of governmental immunity is a complicated area of law, which not only varies among the states, but is also changing with time as states generally follow the modern trend to abolish this immunity. Therefore, it is important that you consult an attorney who is licensed to practice in your state, to learn the current law for your state.

3. charitable immunity

An old principle of law was that nonprofit institutions (e.g., churches, hospitals, private schools and colleges) could not be sued for torts. The reasoning in support of this principle seems to be that:

1. a public policy argument: rendering of charitable services, including occasional negligence, was better than the alternative of no services and
2. limited financial resources should be spent on rendering more charitable services, not on compensating tort victims. This reason is sometimes expressed by observing that the charitable institution held money from donors in trust. It would be a violation of that trust to divert money to compensate tort victims, a purpose not contemplated by donors to the charity. Note that the courts' reasoning is circular in that it assumes that payment of tort claims is not a proper purpose, then uses the trust theory to validate that assumption.

Whatever the value of the doctrine of charitable immunity, it is now thoroughly obsolete, and it now offers no protection to private schools, private colleges, or other nonprofit organizations. See, e.g., *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C.Cir. 1942); *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957).

4. Workers' Compensation

When a graduate student is injured in a laboratory, a college often takes the legal position that the student was an employee (e.g., teaching assistant or research assistant) and therefore the student is only entitled to Workers' Compensation. The state Workers' Compensation Act gives the employer immunity from torts, including negligence.

Whether an injured person is a student or an employee is an important legal question, because awards in Workers' Compensation cases are typically much less than in a tort case for negligence. I believe there are good reasons why a graduate research assistant is *not* an employee of the college. The issue is not as clear for teaching assistants.

Cases Involving Pupils

Mastrangelo, (Calif. 1935)

A 16 year old boy was assigned to make gunpowder in a high school chemistry laboratory. He erroneously substituted potassium chlorate for the potassium nitrate listed in the recipe. Instead of pulverizing the ingredients on separate sheets of paper as listed in the instructions, he poured all three ingredients into an iron mortar and pulverized them simultaneously with a pestle, which produced an explosion. The explosion “blew off his left hand and seriously injured his right hand. His right eye was completely destroyed [he subsequently wears a glass eye], and his left eye was injured. He is now scarcely able to read or see.” *Mastrangelo*, 42 P.2d at 635-636. The teacher was not only present in the laboratory, but also stood about 15 feet behind the plaintiff. *Mastrangelo*, at 637. The trial court granted defendant’s motion for a nonsuit. The appellate court and California Supreme Court, reversed, holding that there was sufficient evidence to find the teacher liable for negligence. *Mastrangelo v. West Side Union High School*, 29 P.2d 885 (Calif.App. 1934), *adopted by*, 42 P.2d 634 (Calif. 1935).

Although a trial was needed, the California Supreme Court clearly said there was evidence of negligence by the school:

Applying the foregoing rules to the record in the present case, it may be reasonably inferred there is substantial evidence to indicate that the defendant was guilty of negligence in failing to exercise reasonable care in providing and labeling dangerous materials to be used in chemical experiments, and in failing to properly instruct and supervise the selection, compounding, and handling of dangerous ingredients used in manufacturing explosives. It is not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students regarding the selection, mingling, and use of ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a text-book with general instructions to follow the text. This would seem to be particularly true when young and inexperienced students are expected to select from similar containers a proper harmless substance rather than another dangerous one which is very similar in appearance. It is the province of the jury to determine whether the mixing of the ingredients which were used to compound gunpowder in a mortar by means of a pestle increase the danger of an explosion; whether the plaintiff was without previous knowledge or instruction regarding that danger, and whether that process was knowingly permitted to be followed by the pupil without warning from the teacher. It may also be a proper question for the determination of the jury as to whether the delivery of a text-book to an inexperienced pupil with mere instructions to follow the text, in the performance of a dangerous experiment in chemistry, is a sufficient exercise of care. In other words, if the jury should find that it was highly dangerous to mix together potassium chlorate, charcoal, and sulphur in an iron mortar by means of a pestle, it would become a further question of fact for the jury to determine whether the teacher was negligent in failing to warn the pupil of that danger, particularly if he observed the boy following that method and knew that he was inexperienced in that science. *Mastrangelo*, 42 P.2d 634, 636 (Calif. 1935).

The California Supreme Court added:

It may well be doubted whether it is proper in an introductory school course in chemistry to require pupils to make and ignite an explosive. It would appear that the dangers of such an experiment, incorrectly performed by young children, might be anticipated; and that the benefits to be derived from its actual performance by each pupil are not so great as to justify the risk of serious injury to the child. But at the very least, if it is to be performed, it necessarily requires the strictest personal attention and supervision of the instructor.

Mastrangelo v. West Side Union High School, 42 P.2d 634, 638 (Calif. 1935).

The final result in *Mastrangelo* is not known, because there is nothing further in the Westlaw database for this case.

Desmarais, (Mass. 1971)

A pupil was blinded in one eye in an explosion in a classroom. The judicial opinion describes neither the cause of the explosion nor the age of the pupil. The pupil sued, alleging the teacher's failure to require the pupil to wear safety goggles was the proximate cause of the injury. The trial court dismissed the case and the Massachusetts Supreme Court affirmed the dismissal. In Massachusetts, a school district is protected by governmental immunity, and a teacher can only be liable for misfeasance. The teacher's failure to require safety goggles was not misfeasance, but was nonfeasance. *Desmarais v. Wachusett Regional School Dist.*, 276 N.E.2d 691, 693 (Mass. 1971).

Station, (La.App. 1974)

A Louisiana case in 1974 involved a group of eighth-grade pupils who were attempting to re-light a faulty burner used in their science fair project. A boy poured alcohol from a jug and a girl lit a match near the mouth of the jug, which exploded, severely burning a 14 year old girl who was standing nearby. The trial court found the teacher was negligent and awarded plaintiffs \$ 7890, which was affirmed by an appellate court. The appellate court declared:

Pleas of contributory negligence and assumption of the risk by the defendant were overruled, the [trial] court finding that Miss Station [the plaintiff] did not appreciate the danger or take part in the abortive attempt to relight the burner. We affirm the judgment of that court.

The jurisprudence of this state is firmly established that where one creates, deals in, handles or distributes an inherently dangerous object or substance, that an extraordinary degree of care is required of those responsible.

This duty is particularly heavy where children are exposed to a dangerous condition which they may not appreciate.

Here, a dangerous instrument was placed in the hands of children without any special degree of care, supervision, or direction. Alcohol, a highly flammable substance, was left in their control to be used in connection with a faulty alcohol burner which had continually given trouble. That the situation was fraught with danger is proven by the results.

The duty incumbent upon [the teacher] under these dangerous circumstances was to either positively warn these girls not to attempt to light the burner if it went out or to personally supervise their use of the equipment or provide adequate adult supervision in his absence. He did none of these things. He testified that he did not teach the children how to light the burner because they were not mature enough to do so, but that he had instructed them as to the flammable properties of alcohol. Nowhere in the record, however, is it established that [the teacher] directed these children not to attempt to light the burner should it go out. Neither was adequate adult supervision provided which was commensurate with the danger involved. We agree with the trial judge that this was negligence on the part of [the teacher] and that this negligence was the proximate cause of Geraldine Station's injuries. *Station v. Travelers Insurance Co.*, 292 So.2d 289, 291-292 (La.App. 1974) [citations omitted].

Connett, (Wyo. 1978)

In another case, a 14 year old boy poured alcohol from a can into an experimental determination of the boiling point of solutions of either sugar or salt in water. The court's opinion is not clear about the facts, but the aqueous solution may have been in a beaker above a flame from an alcohol burner. The addition of alcohol to the aqueous solution was not part of the assigned experiment, but was a spontaneous idea of the victim. The teacher was in an adjoining room at the time of the accident. The trial court granted the school's motion for summary judgment. The Wyoming Supreme Court reversed, holding that the alleged negligence of the teacher was a question of fact that needed to be determined by a jury. The Wyoming Supreme Court's opinion says:

Absent special dangerous circumstances, a school district does not have the duty of providing constant supervision of all movements of all pupils at all times.

Connett v. Fremont County Sch. Dist., 581 P.2d 1097, 1103 (Wyo., 1978).

... we would observe that the school owes the student the duty to supervise his activities.

This duty becomes more imperative in the classroom, and risks of danger are foreseeable, and thus the degree of care higher, where young, inexperienced students are handling substances which for them are potentially dangerous.

Connett, at 1104.

Note that while the judge used the words pupil and student interchangeably, the judge should have consistently used pupil to describe the plaintiff, who was enrolled in a middle school.

Nielsen, (Ill.App. 1980)

A high school pupil was injured during a physics class when a container of alcohol burst into flame. The pupil sued and the trial court asked the intermediate appellate court for guidance:

The factual background contained in the record is scanty, but it appears that the plaintiff was injured when a container, partially filled with methanol or ethyl alcohol, exploded or burst into flames during a physics class. The container was ignited when another student lit a match and placed it near the container. It is alleged that the container was incorrectly labeled as floor wax and also that the container was too large for the storage of this hazardous material, allowing the contents to expand into a dangerous gaseous state.

The plaintiff brought alternative counts of negligence and wilful and wanton conduct by the defendant. The defendant moved to dismiss plaintiff's negligence count on the basis that the defendant was immune from ordinary negligence. The trial judge denied the defendant's motion but certified the question for interlocutory appeal. The resolution of this issue turns on which of two standards is applicable to the particular circumstances of this case. If the alleged negligence of the defendant be classified as a failure to provide adequate supervision, then the plaintiff would be barred from bringing a negligence count. On the other hand, if the defendant were negligent in providing defective equipment, then plaintiff's negligence count would not be barred.

Nielsen v. Community Unit School District, 412 N.E.2d 1177, 1178 (Ill.App. 1980).

In Illinois, teachers are only liable for "willful and wanton misconduct" to pupils; teachers in Illinois are *not* liable for negligence. However, a school can be liable for negligent furnishing of equipment to pupils. "Plaintiff's primary allegation is that the school district knew, or should have known, that the container was defective and a dangerous instrumentality." *Nielsen* at 1178. The intermediate appellate court affirmed "the trial court's denial of defendant's motion to dismiss plaintiff's negligence count." The final result of this case is not reported in Westlaw.

Cazsador, (N.Y.A.D. 1996)

A pupil was dissecting a preserved frog in high school biology class, when the preservative solution burned the skin on her face and arms. The solution contained acetone, formalin, and methanol. In 1991, she sued the school. The school then sued the supplier of the frog. A jury awarded her \$30,000, which was upheld on appeal, except to limit the school's liability to \$4050, according to state statute. The appellate court did not order the supplier to pay the remaining verdict, because plaintiff never sued the supplier. *Cazsador v. Greene Central School*, 632 N.Y.S.2d 267 (N.Y.A.D. 1995). The highest court in New York State declined to hear the plaintiff's appeal. *Cazsador*, 666 N.E.2d 1059 (N.Y. 1996).

