

Student Suicides and School System Liability

by Cindy Singer Cafaro

“The attitude of the typical teacher is one of personal responsibility for the student’s welfare as well as for his education.”¹

WITH INCREASING FREQUENCY, the estates and families of students who have committed suicide are suing school systems. In most instances, such cases are dismissed before reaching trial. This cause of action is not without teeth, however. Under both survival statutes² and wrongful death statutes,³ school boards have been forced to pay monetary damages.

The death of a child is a tragedy for the child’s family, friends, and community. The suicide of a child causes still greater damage. Two legal theories drive these suicide-related suits:⁴ state negligence law and federal due process law. Although no reported appellate

decision in the state courts of North Carolina or in the federal Fourth Circuit Court of Appeals⁵ has as yet imposed liability on a school system for the self-inflicted death of a student under either of these theories, there is no reason to expect that this area will remain dormant. This article, by examining established North Carolina principles and related precedent from other states, addresses and foreshadows some of the significant questions arising in this area of education law.

Educators claim, and “[h]istory shows that, no matter what a school official chooses to do, someone will be unhappy.”⁶ This may be due, in part, to the wide scope of duties that school officials are charged to carry out. School officials must, among other things, adequately supervise both students and employees, properly investigate and train prospective employees, and provide emergency medical care for injuries occurring on school grounds.⁷

Though not legally obligated to guarantee the safety of their students, school officials are required to provide a degree of protection and attention to all students. In practical terms, this means that their actions (or their failure to act), as well as school board policies, will be closely scrutinized following a student’s suicide.

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1. *New Jersey v. TLO*, 469 U.S. 325, 350 (1985) (Powell, J., concurring).

2. At common law, a cause of action could not survive the death of the person who originally had the right to bring it. Therefore the death of a potential plaintiff or defendant effectively destroyed any cause of action. Modern *survival statutes* modify this outcome. North Carolina’s survival statute is N.C. GEN. STAT. § 28A-18-1 (hereinafter G.S.).

3. Analogous to a *survival cause of action* for which “no such cause of action existed at common law” [*Cowan v. Brian Ctr. Mgmt. Corp.*, 109 N.C. App. 443, 446, 428 S.E.2d 263, 265 (1993)], a *wrongful death action* is a “type of lawsuit brought on behalf of a deceased person’s beneficiaries that alleges that death [of the decedent] was attributable to the willful or negligent act of another.” BLACK’S LAW DICTIONARY 1612 (6th ed. 1990). North Carolina’s wrongful death statute is G.S. 28A-18-2.

4. For an excellent introduction to social conditions that drive these suits, see Roger C. Cramton, *The Future of the Legal Profession: Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L.REV. 531 (1994). Americans have turned to the courts, Cramton asserts, because “other mechanisms of social control . . . have lost some of their effectiveness. . . . The unwillingness or inability of other branches of government to deal decisively with social problems . . . relegates problems to the courts or encourages efforts to do so.” *Id.* at 536-37.

5. The Fourth Circuit Court of Appeals is a division of the federal court system hearing cases arising in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

6. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641 (1999) (Kennedy, J., dissenting) (quoting *amici curiae brief for National School Boards Association*).

7. See DOUGLAS S. PUNGER, *Tort Liability*, EDUCATION LAW IN NORTH CAROLINA § 3203.B.1. (Janine M. Murphy ed., 1999) (footnotes omitted).

The lengths to which a school system must go to ensure the safety of its students will depend upon the jurisdiction's⁸ precedent (i.e., *stare decisis*)⁹ and statutes. Several state courts evaluate these situations on a case by case basis.¹⁰ At least one state court has flatly refused to hold its school systems liable for negligence in any student suicide, regardless of the facts of the case.¹¹

Following is a detailed discussion of both of the relevant theories of liability, negligence, and due process, and the reception of each in various jurisdictions in cases involving student suicide.

