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Negligence--Schools--Personal Injuries Received by Pupil--Liability of Teacher for Negligence--Liability of Board of Education (Frank Govel, an infant, by Nellie Govel his guardian ad litem, appellant-respondent v. Board of Education of the City of Albany, et. al., respondents; J. Emmett Dowling, defendant-appellant, et al., defendants. Joseph Govel, appellant-respondent v. Board of Education of the City of Albany, et. al., respondents; J. Emmett Dowling, defendant-appellant, et al., defendants, 267 App. Div. 621 (1944))

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Mr. Justice Holmes states the answer strongly when he says, "But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and brought back. Using the language of domicil, which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign ports." [6]

In all the cases there can be no question of unconstitutionality as depriving the owner of its property without due process of law [7] because the ships, cars, or airplanes are at times temporarily absent from the state since no tax was levied upon such vehicles which were permanently without the state.

J. F. S.

NEGLIGENCE—SCHOOLS—PERSONAL INJURIES RECEIVED BY PUPIL—LIABILITY OF TEACHER FOR NEGLIGENCE—LIABILITY OF BOARD OF EDUCATION.—Plaintiff was an infant eighteen years of age and a senior at Albany High School when on March 5, 1943 he suffered a broken leg as a result of a fall which occurred in the gymnasium of that school during physical training exercises conducted under the supervision of J. Emmett Dowling, the physical education teacher. The acrobatic feat in which plaintiff was injured, was a somersault over elevated parallel bars. The exercise was not one included in the syllabus prepared by the regents which describes numerous exercises and acrobatic feats, but was a combination of two or more exercises. It was not generally taught and should be attempted only by exceptionally skilled pupils. The floor on the far side was ordinarily covered by a mat; on this occasion it was not. Action was brought against the Board of Education and J. Emmett Dowling on behalf of the infant for damages for personal injuries, and by the infant's father for medical and hospital expenses. The jury returned verdicts against the Board of Education and Dowling in favor of the plaintiff and his father. The verdicts against the Board of Education were set aside by the trial justice, although they were not as against Dowling. Dowling appeals from the denial of his motion to set aside the judgment against him, and plaintiff and his father appeal from the portion of the order which set aside the verdicts as against the Board of Education.

On April 3, 1942 plaintiff was injured by gunshot wounds in both arms while working in the machine shop maintained by the

[6] N. Y. Central R. R. v. Miller, cited *supra* note 5.

[7] U. S. CONST. AMEND. XIV, § 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law."

Board of Education at Philip Schuyler High School in connection with the Defense Training Program. The injury was inflicted by a gun brought to the mechanical workroom for repair by another student. Leo P. Duffy, the teacher, consulted with Mapes, Assistant Director of Vocational Education of the Board of Education, who gave permission to work on the gun. Without ammunition the portion of the gun which was brought to the room was not hazardous. Duffy inspected the repairs of the mechanism of the rifle and found that the job had been satisfactorily completed. There was no cartridge in the gun at that time. Thereafter it was loaded and discharged in the crowded room. The jury returned verdicts against the Board of Education and Duffy for the physical injuries received and the father recovered for medical and hospital expenses. These verdicts were set aside by the trial justice and the plaintiff and his father appeal. *Held,* judgments and orders against defendant Dowling affirmed with costs. Judgments and orders dismissing complaints as to Board of Education in the *Dowling* cases affirmed. Judgments and orders dismissing complaints against defendant Duffy reversed on the law and facts and verdicts reinstated. Judgments and orders dismissing complaints as to the Board of Education with respect to the causes of action where Duffy is a defendant reversed on the law and facts and verdicts reinstated. *Frank Govel, an infant, by Nellie Govel his guardian* ad litem, *appellant-respondent v. Board of Education of the City of Albany,* et al., *respondents; J. Emmett Dowling, defendant-appellant,* et al., *defendants. Joseph Govel, appellant-respondent v. Board of Education of the City of Albany,* et al., *respondents; J. Emmett Dowling, defendant-appellant,* et al., *defendants,* 267 App. Div. 621, 48 N. Y. S. (2d) 299 (1944).

All children over eight years of age, in elementary and secondary schools, are required to take physical instruction.[1] A teacher of physical education is under a duty to assign pupils to activities commensurate with their ability. Failure to do so is actionable negligence on the part of the teacher.[2] A finding by the jury that a teacher has been negligent in the performance of his duties is not against the weight of credible evidence where it appears that the teacher has assigned a pupil to a difficult exercise not included in the syllabus provided by the regents; that the feat required exceptional skill not possessed by the pupil; that adequate precautions to prevent injuries by placing mats on the floor to break the pupil's fall had not been

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[1] EDUCATION LAW § 695.

[2] Miller v. Board of Education, 291 N. Y. 25, 50 N. E. (2d) 281 (1943); Hoose v. Drumm, 281 N. Y. 54, 22 N. E. (2d) 233 (1939).

[3] "Although children of tender years are favored by the law, yet even before one of them can recover for an injury, it must appear that the person causing the injury owed a duty to the injured child and that he negligently failed to discharge that duty by failing to exercise that degree of care that the law imposed under the circumstances." Bogden v. Los Angeles etc. R. R. Co., 59 Utah 505, 205 Pac. 571 (1922).

provided;[3] and that the teacher was aware of the danger[4] of the exercise since several boys had been injured in the performance of the same feat.