In later litigation, the plaintiff sued the supplier to recover the balance of the damages, \$22950, after payment by the school. Because the plaintiff filed after the statute of limitations had expired, the appellate court dismissed the litigation. *Cazsador v. Greene Central School*, 663 N.Y.S.2d 310 (N.Y.A.D. 1997), *leave to appeal denied*, 695 N.E.2d 717 (N.Y. 1998).

unauthorized experiments by pupils

Looking beyond the narrow scope of instructions in a laboratory class, pupils often deviate from assigned laboratory experiments which raises legal issues of assumption of risk, contributory negligence, comparative negligence, or even consent. For example, pupils and students sometimes use chemicals to build explosives, rocket fuel, or incendiary devices. Several courts have considered pupil's surreptitious deviations from assignments as contributory negligence by pupils, which barred any recovery in tort by the pupil, despite the pupil's young age.

Gregory, (N.Y.A.D. 1927)

A boy was injured in a school chemistry laboratory. Neither the cause of the injury nor the age of the injured pupil is mentioned in this terse opinion. At trial, there was a jury verdict for plaintiff. The appellate court reversed, because the trial court erred in instructing the jury that the school could be liable for failing “to prescribe a suitable course of study in chemistry.” In this case, any written instructions issued by the school were irrelevant, because “the experiment which plaintiff was conducting was unauthorized, and was no part of the course of study in actual use.” However, the appellate court did hold that “It was the duty of the defendant to use reasonable care in the keeping and distribution of chemicals potentially dangerous in combination.” The case was remanded for a new trial. *Gregory v. Board of Education of City of Rochester, NY*, 225 N.Y.S. 679 (N.Y.A.D. 1927).

This opinion is very terse, but it appears that the pupil *may* be negligent in performing an unauthorized experiment. There *might* be negligence by the teacher in the “distribution of chemicals potentially dangerous in combination.” We don’t know the result of the second trial, because there is nothing further in the Westlaw database for this case.

Moore, (4thCir. 1959)

A 15½ year old boy was granted access to the school chemistry laboratory for the specific purpose of assembling apparatus for an experiment to be conducted during chemistry class, later that day. While there, he made an explosive compound according to his own recipe (i.e., *neither* in the school’s chemistry textbook *nor* in the school’s laboratory manual). The explosion blinded his left eye, mangled his left hand so that it required amputation, and perforated his stomach with glass. The trial court directed a verdict for defendant, owing to the contributory negligence of plaintiff in doing an unauthorized experiment. *Moore v. Order Minor Conventuals*, 164 F.Supp. 711 (W.D.N.C. 1958), *aff’d*, 267 F.2d 296 (4thCir. 1959).

It may seem harsh to hold that a 15 year old boy is totally responsible for his injuries. The judge may have relied on the facts that the boy had been familiar with firearms for nine years,¹⁷ and his fellow students in the laboratory advised him *not* to mix those chemicals.¹⁸

¹⁷ *Moore*, 164 F.Supp. at 712.

¹⁸ *Moore*, 164 F.Supp at 714, 267 F.2d at 297-298.

Wilhelm, (N.Y. 1963)

A 13 year old boy was assigned to build a record player in the school laboratory. Instead, he mixed chemicals for rocket fuel, which exploded and burned him. Although the trial court awarded damages to the boy, the appellate court reversed, by holding that the boy was contributorily negligent. *Wilhelm v. Board of Education*, 227 N.Y.S.2d 791 (N.Y.A.D. 1962), *aff'd without opinion*, 189 N.E.2d 503 (N.Y. 1963).

Hutchison, (Or.App. 1970)

A 15 year old boy stole crystalline potassium chlorate from a high school chemistry storage room. The chemical was used to make propellant for a cannon, which exploded and "severely injured" the hands of the 15 year old plaintiff. The trial court granted defendant's motion for nonsuit at the conclusion of plaintiff's case. The appellate court affirmed, holding that plaintiff had been contributorily negligent as a matter of law. *Hutchison v. Toews*, 476 P.2d 811 (Or.App. 1970).

Shifton, (Or.App. 1974)

A 17 year old high school senior, and student assistant to the chemistry teacher, mixed red phosphorus and potassium chlorate in a glass test tube with a metal spatula. He mixed "somewhere between 65 and 100 times the volume prescribed in the manual it exploded, causing plaintiff serious injury." A jury returned a verdict in favor of the teacher and school. The reported opinion of the appellate court is concerned with a motion for a new trial, which it denied. *Shifton v. North Clackamas Sch. Dist.*, 523 P.2d 1296, 1298 (Or.App. 1974).

Bush, (Mich.App. 1981)

A plastic jug of methanol exploded in science laboratory, severely burning a 14 y old girl in a public high school in Michigan. The class was held in a mathematics classroom that was neither designed nor equipped as a chemistry laboratory, because of increased enrollment at the school. *Bush*, 250 N.W.2d at 761; 275 N.W.2d at 270. "[P]ortable alcohol burners were used" because there was no gas supply for Bunsen burners in the classroom. *Bush*, 275 N.W.2d at 270.

The intermediate appellate court said how plaintiff initially described the accident:

Wood alcohol (methanol) was stored in bulk in an old plastic jug which was allegedly damaged and split. The jug and the alcohol lamps were kept on a counter at the rear of the classroom. Plaintiffs' complaint alleges that on the date of the injury some of the fuel had been spilled on the counter and a lighted lamp had been placed beside the fuel container, and that as plaintiff attempted to extinguish the lamp there was an explosion and fire igniting her clothing and inflicting severe second and third-degree burns.

Bush, 250 N.W.2d 759, 761 (Mich.App. 1976).

The Michigan Supreme Court described the same initial account of the accident:

At the time of the accident [plaintiff] was returning her burner and noticed a lighted burner on the counter [where the alcohol jug with an open top was located]. She picked [the lighted burner] up and as she attempted to extinguish it an explosion occurred and she caught fire. [Plaintiff] suffered second-and third-degree burns.

Bush, 275 N.W.2d 268, 270-271 (Mich. 1979).

The trial court granted summary judgment for all defendants. The intermediate court of appeals reversed the summary judgment for the teacher and principal. The Michigan Supreme Court held that the complaint stated valid cause of action against the school district, but the teacher and principal were immune, and remanded for trial. *Bush v. Oscoda Area Schools*, 250 N.W.2d 759 (Mich.App. 1976), *rev'd*, 275 N.W.2d 268 (Mich. 1979).

At trial, plaintiff admitted she previously had lied about how the accident occurred. The true version is in the next paragraph. The jury would have awarded her \$295,000, but the jury found the plaintiff was 44% responsible for her injuries under comparative negligence. Including interest, the plaintiff won a jury verdict of \$162,839. The school district appealed. The intermediate appellate court affirmed the trial court. *Bush v. Oscoda Area Schools*, 311 N.W.2d 788 (Mich.App. 1981). There is nothing further in the Westlaw database on this case.

Here is the true version of how the explosion occurred:

... Ms. Foxworth [the plaintiff] initially lied about how the explosion occurred. The original opinions in this case were premised on the false testimony. Ms. Foxworth, who had apparently matured over the years since the accident occurred, elected to tell the truth at trial. Foxworth admitted that she brought a lighted match near the open end of the alcohol jug and this is what caused the explosion.

It does not appear to us that Foxworth's original deception has any bearing on defendant's present challenge to the evidence. The case was tried on the theory that the classroom constituted a dangerous place when used for physical science classes because it lacked safety devices including an exhaust hood, safety shower, sinks, fixed desks, chemical powder fire extinguisher, was exposed to sunlight, and was used for improper storage. The fact that Ms. Foxworth was more responsible for the explosion than was originally believed in no way negates the fact that there were inadequate safety devices.

Bush, 311 N.W.2d at 790-791. The fact that plaintiff held a lighted match near the open end of a jug of methanol explains why the jury found plaintiff 44% responsible for her injuries.

I include this case under the subcategory of unauthorized experiments by pupils, because plaintiff's injuries were *not* associated with performing an assigned experiment. Plaintiff holding a lighted match near the open end of a jug of methanol was definitely *not* assigned by the teacher. But the case was tried on a theory of defective classroom with the school district as the only defendant, so the result (excepting her comparative negligence) is the same as if she were injured during an assigned experiment.

Kush, (N.Y. 1983)

An 8 y old boy was injured while playing with chemicals that he found outside a public school during a summer vacation. He sued and the trial court awarded him damages. The school appealed, and an intermediate appellate court affirmed with a terse opinion. *Kush v. City of Buffalo*, 453 N.Y.S.2d 388 (N.Y.A.D. 1982). The school appealed again, and the highest court in New York State unanimously affirmed the jury verdict. *Kush v. City of Buffalo*, 449 N.E.2d 725 (N.Y. 1983). The facts are:

During 1972, as part of a summer youth program sponsored by the Buffalo Board of Education, two 15-year-old students were hired to assist the custodial staff at Kensington High School. On July 11, while the adult employees were on their coffee break, the two, unsupervised student employees went to the school's chemistry laboratory. Neither the laboratory nor its adjacent storeroom were locked. The employees took some magnesium powder and potassium nitrate from glass jars, placed the chemicals into plastic sandwich bags, and dropped the bags from a fourth story window into the bushes below. They intended to retrieve the chemicals after work that day.

The infant plaintiff, then eight years old, lived near the school and regularly played on its grounds. On the day of the accident, as he had done previously, the child walked along a trodden path behind the bushes where the chemicals had been dropped. He found the chemicals and, believing them to be sand, began playing with the chemicals and with matches he had earlier found. The chemicals exploded and the boy sustained second degree burns to his hands, arms and face.

Kush v. City of Buffalo, 449 N.E.2d 725, 727 (N.Y. 1983).

Kush stands for the proposition that schools have a legal duty to secure dangerous chemicals (e.g., magnesium powder) from pupils. The highest court in New York State wrote a detailed discussion of the law:

First deciding to whom a duty, if any, was owed, plaintiff's presence on the school grounds could be found to be foreseeable. By their very nature, a school and its playgrounds attract children. In addition, Kensington High School is located in a residential neighborhood. It is true that the boy's accident occurred when school was out of session, a factor germane to the issue of the foreseeability of his presence on the grounds. This, however, does not vitiate defendant's duty to the infant plaintiff because there was proof that school authorities were aware that children played on the school property during the summer months.

Consideration now turns to what constituted reasonable care under the circumstances and whether defendant exercised that care. Defendant maintained on the school premises a store of dangerous chemicals for use in science classes. Defendant recognized that unsupervised access to these chemicals by children created a grave risk of harm to all present on the school grounds. The dangers inherent in many of the chemicals stored at the school included flammability and toxicity.

The superintendent of schools recognized the potential safety problem and promulgated regulations entitled "Safety in the Science Classroom and Laboratory". The regulations unambiguously provided that "[p]upils are not allowed in science classrooms, laboratories, storerooms or preparation room when the teacher is not present. These rooms should be kept locked when not in use." The regulations also stated that "[c]ombustible materials, e.g. red phosphorous and magnesium should be stored in a locked, fireproof cabinet." Finally, a

chemistry teacher who had been on the school's faculty for 21 years testified that as a general practice, special security measures were necessary for chemicals that "would be likely to cause trouble * * * if gotten in poor hands."

The severity of potential injuries from the misuse of chemicals is manifest. Accounts of children being maimed, blinded, or killed by playing with dangerous substances are legion. This danger could be averted with great ease and at little cost merely by storing the chemicals in a locked, fireproof cabinet — a remedy recognized in defendant's own regulations.