Liability Based on Negligence

Negligence is defined as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances."¹² It consists of either "the *doing* of some act which a person of ordinary prudence would not have done under similar circumstances or *failure to do* what a person of ordinary prudence would have done under similar circumstances."¹³

Elements of a Negligence Cause of Action

For a *negligence cause of action*¹⁴ to be successful, a plaintiff must prove each of the following elements: (1) that a duty of care was owed by the defendant to the plaintiff; (2) that this duty of care was breached by the defendant; (3) that there was a causal connection between this breach and the plaintiff's injury; and (4) that an actual loss, damage, or injury to the plaintiff

resulted from the defendant's breach of duty.¹⁵

Although the elements of duty and breach are closely interwoven in the evaluation of a plaintiff's claim—without a duty there can be no breach; without a breach there can be no legal harm to be redressed—the two are in fact distinct. If no duty exists, the behavior of the defendant, even if apparently egregious, will never be at issue. The case will end before reaching trial. If a duty is found to exist, however, the behavior of the defendant, even if apparently benign, must be examined for a breach of duty. The case likely will go to trial.

Duty

A *legal duty* is an "obligation to conform to legal standards of reasonable conduct in light of apparent risk."¹⁶ This standard of reasonable conduct is often referred to as a *standard of care*.

Standard of care for teachers. North Carolina teachers are "held to the same standard of care which a person of ordinary prudence, charged with the teacher's duties, would exercise in the same circumstances."¹⁷ The level of care required to satisfy that standard varies, however, according to the particular facts and circumstances of each case. For example, teachers have a duty to adequately supervise their pupils, and thus the school board that employs them can be held liable for "foreseeable injuries that result from a lack of teacher supervision."¹⁸ A reasonably prudent teacher would keep a more careful eye on a young child than on an older child. Similarly, a distraught child would receive more supervision than would a student who appeared to be calm and contented.¹⁹

Teachers are not required "to anticipate the myriad of unexpected acts which occur daily in and about schools and school premises."²⁰ In every case based on negligence, courts and juries must determine

8. *Jurisdiction* is the "area of authority" of a court. BLACK'S LAW DICTIONARY, *supra* note 3, at 853. The geographic area and types of claims or questions under the power of a certain court (state or federal) also are termed the jurisdiction of the court. For example, the jurisdiction of the Supreme Court is the entire United States, but the jurisdiction of the North Carolina Supreme Court is only the state of North Carolina.

9. The doctrine of *stare decisis* "proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949). "*Stare decisis* has as its purpose the stability of the law . . ." *Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992). The courts of North Carolina attach "great importance to the doctrine of *stare decisis*." *Bulova Watch Co., Inc., v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974).

10. *See, e.g., Wyke v. Polk County Sch. Bd.*, 129 F.3d 560 (11th Cir. 1997)(Fla.).

11. *See McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875 (Wis. Ct. App. 1999).

12. BLACK'S LAW DICTIONARY, *supra* note 3, at 1032.

13. *Id.* (emphasis added).

14. "A situation or state of facts which would entitle [a] party to sustain action and give him right to seek a judicial remedy in his behalf." BLACK'S LAW DICTIONARY, *supra* note 3, at 221.

15. These elements form the principles of "ordinary common law negligence." *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994). Borrowed from English common law, these elements are uniform throughout the United States. *See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 30 (5th ed. 1984).

16. BLACK'S LAW DICTIONARY, *supra* note 3, at 505.

17. *Payne v. North Carolina Dep't of Human Resources*, 95 N.C. App. 309, 313, 382 S.E.2d 449, 451 (1989) [*citing Kiser v. Snyder*, 21 N.C. App. 708, 710, 205 S.E.2d 619, 621 (1974)].

18. *Id.* at 313, 382 S.E.2d at 451.

19. *See PUNGER, supra* note 7 at § 3203.B.2.; *compare Pruitt v. Powers*, 128 N.C. App. 585, 591, 495 S.E.2d 743, 747 (1998) (including many citations and examples of North Carolina courts' articulations of the duty of care to students and children).