A teacher in charge of a small room filled with a large number of pupils acquiring skill in the operation of machines is under a duty to supervise closely.[5] Actionable negligence generally consists in a failure of a duty, the omission of something which ought to have been done, or the doing of something which ought not to have been done.[6] The degree of care that is required to be exercised by any person owing a duty to exercise reasonable care varies with the dangers which are incident to his failure to exercise care.[7] Where knowledge that live ammunition was to be used in testing the gun may be inferred from the fact that before allowing the pupil to commence working on the gun (which in itself, without ammunition, was not inherently dangerous) the teacher consulted the Director of Vocational Education who gave his permission, a finding by the jury of negligence is not unjustified.

Verdicts against the Board of Education may be sustained only if there was a failure to perform a statutory duty.[8] It is well settled that the doctrine of *respondeat superior* does not apply to it and it is not liable for negligent acts of its subordinates.[9] The Board of Education is required by statute to employ a qualified teacher, duly licensed under regulations of regents, to give physical education instruction.[10] The exercises to be included in the physical training program, the period of instruction and the qualifications of teachers are determined by the regents.[11] While the Board of Education is required to provide adequate supervision of physical training classes, its obligation was fulfilled when it provided such supervision in the person of a competent instructor.[12] It is not responsible for the individual negligence of one of its teachers.[13] When a syllabus of the exercises to be given is prepared and supplied to the teacher and the teacher appointed has met a high standard of qualifications pro-

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[4] "General rule is that in order that an action or omission may be regarded as negligent, the person charged therewith must have knowledge that such act or omission involved danger to another." CORPUS JURIS, Vol. 45, *Negligence*, § 25, p. 651; Bertolami v. United Engineering Co., 120 App. Div. 192, 105 N. Y. Supp. 90 (1907).

[5] Hulley v. Moosbrugger, 88 N. J. L. 161, 95 Atl. 1007 (1916).

[6] Toppi v. McDonald, 128 App. Div. 443, 112 N. Y. Supp. 821, *aff'd*, 199 N. Y. 585, 93 N. E. 1133 (1910).

[7] Goldman v. New York Railways Co., 185 App. Div. 739, 173 N. Y. Supp. 737 (1919).

[8] Herman v. Board of Education, 234 N. Y. 196, 137 N. E. 24 (1922).

[9] Wahrman v. Board of Education, 187 N. Y. 331, 80 N. E. 192 (1907).

[10] EDUCATION LAW § 695.

[11] *Id.* § 696.

[12] Graff v. Board of Education, 258 App. Div. 813, *aff'd without opinion*, 283 N. Y. 574, 27 N. E. (2d) 438 (1940).

[13] Kattershensky v. Board of Education, 215 App. Div. 695 (1925); Herman v. Board of Education, cited *supra* note 8.

vided by the regents and has had long experience as a physical education instructor, no breach of statutory duty may be imputed to the Board of Education.[14] However, where the Board of Education has failed to perform a duty imposed on it by statute, it is liable for damages for injuries resulting from its negligence. The statute imposes a duty on the Board of Education to prescribe regulations and by-laws for the general management, control, maintenance and discipline of schools and other educational activities under its direction.[15] In the gunshot wound case, by failing to establish rules and regulations concerning the care, inspection and supervision to be exercised by a teacher in the position of Duffy, when and if students brought guns needing repairs, or other inherently dangerous instrumentalities into crowded classrooms, the Board of Education failed to perform a statutory duty and was guilty of negligence.

In view of the statutory liability placed upon a Board of Education to save harmless and indemnify by insurance or otherwise teachers on account of financial loss arising out of any suit,[16] there may be little practical reason for determining whether these verdicts should be reinstated as against the Board of Education.

M. D.

SELECTIVE TRAINING AND SERVICE—EXCLUSIVE JURISDICTION OF CIVIL COURTS OVER VIOLATIONS BY PERSONS SELECTED BUT NOT YET ACTUALLY INDUCTED.—Petitioner's claim that he is a conscientious objector was rejected by his local board. Pursuant to orders of the board, he joined the group selected for induction and was transported to Fort Leavenworth. Petitioner was given both the physical and mental examinations. He then informed the officers in charge at the induction office that he refused to serve in the army and that he wanted to turn himself over to the civil authorities. They said that he was already under the jurisdiction of the military. Thereupon an army officer read petitioner the oath of induction, which he refused to take. He was then ordered to submit to finger-printing; he refused to obey. Military charges were preferred against him for wilful disobedience of that order. *Held,* judgment of lower courts, that induction was completed when the oath was read to the petitioner, reversed. *Billings v. Truesdell,* 321 U. S. 542, 64 Sup. Ct. 737 (1944).

The civil courts have exclusive jurisdiction over persons who have been selected under the Selective Training and Service Act but who have not yet been actually inducted.[1] Section 11, read together

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[14] Lessin v. Board of Education, 247 N. Y. 503, 161 N. E. 160 (1928).
[15] EDUCATION LAW § 869, subd. 9
[16] *Id.* § 569-a.

[1] § 11 SELECTIVE TRAINING AND SERVICE ACT (1940) (54 STAT. 894, 50 U. S. C. APP. § 311): "Any person . . . who in any manner shall knowingly