Thus, defendant purposely maintained a store of chemicals, some of which were inherently dangerous, and recognized that, in the environs of a school, a serious hazard would arise if deliberate safeguards were not in place. Reasonable care under the circumstances required the securing of the dangerous chemicals in such a way that their unsupervised access could not be readily obtained by children. *Kingsland v. Erie County Agricultural Society, ...*, 84 N.E.2d 38 [(N.Y. 1949)].¹⁹ In light of the foreseeability of the risk and potential severity of harm to others engendered by a breach of this duty and the ease with which this duty could be satisfied, the jury acted rationally in finding that defendant failed to exercise reasonable care under the circumstances by failing to secure the dangerous chemicals from unsupervised access by school children.

Defendant's breach of duty was comprised of two elements. First, defendant failed to adequately supervise its two student employees. [footnote omitted] The director of the summer employment program testified that "the key word is supervision" in the operation of the program. One of the program's co-ordinators admitted that he had expected the two student employees to be under complete supervision at all times. Nevertheless, the adults charged with overseeing the students left them alone for 30 minutes each day when they went to the school's basement for their coffee break. The students were told to stand by until the adults returned. It was during one of these periods that the students took the chemicals that eventually caused plaintiff's injuries.

Defendant's argument that it should be liable only for the acts of its employees done in the scope of their employment and that here the students acted outside the scope of their employment is inapposite. Defendant's duty in this case is not predicated on its status as an employer. Rather, the control and supervision of school-aged children present within the building, whether as students or employees, is an essential part of defendant's duty to secure dangerous chemicals from the children's access. [footnote omitted]

The second element of defendant's negligence was its failure to adequately secure the dangerous chemicals. There was testimony that, on the day of the accident, the door leading from the corridor to the laboratory was unlocked. The door connecting the laboratory and the storeroom could not be locked because the custodial staff had no key. Finally, in direct contravention of one of its safety regulations, defendant failed to maintain a locked, fireproof cabinet for storage of the chemicals. As a consequence of defendant's acts, children were left unsupervised in a building with unsecured dangerous chemicals, a situation defendant had expressly recognized would create a grave safety risk.

Kush v. City of Buffalo, 449 N.E.2d 725, 727-729 (N.Y. 1983).

It is a well-established rule of law that when a defendant violates its own rules, there can be liability. But if the school had failed to establish rules regulating the storage of dangerous chemicals, that would be additional negligence by the school.

¹⁹ Footnote by Standler: see quotation from *Kingsland* at page 34, below.

The theft of the chemicals by the 15 y old pupils did not interrupt the causal chain begun by the school's negligent storage of dangerous chemicals, because their theft was held to be reasonably foreseeable. *Kush*, 449 N.E.2d at 729. Therefore, the negligent storage of dangerous chemicals by the school was the proximate cause of injuries to the 8 y old boy.

fireworks cases

The *Kingsland* case, cited in *Kush*, involves children finding live fireworks that had been discarded on a fairground. The discarded fireworks were stolen by children who trespassed at the fairground. The highest court in New York State affirmed a jury verdict for plaintiffs in *Kingsland*:

The fact that the boys may have been trespassers on the fairgrounds is immaterial, since there was sufficient evidence that the article which caused the injury was 'inherently dangerous.' One who keeps an explosive substance is 'bound to the exercise of a high degree of care to so keep it as to prevent injury to others.' *Travell v. Bannerman*, ..., 66 N.E. 583 [(N.Y. 1903)]. The degree of care required is commensurate with the risk involved, depending upon such circumstances as the 'dangerous character of the material' and its accessibility to others, particularly children whose presence should have been anticipated, regardless of whether or not they are trespassers. [citations omitted] *Kingsland v. Erie County Agricultural Society*, 84 N.E.2d 38, 45 (N.Y. 1949). The court in *Kingsland* cited RESTATEMENT (FIRST) OF TORTS, § 522 ("ultrahazardous activities"). *Kingsland* at 47. This legal concept is now codified at RESTATEMENT SECOND OF TORTS §§ 519-520 (1977) ("abnormally dangerous activities").

There are many reported cases involving children injured by fireworks. These cases typically do *not* involve a school, but do discuss analogous legal issues to cases involving injury by schools.

Several boys, 15 to 17 y old, stole smoke grenades from a U.S. Army post in Illinois in 1947. An 8 y old boy found a stolen grenade and he was permanently disabled when it ignited in his hand. The U.S. Court of Appeals held that the Army was negligent in storing the grenades, and such negligence was the proximate cause of the injuries. *Stewart v. U.S.*, 186 F.2d 627 (7th Cir. 1951).

A company sold a kit for assembling firecrackers to a child via mail order in 1969. The child abandoned some of the kit in a public park. “Two days later, someone threw a match into the bottle [from the kit], causing an explosion which killed two of the minor plaintiffs and injured the other four.” *Suchomajcz*, 524 F.2d at 22. The manufacturer of the chemicals used in the kit was sued.²⁰ The U.S. Court of Appeals said it was a question for the fact-finder at trial whether the child’s discarding the kit in a public place was foreseeable, but noted:

Pennsylvania has recognized that “(c)hildren must be expected to act upon immature judgment, childish instincts and impulses; others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly.” *Styer v. City of Reading*, 360 Pa. 212, 61 A.2d 382, 385 (1948). Thus, Pennsylvania specifically has noted that minors are likely to misuse such dangerous items as motor vehicles, diminutive railroad trains, and firearms. See, e. g., *Glass v. Freeman*, 430 Pa. 21, 240 A.2d 825 (1968) (motor vehicles); *Hogan v. Etna Concrete Co.*, 325 Pa. 49, 188 A. 763 (1936) (diminutive railroad trains); *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957) (firearms). *Suchomajcz v. Hummel Chemical Co.*, 524 F.2d 19, 28 (3dCir. 1975).

Rosenau v. City of Esterville, 199 N.W.2d 125 (Iowa 1972) is similar to *Kingsland*. Here, the Iowa Supreme Court affirmed a jury award of \$ 75,000 to a 14 y old boy who lost most of his right hand from a pyrotechnic device that exploded in his hand.

Kush, and the fireworks cases, stand for the proposition that judges will compensate young (e.g., 8 y old) victims of injury by dangerous chemicals, such as those in pyrotechnic devices, even if conventional tort law needs to be stretched to declare the proximate cause of the injury was the failure to securely store the dangerous chemicals.

Brazell, (N.Y.A.D. 1990)

A teenaged boy stole sodium chlorate from a school laboratory, by secreting it in his pants pocket. That night, at home, the chemical spontaneously ignited and burned his leg. Although the trial court denied the school’s motion for summary judgment, the five-judge panel on the appellate court unanimously reversed, by holding that the intentional theft was a superseding force that absolved the school from liability. *Brazell v. Board of Education*, 557 N.Y.S.2d 645 (N.Y.A.D. 1990).

Brazell seems inconsistent with *Kush*, 449 N.E.2d 725, 729 (N.Y. 1983), where theft of chemicals was *not* a superseding event, because the theft of chemicals by children was reasonably foreseeable.

²⁰ Why not sue the seller of the kits? The judicial opinions are not clear on this decision by plaintiffs, but the seller of the kits was in violation of federal statute *and* in violation of a judicial injunction. See *U.S. v. Christie Industries*, 465 F.2d 1002 (3dCir. 1972). I speculate that the seller of the kits probably had few assets after paying the fees of his criminal defense attorney, so the seller of the kits was not an attractive defendant.

Nash, (N.Y.A.D. 2011)

Because this case involved a research project for academic credit, instead of a weekly assigned laboratory exercise, I am including this case in the unauthorized experiment section of this essay. There is some factual dispute about whether the biology teacher authorized the pupil to use alcohol to sterilize laboratory equipment, but the court found clear negligence by the teacher.

An intermediate appellate court in New York state summarized the case, which arose out of an accident in a high school laboratory in April 2007:

The infant Stephen A. Nash (hereinafter the plaintiff), on whose behalf his mother, Marguerite Nash, commenced this action, sustained severe injuries as a result of an explosion that occurred in his high school's science laboratory. It is undisputed that the teacher assigned to supervise the plaintiff and another student departed from school premises, leaving the two students completely unsupervised. Among the primary issues presented on this appeal, we consider the applicable duty of care when an incident occurs after the formal end of classes for the day, but in an academic setting on school premises involving a course completed for academic credit. We also address the foreseeability of the circumstances leading to the explosion, and whether the accident occurred in so short a span of time that the teacher could not have prevented the plaintiff's injury regardless of the level of supervision. Ultimately, we hold that the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that the defendant, Port Washington Union Free School District (hereinafter the school district), breached its duty to exercise the level of care as would a parent of ordinary prudence in comparable circumstances, and that this failure was a proximate cause of the plaintiff's injuries. In opposition, the school district failed to raise a triable issue of fact. Moreover, on the school district's cross motion, it failed to meet its initial burden of establishing its prima facie entitlement to judgment as a matter of law dismissing the complaint. Accordingly, the [trial] Court properly granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability, and properly denied the School District's cross motion for summary judgment dismissing the complaint.

Nash v. Port Washington Union Free School Dist., 922 N.Y.S.2d 408, 410 (N.Y.A.D. 2011).

The science experiment was being conducted by a third-party defendant (the judicial opinion does not mention his name) who had attention deficit hyperactivity disorder, and who was unable to sit still. "[T]he third-party defendant struck the spark lighter several times" in the vicinity of surfaces that he had recently sterilized with ethyl alcohol, and the alcohol ignited, burning plaintiff. *Nash*, at 411. The teacher did *not* know her pupil suffered from attention deficit hyperactivity disorder. *Nash*, at 413. I think the school's failure to notify the teacher about the attention deficit hyperactivity disorder (ADHD) of her student would be an important fact in determining negligence of the teacher, but the judicial opinion does not mention it further. A pupil with ADHD may require more supervision than a normal pupil.

The appellate court wrote about the teacher's absence from the laboratory at the time of the accident:

At approximately 4:15 P.M., [the teacher] elected to leave the high school premises to go to the Bagel Boss, a deli within walking distance of the school, to buy something to eat, leaving the two boys unsupervised in the lab. She anticipated that she would be away from the high school for approximately 20 minutes.

[The teacher] acknowledged that she was aware of school policy, which included a rule that students may not be left unattended in classrooms. However, in her deposition testimony, she maintained that there was an "understanding" that was "part of the culture of the building" that this rule applied only during regular school hours, as opposed to after the traditional school day. [The teacher] testified that, if the rule was that students were required to be supervised under circumstances such as those at issue here, the rule was previously "not adhered to."

In this regard, the third-party defendant did not characterize his science project as "extracurricular." He observed that there was time allotted in his school schedule for such projects, and he would receive a grade for his work on the project.

Additionally, Jay Lewis, Principal of the high school, testified at his deposition that the high school had a policy pursuant to which students were not to be left alone in a room. When asked if it were true that this policy was not followed in connection with after-school activities, Lewis responded "[that] is not correct." Lewis stated that, "on multiple occasions, in full faculty gatherings, meetings, as well as at other times, I and the building administrators always made it clear that students were to be supervised at all times, before, during and after school, in any type of classroom or classroom-related setting, which would include extra help, clubs and activities and after-school activities, sports, anything. I never made a distinction between before and after-school activities and supervision of students during the school day." When asked if there was a custom or practice among faculty members that this rule was not to be followed in connection with after-school activities, Lewis responded in the negative. Lewis also stated that it would not have been adequate for a teacher to remain in an office while students were performing an experiment in the adjacent lab.