20. *Payne*, 95 N.C. App. at 314, 382 S.E.2d at 451 [quoting *Morris v. Ortiz*, 437 P.2d 652, 654 (1968)].

the standard of reasonable care demanded in a particular situation. Factors that weigh in this decision include the “foreseeability of an injury, the hazardousness of the activity, expert opinions in the field about what is reasonable under the circumstances, and the pertinent statutory or regulatory standards of care.”²¹

Foreseeability and the standard of care. North Carolina law focuses upon whether the injury—whether a student’s broken leg or a suicide—was reasonably foreseeable. This focus is clearly illustrated in *James v. Charlotte-Mecklenburg Board of Education*.²² In that 1983 case, a teacher left her sixth-grade class unsupervised while she finished eating her lunch. Two of the unsupervised students began dueling with pencils. One of the pencils flew across the room and struck a third student, the plaintiff, who ultimately lost the vision in one eye. The North Carolina Court of Appeals held that neither the teacher nor the local board of education were liable to the injured student, noting that although “[o]ne is bound to anticipate and provide against what usually happens and what is likely to happen,” it would “impose too heavy a responsibility to hold [defendants] bound in a like manner to guard against what is unusual and unlikely to happen or what . . . is only remotely and slightly probable.”²³ Therefore, in North Carolina, foreseeability is both “the test of the extent of the teacher’s duty to safeguard her pupils”²⁴ and “an inherent component of any ordinary negligence claim.”²⁵ A defendant’s failure to foresee events that are “merely possible” will not create liability.

Suicide and the standard of care. The common law classified suicide, or self-murder, as a felony along with conventional murder. Thus courts faced with “suicide claims allegedly resulting from a defendant’s negligent act” consistently held that the defendant’s civil liability ended with the act of suicide. Because suicide was considered a criminal act, courts reasoned that it “was typically not the foreseeable result of any alleged negligence.”²⁶ Even now, after the decriminalization of suicide,²⁷ courts remain “rather reluctant to recognize suicide as a proximate consequence of a defendant’s wrongful act.” Suicide is often still “viewed

as ‘an independent, intervening act which the original tortfeasor²⁸ could not have reasonably [been] expected to foresee.’ ”²⁹

This traditional mindset is exemplified by the Wisconsin Supreme Court’s decision in *Bogust v. Iverson*.³⁰ In this 1960 case, a professor in the education department at the University of Wisconsin–Stout was employed as the college’s full-time director of student personal services. For five months he interviewed the then eighteen-year-old Jennie Bogust concerning her “personal, social, and educational problems and her conflicting feelings, environment, and social ineffectiveness.”³¹ He then recommended that their interviews be discontinued. Six weeks later, Bogust committed suicide. Her parents sued Iverson in Wisconsin state court, but both the trial and appeals courts held that the facts as alleged were insufficient to constitute a cause of action. The Wisconsin Supreme Court affirmed the rulings of the lower courts, reasoning that to expect “a teacher who has no training, education, or experience in medical fields . . . to recognize in a student a condition, the diagnosis of which is in a specialized and technical medical field, would require a duty beyond reason.”³²

The court’s characterization of Iverson as simply a “teacher” is a bit odd considering his position as the director of student personal services.³³ The plaintiffs’ allegation that the “defendant was charged with the maintenance of a counseling and testing center for various educational, vocational, and personal problems which students of the college might have” failed to impress the court, however. Even if true, the court held, “that fact does not qualify him as an expert in the field of medicine or psychiatry.”³⁴

More recently, courts have begun to entertain the idea of imposing liability under similar circumstances, demonstrated by the 1991 decision in *Eisel v. Board of Education of Montgomery County*.³⁵ Nicole Eisel was thirteen years old when she died in an allegedly satanic

28. A *tortfeasor* is a person who has committed a tort, that is, a civil wrong (other than a breach of contract) for which the injured person may bring a private lawsuit seeking damages.

29. *Watters v. TSR, Inc.*, 904 F.2d 378, 383 (6th Cir. 1990) (citations omitted) [quoting *Jarvis v. Stone*, 517 F. Supp. 1173, 1175 (N.D. Ill. 1981)].

30. 102 N.W.2d 228 (Wis. 1960).

31. *Id.* at 229. The professor’s duties included maintaining a counseling and testing center for troubled students.

32. *Id.* at 230.

33. Wisconsin courts remain disinclined toward finding liability for a self-inflicted death. See, e.g., *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875 (Wis. Ct. App. 1999) [expressly following the precedent of *Bogust v. Iverson*, 102 N.W.2d 228 (Wis. 1960)].

34. *Bogust*, 102 N.W.2d at 230.

35. 597 A.2d 447 (Md. 1991).

21. PUNGER, *supra* note 7 at § 3203.B.2. (footnotes omitted).

22. 60 N.C. App. 642, 300 S.E.2d 21 (1983).

23. *Id.* at 646, 300 S.E.2d at 23.

24. *Id.* at 648, 300 S.E.2d at 23.

25. *Winters v. Lee*, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994).

26. *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 808 (R.I. 1996).

27. G.S. 14-17.1, enacted in 1973, abolished the common law crime of suicide in North Carolina.

murder-suicide pact. In the week before her death, several students notified counselors at her junior high school that Eisel had made multiple suicide threats. The counselors questioned her, but when she denied having made any suicidal statements, they let the matter drop. Contrary to school board policy,³⁶ the counselors failed to notify either Eisel's parents or school administrators about the alleged statements.³⁷

Eisel's father asserted that the school's failure to convey known information was an unreasonable breach of the counselors' duty because it prevented him from exercising his powers of custody and control over his daughter. The Court of Appeals of Maryland, finding no direct precedent, noted that "[p]robably the closest case, factually, to the matter before us is *Bogust v. Iverson*."³⁸ Nevertheless, the appeals court reversed the summary judgment³⁹ in favor of the defendants, which the lower court had granted based upon the holding that the counselors were under no duty to warn Eisel's parents and therefore could not be held negligent.

In the view of the appeals court, "a special relationship between a defendant and the suicidal person [such as a custodial or therapist-patient relationship] creates a duty to prevent a foreseeable suicide." Acknowledging that "recent attempts to extend the duty to prevent suicide [and thereby the definition of a special relationship] beyond custodial or therapist-patient relationships had failed,"⁴⁰ the court sought to fit Eisel's relationship

with her counselors into a custodial or therapist-patient framework. Toward that end, the court noted that the relationship of a school to its pupil is "analogous to one who stands in loco parentis [in the place of a parent]"⁴¹ and that "the relationship of school counselor and pupil is not devoid of therapeutic overtones."⁴²

The *Eisel* court found the relational framework and the evidence of Eisel's intent to commit suicide sufficient grounds to remand the case for trial. While the *Bogust* court sympathized with overburdened teachers, the *Eisel* court was swayed by what it described as the "total and irreversible harm" that could result "from a school counselor's failure to intervene appropriately when a child threatens suicide." When "the consequence of the risk is so great," the *Eisel* court found, "even a relatively remote possibility of a suicide may be enough to establish duty."⁴³

The *Eisel* court's sympathy and boldness have not been universally imitated. The Fourth Circuit, in another Maryland-based case, *Scott v. Montgomery County Board of Education*,⁴⁴ asserted in dicta⁴⁵ that *Eisel* dealt only with threats of "imminent action."⁴⁶ Thus the *Scott* court found that, under *Eisel*, school officials do not have

36. A policy may be used as evidence of what was reasonably foreseeable to the school system. It can help establish how a reasonable person would be expected to respond to a certain situation as well as the existence of a duty. A policy violation, however, will *not* automatically lead to a successful negligence action.