Nash v. Port Washington Union Free School Dist., 922 N.Y.S.2d at 410-411 (N.Y.A.D. 2011).

The appellate court noted testimony by the teacher that makes her absence from temporary absence from the school building unimportant, because if she had remained in the building she still might not have been in the laboratory supervising the two pupils.

[The teacher] testified that, if she had been present in the classroom, she would not have permitted the third-party defendant to use ethyl alcohol to clean a beaker. However, she also testified that, had she stayed on premises, she may have been in an office adjacent to the lab rather than in the lab itself actively supervising the plaintiff and the third-party defendant.

Nash v. Port Washington Union Free School Dist., 922 N.Y.S.2d 408, 412 (N.Y.A.D. 2011).

The appellate court held that the appropriate duty of care was the "reasonably prudent parent" standard. *If* the lab experiment had been a "voluntary, extracurricular activity" then the appropriate duty of care would have been the less-demanding "reasonably prudent person" standard. The appellate court wrote:

As a general matter, "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the

absence of adequate supervision” (*Mirand v. City of New York*, 84 N.Y.2d 44, 49, 614 N.Y.S.2d 372, 637 N.E.2d 263; see *Hansen v. Bath & Tennis Mar. Corp.*, 73 A.D.3d 699, 700, 900 N.Y.S.2d 365; *Tanenbaum v. Minnesauke Elementary School*, 73 A.D.3d 743, 744, 901 N.Y.S.2d 102; *Armellino v. Thomase*, 72 A.D.3d 849, 849, 899 N.Y.S.2d 339). “Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable ‘for every thoughtless or careless act by which one pupil may injure another’ ” (*Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263, quoting *Lawes v. Board of Educ. of City of N.Y.*, 16 N.Y.2d 302, 306, 266 N.Y.S.2d 364, 213 N.E.2d 667; *Armellino v. Thomase*, 72 A.D.3d at 849–850, 899 N.Y.S.2d 339; *Paca v. City of New York*, 51 A.D.3d 991, 992, 858 N.Y.S.2d 772; *De Los Santos v. New York City Dept. of Educ.*, 42 A.D.3d 422, 422, 840 N.Y.S.2d 91). “[A] teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances’ ” (*Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263, quoting *Hoose v. Drumm*, 281 N.Y. 54, 57–58, 22 N.E.2d 233; see *Swan v. Town of Brookhaven*, 32 A.D.3d 1012, 1013, 821 N.Y.S.2d 265; *Doe v. Orange–Ulster Bd. of Coop. Educ. Servs.*, 4 A.D.3d 387, 388, 771 N.Y.S.2d 389). “The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians” (*Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263).

Since the duty owed is derived from the school's assumption of custody of and control over the students, in place of parents and guardians, “the school's ‘duty to protect its students from negligence is coextensive with and concomitant to its physical custody and control over its students’ and ... ‘[t]herefore, once students leave their school's orbit of authority, parents are free to resume custodial control and the school's custodial duty ceases’ ” (*Hansen v. Bath & Tennis Mar. Corp.*, 73 A.D.3d at 701, 900 N.Y.S.2d 365, quoting *Banks v. New York City Dept. of Educ.*, 70 A.D.3d 988, 990, 895 N.Y.S.2d 512). Thus, as we stated recently, “[a]lthough during school hours the standard is that of the reasonably prudent parent, a lesser standard, that of the reasonable and prudent person, is applicable in the context of a student's voluntary participation in an intramural or extracurricular school sport” (*Hansen v. Bath & Tennis Mar. Corp.*, 73 A.D.3d at 701, 900 N.Y.S.2d 365; see *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 656, 543 N.Y.S.2d 29, 541 N.E.2d 29; *Reed v. Pawling Cent. School Dist.*, 245 A.D.2d 281, 664 N.Y.S.2d 483; *Barretto v. City of New York*, 229 A.D.2d 214, 218, 655 N.Y.S.2d 484).

Nash v. Port Washington Union Free School Dist., 922 N.Y.S.2d at 415-416 (N.Y.A.D. 2011).

The appellate court wrote about breach of the duty and causation:

With regard to the issue of whether the school district breached the applicable duty of care, the evidence establishes that [the teacher], and, by extension, the school district, exercised no supervision whatsoever over the plaintiff and the third-party defendant at the relevant time. While the third-party defendant was working on his project and the plaintiff was nearby, [the teacher] left the premises, leaving the two students unattended in the lab. Thus, upon her departure, and at the time of the accident, the students were completely unsupervised. Accordingly, the conclusion is inescapable that the school district, by [the teacher], breached its duty.

Of course, to impose liability upon the school district based on inadequate supervision, the injuries to the plaintiff must have been foreseeable and “proximately related to the absence of adequate supervision” (*Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372,

637 N.E.2d 263). Relatedly, “[t]o establish a breach of the duty to provide adequate supervision in a case involving injuries caused by the acts of fellow students, a plaintiff must show that school authorities ‘had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated’ ” (*Doe v. Department of Educ. of City of New York*, 54 A.D.3d 352, 353, 862 N.Y.S.2d 598, quoting *Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263; see *Brandy B. v. Eden Cent. School Dist.*, 15 N.Y.3d 297, 302, 907 N.Y.S.2d 735, 934 N.E.2d 304). “ ‘[S]chool personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily’ ” (*Armellino v. Thomase*, 72 A.D.3d 849, 850, 899 N.Y.S.2d 339, quoting *Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263). “Thus, a student's injury which is caused by ‘the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act’ ” (*Armellino v. Thomase*, 72 A.D.3d at 850, 899 N.Y.S.2d 339, quoting *Mirand v. City of New York*, 84 N.Y.2d at 49, 614 N.Y.S.2d 372, 637 N.E.2d 263).

Here, the plaintiff's injuries were foreseeable, and they were proximately related to the absence of adequate supervision. It is undisputed that the third-party defendant spoke with [the teacher] about the sterilization procedure he proposed to implement, involving the use of ethyl alcohol. According to [the teacher], the third-party defendant questioned her about this method repeatedly. [the teacher] testified at her deposition that she instructed the third-party defendant that he was never to use ethyl alcohol in such a manner. However, she also testified unequivocally that she was aware of the fact that the third-party defendant was using ethyl alcohol. Meanwhile, according to the third-party defendant, both [the teacher] and another individual had informed him of the procedure of sterilizing with ethyl alcohol. According to the third-party defendant, [the teacher] instructed him before he ever began working on the project at issue to use ethyl alcohol in this manner. He testified that he used this procedure “all the time.” Moreover, in addition to the facts that [the teacher] at the very least knew that there was ethyl alcohol present in the lab, that the third-party defendant was using ethyl alcohol in some manner, and that the third-party defendant proposed using ethyl alcohol in the manner described, [the teacher] acknowledges that she was aware of the presence of spark lighters in the lab, and that one may have been “laying around.” Based on the facts known to [the teacher] at the time, she was on notice of the dangerous conduct which would ultimately cause the plaintiff's injury, and the third-party defendant's actions were foreseeable.

Nash v. Port Washington Union Free School Dist., 922 N.Y.S.2d at 417-418 (N.Y.A.D. 2011).

The four-judge panel unanimously concluded:

Accordingly, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that the school district breached its duty to exercise the level of care as would a parent of ordinary prudence in comparable circumstances, and that this failure was a proximate cause of the plaintiff's injuries. In opposition, the school district failed to raise a triable issue of fact. For the same reason, on the school district's cross motion, it failed to meet its initial burden of establishing its prima facie entitlement to judgment as a matter of law dismissing the complaint.

The [trial] Court properly granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability, and properly denied the defendant's cross motion for summary judgment dismissing the complaint. Accordingly, the order is affirmed.

Nash v. Port Washington Union Free School Dist., 922 N.Y.S.2d 408, 419 (N.Y.A.D. 2011).

The teacher was formally reprimanded by the school, and the teacher resigned. *Nash*, at 413. Because I do not believe the teacher's negligence should be a career-ending event, I have omitted her name in this essay.

pupils may *not* be contributorily negligent

I would caution against teachers and schools relying on cases that hold young pupils are contributorily negligent. Attorney for the plaintiff could easily argue that teachers should have foreseen such misuse of laboratory equipment by pupils, who were too young to understand fully the magnitude of the danger involved. Anyone who works in education knows that pupils and students — even those who are “old enough to know better” — sometimes do stupid or immature things, because of their lack of experience and because of their lack of perception of the magnitude of the danger. See, e.g., *Kush v. City of Buffalo*, 449 N.E.2d 725, 729 (N.Y. 1983) (Not locking chemical storeroom at high school was negligent, when storeroom contained “dangerous chemicals”, such as magnesium powder and potassium nitrate.).

The dean of the Marquette University School of Law and a former administrator in the Omaha, Nebraska public schools commented:

The problem is that the court may often conclude that although pupils recognize that a warning of danger has been given, they do not fully comprehend the extent of the danger. The court is likely to see in the failure to properly supervise the creating of an improper atmosphere of temptation to experiment.

Reynolds C. Seitz, "Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Towards Pupils", 15 HASTINGS LAW JOURNAL 495, 504 (1964). Seitz cites a 1943 opinion in California that says:

Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by such danger. *Ridge v. Boulder Creek Union ...*, 140 P.2d 990, 993-994 (Cal.App. 1943).

The two dissenting judges in a famous New York state case noted:

When a large number of children are gathered together in a single classroom, without any effective control or supervision, it may reasonably be anticipated that certain of them may so act as to inflict an unintentional injury upon themselves or their classmates. Children have a known proclivity to act impulsively without thought of the possibilities of danger. It is precisely this lack of mature judgment which makes supervision so vital.

Ohman v. Board of Education of City of New York, 90 N.E.2d 474, 478 (N.Y. 1949) (Conway, J., dissenting, with whom Chief Judge Loughran concurred.). As any responsible parent knows, and as any teacher knows, children are more likely to misbehave when they are *not* supervised. In the same dissent, Judge Conway wrote a telling retort to the majority's holding that the teacher's 75 minute absence from the classroom was not the proximate cause of a pupil's injury.

Parents do not send their children to school to be returned to them maimed because of the absence of proper supervision or the abandonment of supervision. *Ohman*, 90 N.E.2d at 476 (Conway, J., dissenting.).

While this dissent is not law in New York State, two courts in Maryland have quoted the remark about parents not sending their children to school to be maimed. *Segerman v. Jones*, 259 A.2d 794, 801 (Md.App. 1969); *Berg v. Merricks*, 318 A.2d 220, 227 (Md.App. 1974). Also, a trial court judge in New York State agreed with Judge Conway's dissent. *Feuerstein v. Board of Ed. of City of N.Y.*, 202 N.Y.S.2d 524, 528 (1960), *aff'd without opinion*, 214 N.Y.S.2d 654 (N.Y.A.D. 1961).