37. The school's principal had sent out a lengthy memorandum less than two years before Nicole's death entitled "Suicide Prevention." This memorandum included warning signs and gave answers to the question "how can you help in a suicide crisis?" One of these answers was: "Tell others—As quickly as possible, share your knowledge with parents, friends, teachers or other people who might be able to help. Don't worry about breaking a confidence if someone reveals suicide plans to you. You may have to betray a secret to save a life." The top sheet of the memorandum consisted of steps to be followed in the event that a student alleged an attempt to commit suicide. The first step was to "Notify the appropriate grade level counselor and administrator immediately." *Eisel*, 597 A.2d at 453–54. The principal later testified: "If the student is in danger, of course, you take care of that first. Then the next thing you do would be to notify a parent. If the student is in no apparent danger, you notify the parent." *Id.* at 450.

38. *Id.* at 451. Foreseeability was not brushed aside in *Eisel*; in fact, it was called "the most important variable in the duty calculus." *Id.* at 453.

39. A summary judgment ends a controversy without a trial. It is a procedural device and can be granted only if "there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved." BLACK'S LAW DICTIONARY, *supra* note 3, at 1435.

40. *Eisel*, 597 A.2d at 450. *Eisel* has been called "a direct descendent" of *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976)

(en banc). *Tarasoff* is "best known for a more or less precise holding: 'Once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, [the therapist] bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.'" PETER F. LAKE, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98 (1994) (footnotes omitted); see also Amy J. Fanzlaw, "A Sign of the Times: How the Firefighter's Rule and the No-Duty-to-Rescue Rule Impact Convenience Store's Liability for Failure to Aid a Public Safety Officer," 23 STETSON L. REV. 843, 868 (1994).

41. *Id.* at 451 (emphasis added). The United States Supreme Court has noted, however, that while "a few courts have concluded that . . . [t]eachers and school administrators . . . act in loco parentis in their dealings with students . . . [s]uch reasoning is in tension with contemporary reality and the teachings of this Court. . . . Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *New Jersey v. TLO*, 469 U.S. 325, 336 (1985). The Fourth Circuit and North Carolina courts have unequivocally declined to view the teacher-student relationship as a "special" or custodial relationship.

42. *Eisel*, 597 A.2d at 452.

43. *Id.* at 455.

44. 1997 U.S. App. LEXIS 21258 (4th Cir. 1997) (unpublished per curiam opinion). See *infra* at page 22 for a detailed discussion of the case. Under the *Erie* doctrine [see *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)], unless the matter in question is expressly governed by the United States Constitution or federal law, federal courts are bound by the substantive laws of the state in which they are situated. Thus the Fourth Circuit was bound by Maryland precedent in the *Scott* case.

45. "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case on hand are . . . dicta, and lack the force of an adjudication." BLACK'S LAW DICTIONARY, *supra* note 3, at 454 (emphasis added). *Dictum* is the singular form of dicta.

46. *Scott*, 1997 U.S. App. LEXIS 21258, at *17.

a duty to notify a student's parents of "non-imminent" threats. This limitation of *Eisel* is dubious. First, distinctions between "imminent" and "non-imminent" threats are far from clear-cut.⁴⁷ Second, the *Scott* court claimed to base its distinction upon a questionable reading of another Maryland case, which the *Scott* court perceived as "distinguishing *Eisel* in part, on the basis that the threat in *Eisel* was of impending intentional harm."⁴⁸ The passage the *Scott* court relied upon, however, reads: "In *Eisel*, it was asserted that the school officials had actual knowledge that a pupil intended to commit suicide, knowledge that the child's parents did not have."⁴⁹ The *Scott* court thus collapses an important distinction: whether a school official can only be liable if he or she knew of an "imminent" threat or if "actual knowledge" of a threat is enough. Requiring knowledge of imminent action on the threat sharply limits the duty requirement.

Another case imposing a duty requirement less expansive than that imposed in *Eisel* is *Brooks v. Logan*.⁵⁰ Logan was an English teacher who required her students to keep a daily journal. She periodically checked the journals and graded them at the end of the semester. The journal of one student, Jeffery Brooks, documented some adolescent angst but never clearly referred to suicide.⁵¹ Brooks killed himself one month after turning in the completed journal. His parents sued, alleging that Logan had "a duty to seek help for a student who displays suicidal tendencies at school."⁵² The parents' claims against the school district were thrown out on the basis of governmental immunity,⁵³ and the trial court granted summary judgment for Logan, ruling that

she had no duty to seek help for a student with suicidal thoughts. The Idaho Supreme Court disagreed, finding that the state legislature had created a statutory duty requiring a school "to act affirmatively to prevent foreseeable harm to its students," which that Court had previously recognized as "simply a duty to exercise reasonable care in supervising students while they are attending school."⁵⁴ Unlike *Eisel*, however, the *Brooks* court flatly refused to recognize any duty based upon analogies to a custodial relationship.⁵⁵

Breach of Duty

Once a court decides that a duty of care existed between the plaintiff and the defendant, the plaintiff must then convince the finder of fact⁵⁶ that the defendant did not respond to this duty as a reasonably prudent person would have. This is a largely fact-based and fact-specific analysis. For example, the *Logan* court ruled that a statutory duty existed between Logan and her student. This ruling did not mean the case was over. It only gave the plaintiffs an opportunity to convince the finder of fact that this duty had been breached. If the finder of fact was not convinced, the plaintiff's case would be over.⁵⁷

Causation

If it is determined that a duty of care existed and was breached, the finder of fact must then determine whether the defendant's action (or inaction) was the actual cause of the plaintiff's injury. If it can be said with reasonable certainty that "but for" the defendant's action (or inaction) the plaintiff's injury would not have occurred, the trier of fact must then determine whether the defendant's action or inaction was the proximate

47. In *Eisel*, the school counselors learned of Nicole Eisel's threats "[d]uring the week prior to the suicide." *Eisel*, 597 A.2d at 449. Whether this may be labeled an imminent threat is at least questionable. While it is certainly more imminent than the threats of the fourteen-year-old *Scott* decedent, who threatened to kill himself before reaching the age of twenty, drawing a bright-line test of imminence may be an arbitrary matter.

48. *Scott*, 1997 U.S. App. LEXIS 21258, at *17 [citing *Hammond v. Board of Educ. of Carroll County*, 639 A.2d 223, 227 (Md. Ct. Spec. App. 1994)].

49. *Hammond*, 639 A.2d at 227.

50. 903 P.2d 73 (Idaho 1995).

51. A typical entry reads "I don't know if I will. I met some old friends recently, so I'm here for awhile. I know that you may not be following all this because I really haven't come right out and said what I meant and since it is a little far fetched. Not many people follow me because I'm so original but, who cares!?!?" *Id.* at 81 (Young, J., dissenting). Logan had promised Brooks that she would not read his entries but would only check their length. There was a factual dispute as to whether Logan had kept her promise. For the purposes of the summary judgment motion this opinion reviewed, it was deemed that she had read the entire journal. *See id.* at 76.

52. *Id.* at 75-76.

53. *See* the discussion of governmental immunity beginning on page 24.

54. The court cited Section 33-512(4) of the Idaho Official Code, which requires a school district to "act affirmatively to prevent foreseeable harm to its students." *See Brooks*, 903 P.2d at 79. The *Eisel* court, to a lesser extent than the *Logan* court, also relied upon a statute imposing a duty on schools to protect children from suicides, the Maryland Youth Suicide Prevention School Programs Act. *See Eisel*, 597 A.2d at 453.

55. "The courts have held that when a person is being detained in a hospital or jail, and that person then commits suicide, the institution may be liable if the suicide was foreseeable. We are not presented with that situation here. . . . Accordingly, we do not find that a duty predicated on a custodial relationship arises in this case." *Brooks*, 903 P.2d at 79 (citation omitted). The court also rejected the argument that Logan had assumed a duty of care to Brooks by occasionally helping other troubled students during her teaching career. "Nothing in the record supports a finding that Logan volunteered to help [Brooks] and thus assumed a duty of care for him." *Id.* at 78.