From an authoritarian point of view pupils, perhaps students also, should be required to obtain advance permission from a teacher or professor for any significant deviations from the laboratory instructions or for any experimental initiatives that the pupil or student may devise. This authoritarian point of view, in my opinion, is ill-suited for an educational environment. Further, most teachers in elementary school and many chemistry teachers in high school lack the detailed knowledge of chemistry that would allow them to predict the consequences of a chemical reaction. Rigidly prohibiting (or even discouraging) any deviations by pupils would inhibit their creativity and learning. Thus, balancing of competing concerns is more appropriate than rigid rules.

Cases Involving Undergraduate Students

Parks, (Ill. 1905)

A dental student was injured in chemistry laboratory at Northwestern University.²¹ The student lost the sight in one eye as a result of the accident. The courts held that the defendant, a private university and nonprofit corporation, was protected by charitable immunity and dismissed the litigation. *Parks v. Northwestern University*, 121 Ill.App. 512, 1905 WL 2138 (Ill.App. 1905), *aff'd*, 75 N.E. 991 (Ill. 1905).

This result is now obsolete, because charitable immunity was abolished in Illinois. *Molitor v. Kaneland Community*, 163 N.E.2d 89, 92-96 (Ill. 1959) (abolishing school district immunity); *Darling v. Memorial Hospital*, 211 N.E.2d 253, 260 (Ill. 1965) (relying on *Molitor* to abolish charitable immunity).

²¹ Neither of the two judicial opinions in this case mention any facts. The intermediate appellate court says plaintiff was "pursuing his studies in [a] chemical laboratory." The Illinois Supreme Court said the plaintiff was a dentistry student.

Hamburger v. Cornell Univ., (N.Y. 1919)

A home economics student at Cornell University was injured in a chemistry laboratory in 1916.

The trial court described the facts of this case in a hideously run-on sentence:

... in the afternoon of January 12, 1916, pursuing her work in 'Chemistry One,' she was required to perform an experiment known as experiment 88, described in the text-book then used, which consisted of combining or mixing two grams of mercuric sulphide with two grams of calcium oxide and heating the mixture in a glass tube, closed at one end; the defendant furnished the chemicals to the students in bottles bearing labels intended to show the contents thereof, from which bottles the students helped themselves to the necessary quantities; plaintiff took two grams from a bottle labeled calcium oxide, or powdered lime, but found no bottle labeled mercuric sulphide; pursuant to instructions, she went to the stock room, where the attendant, a boy about 15 years old, in charge of dispensing chemicals to students, and upon her request, gave the plaintiff two grams of some red chemical powder upon a piece of paper, which plaintiff believed was mercuric sulphide; plaintiff returned to her laboratory desk, mixed the two substances in a mortar, producing a mixture of reddish color; plaintiff, not knowing how to seal one end of the tube, asked Mr. Lake, the instructor, to seal it; Mr. Lake took the glass, sealed one end of it, and handed it back to the plaintiff, with instructions to put the powder into the tube; plaintiff put the mixture in the sealed tube, the instructor telling plaintiff it was not necessary to use all the mixture; he watched her as she put the mixture in, and told when she had enough in the tube; plaintiff then, according to instructions, subjected the mixture to heat from a gas flame supplied by defendant as part of the laboratory equipment and in accordance with the written directions contained in the text-book and upon the bulletin board in the laboratory and the verbal instructions of the instructor, whereupon the mixture exploded with great force, causing the injuries complained of.

Hamburger v. Cornell Univ., 166 N.Y.S. 46, 47-48 (N.Y.Sup. 1917). Incidentally, Westlaw misspells the first name of plaintiff as "Louis", the correct spelling is "Louise".

The plaintiff's Complaint seems to have been defective, as the trial court says:

We are not very definitely informed why the explosion occurred, whether because improper ingredients were furnished, or they were mixed in improper proportions or amounts, or the tube was not properly sealed at the end or improperly handled, or the heat was excessive, or allowed to reach directly the mixture. We may assume that, since the experiment was authorized, if properly conducted, no explosion would have followed. The explosion occurred, and we are not informed why; one can guess only. An expert chemist alone could make a reasonable guess; and, if he could make such guess, it would be only on knowledge of facts which he has, but which the complaint does not disclose. If the proof left a case in such condition, when the evidence was closed, the complaint would have to be dismissed.

The attorney for the plaintiff claims in his brief that the defendant was negligent in failing to use reasonable care in the employment of the boy; there is no such allegation in the complaint, and no allegations on which such position could be maintained. The attendant at the supply room was a boy of 15 years; it may be assumed that he was not a skilled chemist, but it does not appear that any one would know, from sight alone, mercuric sulphide; the boy apparently had only the duty of handing out from marked packages the articles called for; there are no allegations of the boy's duties, or that defendant was negligent in employing him, or that the boy was negligent, or did any wrong act or thing; and the complaint was evidently

not framed with intent to charge such negligence. In such a case negligence will not be implied; it must be alleged and proved. Under the allegations of the complaint negligence on the part of the boy could not properly be proven, nor could negligence on the part of the defendant in employing him.

The complaint is in substantially the same condition as to the instructor, except that it is alleged that he supervised, assisted in, and watched the experiment. What wrongful act on his part caused the explosion is not disclosed. A careful reading of the complaint fails to inform the court what the negligence complained of is, nor is there anything upon which, if true, the court could say that the instructor was incompetent, or the defendant negligent in employing him for the duties assigned to him. There is nothing in the complaint indicating an intent to charge negligence in employing the instructor.

Hamburger v. Cornell Univ., 166 N.Y.S. 46, 50-51 (N.Y.Sup. 1917).

The trial court granted the University's motion to dismiss on grounds of charitable immunity.

Hamburger v. Cornell Univ., 166 N.Y.S. 46 (N.Y.Sup. 1917).

The intermediate appellate court reversed the trial court, holding that Cornell University was not protected by charitable immunity: "[Cornell Univ.] was not created for the purpose of carrying out any of the governmental functions of the state of New York, and it is not, therefore, freed from the obligations which attach to any other private corporation. It contracted with this plaintiff for the purpose of furnishing her an education in certain lines, and it owed her the duty of exercising reasonable care in the carrying out of that contract." *Hamburger v. Cornell Univ.*, 172 N.Y.S. 5, 7 (N.Y.A.D. 1918) The appellate court also gave plaintiff's attorney twenty days to repair the defective complaint. *Ibid.*

Cornell Univ. appealed to the highest court in New York State, which unanimously, tersely, and without reasons, held that the complaint stated a valid cause of action. *Hamburger v. Cornell Univ.*, 123 N.E. 868 (N.Y. 1919).

Trial was held in a different county than where Cornell Univ. is located. *Hamburger*, 178 N.Y.S.2d 893 (N.Y.A.D. 1919). The jury found for Miss Hamburger, and Cornell appealed. The appellate court characterized the facts:

The plaintiff has a verdict of \$25,000 for the loss of sight of an eye, resulting from an explosion of chemicals in the course of an experiment which was being performed by her in the chemical laboratory of Cornell University as a part of her study of chemistry. She was a student in the Department of Home Economics in the State College of Agriculture, which is owned by the state, but administered by the defendant. A prescribed subject of her study was chemistry, and at the time of the explosion the students were conducting the experiment under the direction of the defendant's instructors and with chemicals supplied by the defendant. The negligence alleged and sought to be proved was that the defendant had not exercised due care, in that it had not placed competent persons in charge of the dispensing of chemicals from the stock room, from which the plaintiff received a portion of the chemicals used by her in the experiment, and had not made proper tests of the chemicals before permitting their use by the students, even though they were purchased in bulk in the original packages from reputable and accredited manufacturers, chemists, and dealers. The defendant denied that it was negligent in such respects, and further defended upon the grounds (1) that it was an agent of a state

institution and entitled to the immunity from suit enjoyed by the sovereign; and (2) that it was a charitable corporation, and as such was not, as to its students, subject to the doctrine of respondent superior.

Hamburger v. Cornell Univ., 199 N.Y.S. 369, 370-371 (N.Y.A.D. 1923).

Note that the U.S. Government Bureau of Labor Statistics says \$ 25,000 in 1923 has the same buying power as \$ 336,667 in March 2013, so this was a substantial award.

On reconsidering, the appellate court held: "... Cornell University is a charitable institution, and is therefore not responsible for the negligence of its agents and servants, if injury was thereby caused to the plaintiff, a beneficiary of the charity. This is unquestionably the law of this state."

Hamburger, 199 N.Y.S. 369, 374 (N.Y.A.D. 1923). Plaintiff's victory in the trial court was reversed and her complaint was dismissed. *Hamburger*, 199 N.Y.S. at 378. One of the four sitting judges dissented, on the grounds that plaintiff was a student at the State College of Agriculture, which is located at Cornell Univ., and therefore he argued that charitable immunity did not apply. The highest court in New York State affirmed the majority opinion. *Hamburger*, 148 N.E. 539 (N.Y. 1925).

This result is now obsolete, because New York abolished charitable immunity in the year 1957. *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957).

Incidentally, the final judicial opinion gives the clearest facts of this case. The laboratory instructions called for the mixing of mercuric sulphide and calcium oxide. A chemistry professor analyzed the residue from the explosion and concluded that Miss Hamburger and another student working independently had both accidentally substituted potassium chlorate for the calcium oxide. *Hamburger*, 148 N.E. 539, 539-540 (N.Y. 1925). That suggests to me that the bottle of calcium oxide may have been mislabeled, but the trial judge rejected a theory of mislabeling. *Hamburger*, 148 N.E. at 541, 543 (N.Y. 1925). Any mislabeling is irrelevant to the case, because the University was protected by charitable immunity.

Lindsay, (Ill.Ct.Cl. 1932)

A laboratory experiment in Mining Engineering at the University of Illinois exploded, injuring plaintiff. The experiment involved the introduction of gas into an enclosed wood box with a glass front, with a "safety lamp" inside. The student was to observe the change in color of the flame of the safety lamp as various gases were introduced. Another student was supposed to put methane gas into the box, but instead put acetylene gas into the box. The acetylene exploded, shattering the glass window, and hurling glass fragments into plaintiff's eye. The plaintiff lost about half of his sight in the injured eye. He sued the state of Illinois.

The Court of Claims observed that “the doctrine of respondent superior does not apply to the State”, so the State was not responsible for any negligent act(s) of the instructor, who was an employee of the State. This is a kind of immunity. *Lindsay v. Illinois*, 7 Ill.Ct.Cl. 103 (Ill.Ct.Claims 1932).

Because of that immunity, the plaintiff proceeded on a theory that the instructor was “grossly negligent” and equity would require the State to pay damages to the plaintiff. The Court of Claims rejected this argument, because the instructor was also injured in the explosion: “It is reasonable to conclude that [the instructor] would not have subjected himself as well as his students, to possible injury by using either a box or a gas that he knew was extremely dangerous.” *Lindsay v. Illinois*, 7 Ill.Ct.Cl. 103 (Ill.Ct.Claims 1932).

The Court noted that it was possible to make the apparatus safer by using a cardboard side opposite the glass window, so that any explosion would blow out the cardboard instead of shatter the glass. In fact, the U.S. Bureau of Mines uses a cardboard back in its demonstrations. This is powerful evidence that the experiment was unreasonably dangerous, but the Court of Claims did not consider that argument.