56. Most often a jury, but sometimes a judge, will play this role.

57. A published opinion as to the resolution of the *Logan* case does not exist. It may have been settled, the Brooks may have dropped the suit, or the finder of fact may have determined that Logan did not breach her duty of care.

cause of the plaintiff's injury. This will be the case if the defendant "could reasonably have foreseen or anticipated that" the defendant's action or inaction "might result in injury to that student."⁵⁸

Even if causation exists, public policy considerations may preclude a plaintiff's recovery if

(1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden [on the defendant]; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.⁵⁹

Such considerations can turn causation into an Achilles' heel for plaintiffs. In the traditional view articulated in *Bogust*, a suicide is "an intervening force which breaks the line of causation from the wrongful act to the death . . . [t]herefore the wrongful act does not render defendant civilly liable."⁶⁰ Even when suicide claims are not automatically barred by this intervening force argument, some courts simply do not want to get involved in this messy cause of action. The *Bogust* court concluded its opinion by noting that even had the defendant reacted differently, "it would require speculation for a jury to conclude that under such circumstances" Jennie Bogust "would not have taken her life."⁶¹ The refusal to allow such speculation ended the plaintiffs' case.

Similar reasoning is evident in the recent Fourth Circuit case *Scott v. Montgomery County Board of Education*, mentioned above.⁶² At the age of fourteen, Aaron Scott was diagnosed as suffering from a serious emotional disturbance and possibly from attention deficit disorder. Scott's special education admission, review, and dismissal (ARD) team called for complete psychiatric and medical evaluations in January of 1993.⁶³ By the time of his death, four months later, no evaluations had been performed. Two months before Scott's suicide, he told his math teacher that there was no point in his doing schoolwork; "he would be dead

before he was twenty years old anyway; and that if he was not dead by the time he was twenty, he would kill himself."⁶⁴ The math teacher notified the school psychologist of this threat. The psychologist spoke to Scott for half an hour the next day. Scott may have denied the intent to commit suicide; he did not, however, deny his threats to do so. The matter was dropped, and the statements were never reported to Scott's parents.

Expert testimony for the plaintiff included the opinion that Scott's death was "highly preventable" and that "problems in school contributed to his decision to commit suicide."⁶⁵ The expert felt that the school's failure to provide the recommended psychiatric and medical evaluations was evidence of the school's greater failure to meet Scott's emotional and behavioral support needs. The court discounted the importance of these conclusions, however, noting that not all of Scott's problems were school related: "the record . . . contains evidence of numerous stressors in Aaron's life, it is impossible to discern why Aaron tragically took his own life, and to conclude that the board's alleged failures were causally related to Aaron's suicide is conjecture."⁶⁶ Therefore, the court held that Scott's mother had not produced sufficient evidence from which a reasonable jury could find that the alleged violations were a proximate cause of her son's suicide. The district court's grant of summary judgment in favor of the board of education was affirmed.

Damages

Once a plaintiff has proved duty, breach, and causation, the last hurdle, proving that she has suffered damages as the result of the defendant's breach of duty, should pose little problem. As the *Eisel* court put it: "The degree of certainty that [the parent] and [the deceased student] suffered the harm foreseen is one hundred percent."⁶⁷ Determining how to place a monetary value on this harm, however, is far less certain.⁶⁸

58. *Logan*, 903 P.2d at 80.

59. *Nalepa v. Plymouth-Canton Community Sch. Dist.*, 525 N.W.2d 897, 904 (Mich. App. 1994) [quoting *Wilson v. Continental Ins. Co.*, 274 N.W.2d 679 (Wis. 1979)].

60. *Bogust v. Iverson*, 102 N.W.2d 228, 232 (Wis. 1960).

61. *Id.* at 233.

62. 1997 U.S. App. LEXIS 21258 (4th Cir. 1997) (unpublished per curiam opinion).

63. *See id.* at *9.

64. *Id.* at *5.

65. *Id.* at *10.

66. *Id.* at *17. Two members of Scott's immediate family had attempted suicide in the previous four years. The court also noted that Scott's brother was a known drug dealer who had been kicked out of the house. *See id.* at *11. In addition, Scott's parents were aware of a separate suicide threat, which they had mentioned to school board officials, but had not realized that Scott was serious. *See id.*

67. *Eisel v. Board of Educ. of Montgomery County*, 597 A.2d 447, 453 (Md. 1991).