The opinion in *Lindsay* ignores the issue of legal liability for the accidental substitution of acetylene for methane. There is nothing further in the Westlaw database for this case.

Lillywhite, (10thCir. 1941)

An 18 year old college freshman in 1933 was taking the second semester of an introductory chemistry class when she mixed potassium chlorate, ferric oxide, and red phosphorous, then applied heat. The mixture exploded and she was injured. The previous experiment in the instruction manual, which she had read and performed, warned not to mix potassium chlorate and combustible materials. The plaintiff and two other students were working in one group, alone in the laboratory. Their instructor was across the hall, meeting with a student. The jury found that plaintiff's injury was proximately caused by failure of the instructor to supervise the experiment and the appellate court affirmed. *Brigham Young University v. Lillywhite*, 118 F.2d 836 (10thCir. 1941).

The jury's verdict troubles me, as it seems to imply that an instructor must monitor every step of every student's experiment, something that is impossible in most laboratory classes, which often have at least a dozen students. Perhaps *Lillywhite* should be viewed as a relic from the era of in loco parentis, an era that ended in the late 1970s.

Jay, (Wash. 1959)

Jay v. Walla Walla College, 335 P.2d 458 (Wash. 1959).

This case is mentioned at page 53, below, in the section on legal duty to rescue.

Brungard, (Pa.Cmwlt. 1979)

A college student was injured in an explosion in a chemistry laboratory. The judicial opinions do not discuss the facts of this case. The student sued both the college and her professor, named Hartman. The student alleged that the professor:

- (a) He failed to properly warn and instruct the Plaintiff of the possible dangers of the aforesaid laboratory experiment;
- (b) He failed to provide adequate supervision to students placed under his control;
- (c) He permitted said experiment to be supervised by persons lacking the necessary qualifications and skills;
- (d) He failed to exercise proper precautions for the Plaintiff's safety; and
- (e) He failed to otherwise exercise due care under the circumstances.

Brungard v. Hartman, 315 A.2d 913, 915 (Pa.Cmwlt. 1974).

The trial court dismissed the case because the college was protected by sovereign immunity and the professor was not liable in the absence of plaintiff proving the professor acted in an "intentional, malicious, wanton[, or] reckless manner." *Brungard v. Hartman*, 315 A.2d 913, 914-915 (Pa.Cmwlt. 1974).

The student appealed to the Pennsylvania Supreme Court, which reversed the dismissal of both the college and professor. In 1978, the Court abrogated sovereign immunity in Pennsylvania. *Brungard*, 394 A.2d 1265 (Pa. 1978).

On remand, the trial court noted that the Pennsylvania legislature had recently passed a statute that re-established sovereign immunity, with eight exceptions. The Plaintiff's allegations did not fit any of those statutory exceptions, so the case against the college was again dismissed. The case against the professor was transferred from the Commonwealth Court to the Court of Common Pleas. *Brungard*, 405 A.2d 1089 (Pa.Cmwlt. 1979). The final result is *not* reported in Westlaw.

LaVoie, (N.Y.A.D. 1982)

A college sophomore in an organic chemistry laboratory at the State University of New York at Albany took a flask of diethyl ether from a fume hood to her laboratory bench. She put the open flask about 75 cm from a lighted bunsen burner. The ether vapor ignited and burned the student. The student sued the university, because neither the directions for that specific laboratory experiment, nor the instructor's comments on that day, contained a warning to keep ether away from flame. The Court of Claims awarded student \$ 45,000 and the appellate court upheld the award. *LaVoie v. State*, 458 N.Y.S.2d 277 (N.Y.A.D. 1982).

Sprague, (W.D.Ky. 2006)

Mary Sprague was a student in a microbiology class in the nursing program at Henderson Community College in Kentucky. Moore, a student standing next to Sprague, accidentally spilled a bacterial culture of *Salmonella typhimurium* on Sprague in June 2003. Sprague became ill and was hospitalized. As a carrier of the bacterium, Sprague "must take special precautions around her immuno-depressed son, so she will not infect him."²²

In May 2004, Sprague filed litigation against the manufacturer of the bacterial culture, because the manufacturer misrepresented the bacterial as *not* pathogenic, and for products liability and negligence. The manufacturer, as third-party plaintiff, then sued three instructors at the College, and also sued Moore, the student who spilled the culture on Sprague.

Motions by the three instructors to dismiss them, plus a motion by Moore for judgment on the pleadings, were dismissed. *Sprague v. Gammon*, 2005 WL 2099807 (W.D.Ky. 2005).

Moore then moved to have her insurance company indemnify her. Moore's motion was denied, because the insurance only covered her for professional liability in a clinical setting (i.e., practicum), *not* in a classroom or college laboratory. *Sprague v. Gammon*, 2006 WL 2051646 (W.D.Ky. 2006).

There is nothing further in the Westlaw database for this case, so I checked the online docket for the federal courts in the Western District of Kentucky. The case was closed on 21 July 2006, when all parties reached a settlement. *Sprague v. Gammon*, case 4:04-cv-00057, Document Nr. 116 (W.D.Ky. 21 July 2006). Because the case settled before the court could resolve the merits of the case, we don't know the legal duties of the various parties.

²² *Sprague v. Gammon*, Complaint, case 4:04-cv-00057, Document Nr. 1 (W.D.Ky. 5 May 2004).

Cases Involving Graduate Students

In contrast to the above cases involving injury to a pupil or undergraduate student, consider the following cases involving injury of a graduate student.

Evans, (Md.App. 1961)

A graduate student pursuing a Ph.D. degree in biology was burned when he was synthesizing monoacetone glucose in a laboratory at Johns Hopkins University. The student chose, as a matter of his personal convenience, to perform the experiment in his usual laboratory that lacked safety equipment, instead of going to a safer laboratory at the University. The student sued the University. The trial court granted the University's motion for summary judgment, holding, as a matter of law, that the student had assumed the risk of an accident. The appellate court affirmed. *Evans v. Johns Hopkins Univ.*, 167 A.2d 591 (Md.App. 1961).

Benning, (7thCir. 1991)

A graduate student in chemistry at Northern Illinois University was performing an experiment with tetrahydrofuran, when the "experiment exploded[,] showering him with shards of glass and burning chemicals." He sued the University, the manager/supervisor of the laboratory, and the chairman of the chemistry department in federal court. The trial court dismissed his claims in an unpublished opinion, and the U.S. Court of Appeals affirmed. *Benning v. Board of Regents of Regency Universities*, 928 F.2d 775 (7thCir. 1991). Plaintiff should have sued in the Illinois state Court of Claims, which has exclusive jurisdiction of claims against the state of Illinois, including claims against faculty working in the scope of their authority. *Benning*, 928 F.2d at 778-780. There is no further judicial opinion in the Westlaw database in this case.

Torres, (Mont. 1995)

The plaintiff was admitted as a doctoral candidate in chemistry at Montana State University in Sep 1985. She withdrew without completing her degree in Feb 1988, allegedly because of "organic brain damage" as a result of exposure to toxic chemicals in the chemistry laboratory, where she was employed as a teaching assistant and graduate research assistant, and where she was also a graduate student. In 1993, the state paid her \$47,500 to settle her workers' compensation claim. She then filed litigation in court stating that her injuries were caused by her exposure to toxic chemicals as a *student*. The trial court granted summary judgement for the State, because the workers' compensation award was her exclusive remedy. The Montana Supreme Court, by a vote of 4 to 3, affirmed the summary judgment for the state. *Torres v. Montana*, 902 P.2d 999 (Mont. 1999).

Because the litigation was dismissed on summary judgment on immunity in the workers' compensation statute, there is no discussion of duty — and no finding of facts — in the judicial opinions.

Incidentally, plaintiff asserted she worked 40 hours/week as an employee (either teaching or research assistantship), *Torres* at 1001. She also asserted she spent between 50 and 60 hours/week in the chemistry laboratory “as a student in pursuit of her degree.” *Torres*, at 1002. Accepting her assertions²³ as true — as we must in summary judgment proceedings — indicates that she has *two* “full-time” roles, one as an employee and one as a student. Note that three of the seven justices dissented and would give plaintiff an opportunity at trial to apportion her injuries between exposure during employment and exposure as a student.

What I see as fatal to her litigation was that in her previous workers' compensation proceeding plaintiff claimed her *entire* injury was due to occupational exposure, and then in her subsequent litigation she claimed *some* of her injury was due to her exposure as a student. A dissenting justice noted plaintiff's inconsistent facts:

This may satisfy the majority's need to punish Torres for what it construes as inconsistent positions. However, in terms of legal analysis of the issues presented to this court, the majority opinion leaves a lot to be desired. However, because of the majority's preoccupation with what it concludes was Torres' inconsistent representation on an earlier occasion, it is necessary to analyze this case on two levels.

Torres, 902 P.2d at 1004 (Trieweiler, J., dissenting).

My reading of the majority opinion suggests to me that plaintiff's inconsistency in facts caused her litigation to be dismissed. *If* her entire injury was caused by occupational exposure, then it is undeniable that workers' compensation is her exclusive remedy.

Niles, (Ga.App. 1996)

A student pursuing a Ph.D. degree in physics was injured in an explosion in a laboratory. He sued, alleging that his professor and the university should have warned him about the danger of mixing acetone, ethanol, and nitric acid inside a metal container. The trial court directed a verdict for defendants, which was affirmed on appeal. The appellate court said:

Neither [the college] nor [the professor] was required to warn [the student] of the dangers of mixing these chemicals. [citations omitted] Although a university student is an invitee to whom the university owes a duty of reasonable care, college administrators do not stand in loco parentis to adult college students. *Bradshaw v. Rawlings*, 612 F.2d 135 (3dCir. 1979).

....

²³ Working 40 + 58 hours/week implies working from 08:00 to 22:00, seven days a week, with her meals eaten in the chemistry building. While such heroic efforts are sometimes made by students, they are not common.

[The professor] had the right to assume that a physics doctoral student, who has graduated with highest honors in chemistry, would either know the dangers of mixing these chemicals or would perform the research necessary to determine these dangers and take the necessary precautions.

Niles v. Board of Regents, 473 S.E.2d 173, 175 (Ga.App. 1996)

... Niles is deemed, as a matter of law, to have equal knowledge [to the professor] of the dangers of mixing these chemicals.

Niles, 473 S.E.2d at 176.

Doe v. Yale Univ., (Conn. 2000)

An anonymous plaintiff, Doe, who was in her sixth week of residency at Yale-New Haven Hospital, was ordered to change an arterial line in a terminally ill AIDS patient. Doe alleged that she had never been trained to do this procedure safely, and she was unsupervised when she did it. Doe accidentally stuck herself with the used needle and became infected with HIV. Doe sued Yale University. Yale argued *unsuccessfully* that Doe was alleging educational malpractice,²⁴ so Yale's motion for summary judgment was denied. *Doe v. Yale University*, 1997 WL 766845 (Conn.Super. 1997). A jury found for plaintiff, and Yale appealed. The Connecticut Supreme Court reversed the trial court, holding that the Workers' Compensation Act made Yale University immune from claims. *Doe v. Yale University*, 748 A.2d 834 (Conn. 2000).

Fu v. Nebraska, (Neb. 2002)

Fu was a doctoral student in the College of Pharmacy at the University of Nebraska, during 1990-1993. In June 1993, Fu attempted to synthesize a bridged tetraoxane for testing as an anti-malarial drug, using 70% hydrogen peroxide. Fu's advisor testified that Fu's experiment was *unauthorized*, and that the advisor had specifically instructed Fu *not* to synthesize this compound. The experiment exploded and Fu lost one and a half fingers. *Fu v. Nebraska*, 643 N.W.2d 659, 662-665 (Neb. 2002).

Fu sued the University. The trial court found in favor of the University. The trial court did note that Fu's advisor was negligent in not supervising Fu more closely, but such negligence was *not* the legal cause of Fu's accident. *Fu*, 643 N.W.2d at 662, 667. The Nebraska Supreme Court quoted part of the trial court opinion:

Finally, the [trial] court found that Fu's actions in walking around with [the experiment that exploded] and stirring it with a glass rod were "hazardous and reckless," noting:

Plaintiff was clearly not a freshman chemistry student, but a graduate student working towards his doctorate, and, at this point in time, had over 10 years of research experience. Plaintiff's supervisor did not have a duty to watch every move Plaintiff made in the lab.... Plaintiff made a mistake in judgment and this Court finds that this mistake in judgment was not limited to Plaintiff's failure to

²⁴ Torts alleging "educational malpractice" are *not* allowed in the U.S.A., as explained in my long essay at <http://www.rbs2.com/edumal3.pdf> .

wear the proper gloves, but to the entire span of Plaintiff's activities on June 13 [sic], 1993....

The Court, therefore, finds that the risk was not foreseeable by the Defendants and that the proximate cause of Plaintiff's damage was Plaintiff's negligence.

Fu, 643 N.W.2d at 668 (quoting trial court). The trial court held *Fu*, a graduate student, to the same standard of care as his advisor, a professor. *Fu*, 643 N.W.2d at 668, 673.

Fu appealed, and the Nebraska Supreme Court heard the case directly, without passing through the intermediate appellate court. The Nebraska Supreme Court tersely found that "instructors generally have a legal duty to supervise students in a nonnegligent manner." *Fu*, 643 N.W.2d at 669. In making this finding, the Court cited three cases involving pupils in Nebraska schools,²⁵ which I think are clearly distinguishable from a case involving a doctoral candidate in graduate school. While the Nebraska Supreme Court may be correct in their holding, the reasoning is sloppy and there are no citations to appropriate authority. Doctoral candidates are being prepared to do independent scientific research and should need minimal supervision. The situation would be different *if* the professor had *ordered* a graduate student to conduct a dangerous experiment without adequate safety equipment.

The Nebraska Supreme Court held that *Fu*'s advisor satisfied his duty:

This duty is illustrated in the present case from the evidence that when *Fu* began his work, [Fu's advisor] gave *Fu* materials about tetraoxane research and the safety precautions *Fu* should take when conducting experiments. [Fu's advisor] also monitored *Fu*'s work regularly.

Fu, 643 N.W.2d at 669. Earlier in their opinion the Court said:

[Fu's advisor] testified that he typically spoke with *Fu* two to three times a week about his work and periodically checked the experiments and results recorded in *Fu*'s notebooks.

[Fu's advisor] did not check *Fu*'s notebooks between May 28, 1993, and [11 June 1993].

Fu, 643 N.W.2d at 664.

The Nebraska Supreme Court agreed with the trial court that *Fu*'s advisor could not foresee that (1) *Fu* would attempt synthesis of this explosive compound, and (2) *Fu* would do this synthesis in a reckless manner. *Fu*, 643 N.W.2d at 670-671. The Nebraska Supreme Court wrote:

The second factual finding made by the trial court was that [Fu's advisor] could not have foreseen *Fu*'s "conducting this experiment in the manner in which it was performed ... by carrying this unstable solution in a hazardous and reckless manner, disregarding all safety procedures, precautionary measures and warnings." Again, we find the record supports such finding.

With respect to the manner in which *Fu* conducted HF-4-21 [i.e., the experiment that exploded], Woller [Fu's expert witness], Aube [Fu's expert witness], and Rhone [director of the hazardous materials program for the University of Nebraska] testified that a graduate student should research an experiment before attempting it. Woller also testified that proper research would have informed *Fu* that HF-4-21 would produce an explosive compound.

²⁵ One of the cases, *Johnson*, involved first-grade pupils, who are approximately 6 or 7 y old!

Woller, Aube, and Clennan [University's expert witness] all agreed that it was a mistake for Fu to carry the mixture and stir it. Aube, Fu's own expert, agreed that Fu's actions in conducting HF-4-21 could be considered dangerous and possibly reckless. Fu, 643 N.W.2d at 671.

Grant, (La.App. 2003)

Grant was a graduate student in chemical engineering at Tulane University during 1992-95, and during 1992-94 she worked as a research assistant to remove nickel and vanadium from used catalysts in the petroleum refining industry. She was feeling ill and went to the student health service in April 1993, where she was tested at her request in July 1993 for nickel and vanadium poisoning. The results of those tests were apparently lost, but in Dec 1994 she told a physician that she had a history of vanadium poisoning. That shows she was aware in 1993 and 1994 that exposure to nickel and vanadium caused her symptoms. In Oct 1999, another physician diagnosed heavy metal poisoning, caused by nickel, vanadium, and three other elements. In Oct 2000, she filed litigation alleging Tulane and the sponsor of the research project "had failed to provide her with a safe place to work". The defendants moved to dismiss, because the statute of limitations had expired. The trial court granted the motion and the appellate court affirmed. *Grant v. Tulane*, 853 So.2d 651, 654, 655 (La.App. 2003) Because this case was dismissed on a legal technicality about statute of limitations, the courts never considered the merits of her case.

Her complaint also alleged that defendants "knowingly and intentionally failed to provide her with proper documentation as to the dangers and health consequences of working with ... the chemicals used" in her research. *Grant*, 853 So.2d at 652. That injury may have been difficult to prove, because — as a graduate student — she had access to the University library and could search the chemical and medical literature for publications on the toxicity of heavy metals and the dangerous properties of the chemicals that she use. In fact, there is a reference book, DANGEROUS PROPERTIES OF INDUSTRIAL MATERIALS, which many chemists and chemical engineers own, that would be a good starting place.

conclusion about graduate students

These cases show that it is difficult for graduate students to recover for injuries suffered in a university laboratory, as a result of their mistake, error, or bad judgment.

Legal Duty to Render First-Aid

The legal duty of the school or college is *not* confined to supervision by teachers and professors, in an attempt to prevent injury. The school or college also has a legal duty to anticipate that there will be accidents and to provide an adequate response to accidents, such as having functional fire extinguishers and first-aid kits.

The general rule in tort law in the USA is that bystanders have *no* duty to rescue an injured person. RESTATEMENT (SECOND) OF TORTS, § 314 (1965). However, there are two reasons why instructors have a legal duty to rescue a pupil or student.

1. Teachers have a “special relationship” with their pupils, so that instructors have a legal duty to rescue and to render first aid. RESTATEMENT (SECOND) OF TORTS, § 314A (1965). There are two parts to this duty: (1) the “duty to protect against unreasonable harm” was discussed at page 9, above, and (2) the duty to provide first-aid and care until the victim reaches a hospital. The second part is relevant to the discussion in this section. While a college’s “duty to protect” students may have been weakened by the decline of “in loco parentis”, my reading of the cases suggests that colleges continue to have a legal duty to provide first-aid to adult students who are injured on campus.
2. A person who creates a peril (e.g., an instructor who assigns an experiment that injures a pupil or student, an institution that makes dangerous chemicals or equipment available to pupils or students) has a legal duty to rescue people injured by that peril. The duty to rescue applies even if the instructor’s conduct in creating the peril is *not* negligent. RESTATEMENT (SECOND) OF TORTS, § 322 (1965).

A case in Washington state in 1959 clearly shows the duty of a college. Jay, a third-year chemistry student was working in one laboratory when he heard an explosion in an organic chemistry laboratory across the hall and ran to help. On entering the organic chemistry laboratory, Jay saw two students using a fire extinguisher in an attempt to put out a fire. Jay picked up an extinguisher from the hallway and re-entered the organic chemistry laboratory. As Jay discovered that his extinguisher was empty, the apparatus exploded, puncturing the retina of his eye and causing permanent injury. There were five fire extinguishers in the basement of the chemistry building, none of which had been recently maintained or inspected. There was normally only one fire extinguisher in the organic chemistry laboratory room, and it had been emptied while fighting two previous fires during the same experiment with ethylene ether and other highly flammable gases. The empty extinguisher had been left in the hallway, where Jay found it. When Jay sued the college, the college’s attorney argued that Jay had consented to the risk of injury when he volunteered to fight the fire! The jury awarded Jay \$ 27303 and the appellate court affirmed. *Jay v. Walla Walla College*, 335 P.2d 458 (Wash. 1959). (Note that the U.S. Government Bureau of Labor Statistics says \$27303 in 1959 has the same buying power as \$ 216,060 in March 2013.) The appellate court held that the frequency of fires, together with the lack of recently inspected fire

extinguishers, made “a prima facie case of negligence in failing to provide adequate fire-fighting equipment.” *Jay*, at 460.

athletic injury cases involving first-aid

There is a long line of judicial opinions about the duty of teachers and coaches to render first-aid to pupils/students who were injured in athletic events. Some of the most notable cases are summarized below.

In a Louisiana case in 1970, a high school pupil collapsed from heat stroke while practicing for football. Because of the delay of two football coaches, the pupil was not seen by a physician for almost two hours after the pupil collapsed. The appellate court held that the two coaches were negligent in failing to call a physician and also in using “ill-chosen first aid”. The appellate court awarded the pupils parents \$ 40,000 in a wrongful death action, plus reimbursement of their son's medical and funeral expenses. *Mogabgab v. Orleans Parish Sch. Bd.*, 239 So.2d 456, 460 (La.App. 1970), writ denied, 241 So.2d 253 (La. 1970).

- *O'Brien v. Township High School Dist. 214*, 415 N.E.2d 1015 (Ill. 1980) (Plaintiff had septicemia in his left knee, with “severe and permanent consequences”. The original injury occurred off campus “during an activity unrelated to school.” Teachers had an incompetent and untrained student provide medical care to Plaintiff, which increased Plaintiff's injuries. Plaintiff alleged “wilful and wanton misconduct”. Illinois Supreme Court remanded for trial.);
- *Stineman v. Fontbonne College*, 664 F.2d 1082, 1086 (8thCir. 1981) (Deaf student hit in eye by softball. Coaches' delay in seeking medical attention for her caused permanent loss of sight in one eye. Held: “We thus find that Fontbonne [College] had a duty to provide medical assistance....”);
- *Ross v. Consumers Power Co.*, 363 N.W.2d 641, 676 (Mich. 1984) (Defendants “can be held liable for failing to comply with § 1288 [of the School Code of 1976, which specifically requires each pupil participating in certain vocational and industrial arts classes to wear eye protective devices] and the school's safety policy since the actual provision of eye protective devices, first aid supplies, and emergency transportation involves only ministerial-operational acts.”);
- *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3dCir. 1993) (Holding college owed lacrosse player duty of care based on “special relationship”, since college recruited student to play lacrosse. Student, who was 21 y of age, suffered cardiac arrest during practice and died. College did not begin CPR until 12 minutes after student collapsed, ambulance arrived 22 minutes after he collapsed.).

- *Cerny v. Cedar Bluffs Junior/Senior Public School*, 628 N.W.2d 697, 706 (Neb. 2001) (High school pupil struck his head on ground during football game and suffered a concussion. Four days later, during football practice, he suffered a second concussion. Nebraska Supreme Court held: “The applicable standard of care by which the conduct of the School's coaching staff should be judged is that of the reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement.” A coaching endorsement requires a teacher pass a class in Prevention and Care of Athletic Injuries. The proper response by a coach to a head injury is to have the victim evaluated by a physician before continuing play or training.).

Injuries in Shop Classes

There are a number of judicial opinions for injuries in shop classes (e.g., woodworking, metal working, welding, automobile repair, etc.), which may offer analogies to injuries in chemistry, physics, or engineering laboratories. Chemistry students are often taught to make glassware, and physics and engineering students often use a drill press and other machines, so even in professional education programs, some vocational skills are taught.

The following is *not* a complete list of shop cases. I have omitted some cases decided on grounds of governmental immunity or insurance coverage, in order to focus on cases that discuss the instructor's duty of care.

pupils

- *Herman v. Board of Education ... Town of Arcadia*, 137 N.E. 24 (N.Y. 1922) (“unguarded buzz saw” in high school was negligent);
- *Ridge v. Boulder Creek Union Junior-Senior High School Dist. of Santa Cruz County*, 140 P.2d 990 (Cal.App. 1943) (Affirming judgment for pupil injured by saw without a guard in school.);
- *Calandri v. Ione Unified School Dist.*, 33 Cal.Rptr. 333, 337 (Cal.App. 1963) (A 15 y old boy made a bronze cannon in a high school shop class. The cannon accidentally fired at pupil's home, injuring pupil's hand. Pupil then sued the teacher for failing to warn the pupil of the hazards of firing the cannon. Jury found for teacher, but appellate court reversed because “plaintiff was entitled to an instruction on the standard of care owed by an adult in his dealings with a child”.);
- *Matteucci v. High School District No. 208, Cook County*, 281 N.E.2d 383, 386 (Ill.App. 1972) (A 15 y old pupil was injured in a woodshop class when he used a saw without a blade guard. Court held: “... where a high school class is obliged to use admittedly dangerous machines, there is a duty upon the instructor, as agent of the school, to exercise due care in

instructing the students in safe and proper use of the machines and also a duty to exercise due care in proper supervision of the students in use of the machines as a part of regular school activities.”);

Miles v. School District No. 138 of Cheyenne County, 281 N.W.2d 396 (Neb. 1979) (pupil’s negligence was sole proximate cause of injuries while using jointer);

- *Fallin v. Maplewood-North St. Paul Dist. No. 622*, 362 N.W.2d 318, 323 (Minn. 1985) (woodworking shop teacher was negligent in leaving shop during class, but teacher’s negligence did *not* cause pupil’s injury by saw);
- *Roberts v. Robertson County Bd. of Educ.*, 692 S.W.2d 863, 870 (Tenn.App. 1985) (high school vocational teacher had a duty to exercise reasonable care to protect his students from the risk of injury in shop class, injury from drill press);
- *Barbin v. Louisiana*, 506 So.2d 888 (La.App. 1987) (Deaf and mute pupil who was 12 y old was injured by table saw without guard. Affirmed judgment of \$185,000.);
- *Tallman v. Markstrom*, 446 N.W.2d 618, 620 (Mich.App. 1989) (operating table saw without guard around blade may be grossly negligent);
- *Norman v. Ogallala Public School Dist.*, 609 N.W.2d 338 (Neb. 2000) (affirming \$342,291 jury verdict for pupil injured during welding class);
- *Cureton ex rel. Cannon v. Philadelphia School Dist.*, 798 A.2d 279 (Pa.Cmwlth. 2002) (school negligently maintained scroll saw, pupil injured while cleaning saw);
- *Wells v. Harrisburg Area School Dist.*, 884 A.2d 946 (Pa.Cmwlth. 2005) (woodshop teacher negligently supervised pupil who was injured by table saw, affirmed jury verdict of \$228,124 for pupil).

college students

- *Kirchner v. Yale University*, 192 A.2d 641, 643 (Conn. 1963). (architectural student injured by jointer in woodworking shop, court held: “It was the obligation of the defendants to exercise reasonable care not only to instruct and warn students in the safe and proper operation of the machines provided for their use but also to furnish and have available such appliances, if any, as would be reasonably necessary for the safe and proper use of the machines.”);
- *Amon v. New York*, 414 N.Y.S.2d 68 (N.Y.A.D. 1979) (student in scenery shop injured by table saw);

- *Delbridge v. Maricopa County Community College District*, 893 P.2d 55 (Ariz. 1994) (Instructor required student to climb thirty-foot high utility pole without a safety strap, student fell and “was rendered paraplegic.” Appellate court reversed summary judgment for community college.);
- *Garrett v. Northwest Mississippi Junior College*, 674 So.2d 1 (Miss. 1996) (junior college student injured while using milling machine);
- *Pritchard v. Von Houten*, 960 So.2d 568 (Miss.App. 2007) (college professor negligently supervised pouring liquid iron to make sculpture, student burned).

academic abstention & educational malpractice

This section concerns an obscure, highly technical legal detail, which is why I put it at the end of this essay.

Professor Nordin²⁶ gave the name *academic abstention* to the poorly articulated doctrine that judges will defer to schools and universities in all disputes involving purely academic matters, e.g.:

1. administrators who make hiring decisions about teachers or professors
2. institutions who expel students for failure to maintain minimum academic standards
3. instructors who award a bad grade to their pupil or student
4. professors who refuse to approve a thesis or dissertation from a graduate student
5. and institutions who expel pupils or students for disciplinary reasons, provided that the First Amendment or “due process” rights of the student have not been violated. See my essay at <http://www.rbs2.com/eatty.pdf> .

In legal jargon, *abstention* indicates the refusal of judges to resolve disputes where the court has jurisdiction. I have written a separate essay about academic abstention, which is posted at <http://www.rbs2.com/AcadAbst.pdf> . Note that the alleged injury to pupils or students in academic abstention cases is typically a bad reputation from either a poor grade, expulsion from a college, rejection of a thesis or dissertation, etc. Such injury from a bad reputation is *distinguishable* from a physical injury in a laboratory accident.

As a consequence of academic abstention — and for various other reasons (some of which I think are specious) — judges in the U.S.A. have refused to allow pupils or students to sue schools or colleges for “educational malpractice”, including claims of either an *inadequate* education or *defective* education. I have written a separate essay about educational malpractice claims, which is posted at <http://www.rbs2.com/edumal3.pdf> .

²⁶ See, e.g., Harry T. Edwards and Virginia Davis Nordin, HIGHER EDUCATION AND THE LAW, pp. 14-17, 601 (1979); Virginia Davis Nordin, “The Contract to Educate,” 8 J. COLLEGE & UNIVERSITY LAW 141 (1981).

Judges are willing to find for plaintiffs in cases involving personal injury in schools and colleges. However, in cases about academic issues, the school or college always wins. It appears to me that judges do *not* apply the doctrine of academic abstention to tort cases involving physical injury to pupils and students. My essay on educational malpractice notes that there is some inconsistency between (a) allowing physical injury cases against educational institutions, but (b) denying all educational malpractice and other academic claims against educational institutions. It appears to me that the distinction between (1) physical injury and (2) educational injury causes judges to treat these two groups of cases separately. However, judges themselves rarely explain the distinction between these two groups of cases.

Conclusion

Personal injuries in science laboratories in schools and universities raise a variety of issues beyond the typical personal injury case. These issues span not only tort law, but also education law and the practice of the relevant area of science, engineering, medicine, etc. Beginning in the 1930s with the decline of governmental immunity and charitable immunity, pupils and students have been able to recover damages in torts against schools and colleges for physical injuries (e.g., loss of any eye, loss of a finger or hand, burns, death, etc.).

In reading the reported cases in this area, I am struck by the inconsistencies among the various state courts in recent years. For example, in *LaVoie*, a college sophomore who put a can of diethyl ether near a flame — a really stupid act — was awarded damages, but in *Wilhelm*, a 13 year old who was injured while working in a laboratory without supervision, was *not* awarded damages, because of his contributory negligence. Thus it is difficult to form general rules: results depend on state statutes for immunity, sympathy of a jury and judge, etc.

Traditionally, the teacher-pupil and professor-student relationships were both considered “special relationships” in tort law, which meant that instructors had a legal duty to protect their pupils/students from foreseeable harms. The teacher-pupil relationship definitely remains a “special relationship”, as explained, beginning on page 9, above. But, since the late 1970s, professors no longer are “in loco parentis” to their students, and so the special relationship between professors and students has generally eroded. However, the professor-student relationship might still be a “special relationship” *if* the student *relied* on the professor’s superior judgment or *if* the college *controlled* the student, as explained beginning at page 15, above.

Schools should carefully consider whether they really *need* to have dangerous chemicals in their science laboratories. *If* dangerous chemicals are to be kept in schools, they should be stored in a locked metal cabinet and dispensed by a teacher only in *small* amounts. Given crowded classrooms and multiple pupils simultaneous demands for supervision by a teacher, it may not be possible for a teacher to adequately supervise the use of dangerous chemicals, which forces the conclusion that dangerous chemicals should *not* be dispensed during large classes.

Bibliography

The authority for this essay is the cases cited above. The following is a list of some of the major law review articles on injuries in school or college laboratories.

Christopher Bello, "Personal Liability of Public School Teacher in Negligence Action...," 34 A.L.R.4th 228 (1984).

Paul O. Proehl, "Tort Liability of Teachers," 12 VANDERBILT LAW REVIEW 723 (June 1959).

Reynolds C. Seitz, "Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Towards Pupils," 15 HASTINGS LAW JOURNAL 495 (May 1964).

About the Author

The author earned a B.Sc. in physics in 1971 from the University of Denver and a Ph.D. in physics in 1977 from the New Mexico Institute of Mining and Technology. After ten years of full-time study as a physics student, Dr. Standler was a professor of electrical engineering for ten years. Following the annihilation of financial support for scholarly research in all of his areas of science and engineering in 1990, he changed careers to law. He earned a J.D. in 1998 from Franklin Pierce Law Center, now called the University of New Hampshire School of Law. Since 1998, Dr. Standler has been an attorney in Massachusetts, where he specializes in academic issues in higher-education law, and consults nationwide with litigators on scientific evidence in torts.

During graduate school in 1972-73, Standler taught laboratories for introductory physics classes, including rewriting the instructions. Later, as a professor of electrical engineering, Dr. Standler — amongst other things — taught or supervised laboratory classes in analog electronic circuit design, and electrical transmission lines, including writing new laboratory instructions. It was this experience in teaching and supervising laboratories for undergraduate college students that motivated the legal research and writing of this essay.

This document is at **www.rbs2.com/labinj2.pdf**

My most recent search for court cases on this topic was in March 2013.

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