68. Discussion of the monetary evaluation of claims is beyond the scope of this article.

A Case Study of a Negligence Cause of Action

Perhaps the first case in which a school district was found liable for negligence in a student's suicide was decided in 1995.⁶⁹ *Wyke v. Polk County School Board*⁷⁰ concerned a thirteen-year-old student, Shawn Wyke, who hanged himself in his backyard. A few days before, he had twice attempted to hang himself on school grounds, during school hours.

The appellate court, construing the evidence in light most favorable to the plaintiff,⁷¹ determined that school officials were made "somewhat aware" of both incidents but had "failed to hold Shawn in protective custody, failed to provide or procure counseling services for Shawn, and failed to notify [his family] of the attempts."⁷² Around the time of his suicide, Wyke's family was aware that he was angry and experiencing some emotional and behavioral problems. An appointment had been made for him to see a mental health counselor, but his family was unaware of his suicidal intent. The district court dismissed the plaintiff's federal due process claims⁷³ but sent the negligence and wrongful death claims to the jury. The jury found for the plaintiff, the district court entered judgment on the verdict, and the Eleventh Circuit Court of Appeals affirmed, holding that "both the evidence and the law" supported holding the school board liable for Wyke's death.⁷⁴

Under Florida law, like North Carolina law, school administrators have a duty to supervise students. The *Wyke* court found that this duty was violated when school administrators, with their degree of knowledge and authority, failed to act as reasonable people would have acted under similar circumstances. As to foreseeability, the court noted that if "ever there was a situation where a 'person of ordinary prudence' would recognize

'an acute emotional state,' this was it."⁷⁵ Although it is true that the "workings of the human mind are truly an enigma," the court made it clear that neither it nor the jury believed "that a prudent person would have needed a crystal ball to see that Shawn needed help and that if he didn't get it soon, he might attempt suicide again."⁷⁶

The court held that Wyke's death was caused by this breach of duty (1) actually, because but for the administrators' failure to adequately supervise Wyke it is reasonable to assume that he would have received additional supervision and care from his family, and (2) proximately, because it was foreseeable to any reasonable person that Wyke might attempt suicide again and eventually might be successful. The damage from the administrator's breach was clear: Wyke's death.⁷⁷

Defenses to a Negligence Cause of Action

Contributory Negligence

Verdicts splitting liability between plaintiffs and defendants, of which the *Wyke* case is an example, are currently impossible in North Carolina. *Wyke* was decided under the laws of Florida, one of forty-six states operating under systems of comparative negligence, which "compare the fault attributable to the plaintiff to the fault attributable to the defendant and provide for the division of damages."⁷⁸

North Carolina operates under a contributory negligence system. This system does not allow negligent plaintiffs to succeed in actions against negligent defendants, regardless of the proportions of fault. A plaintiff who contributes to her injuries will not recover damages, even if her fault was comparatively small in relation to the fault of the defendant. In practical terms, this means that even if a defendant school board was ninety-five percent responsible for a student's death and his parents were 5 percent responsible, the parents would be unable to recover anything from the school board.

69. See Eugene C. Bjorklum, *School Liability for Student Suicides*, 106 EDUC. LAW REP. 21, 27 (1996) (deeming *Wyke* the first).

70. 898 F. Supp. 852 (M.D. Fla. 1995) (mem.), *aff'd* 129 F.3d 560 (11th Cir. 1997) (not recommended for publication in the official reporters). Analysis of this case can be found in *Recent Development in the Law: Primary and Secondary Education*, 27 J.L. & EDUC. 462 (1998). For information on the facts of the case and the 1995 decision, see Bjorklum, *supra* note 69, at 27.

71. For the purposes of the appeal, the Eleventh Circuit construed the evidence in the light most favorable to the prevailing plaintiff. *Wyke*, 129 F.3d at 563.

72. *Wyke*, 129 F.3d at 563.

73. Discussed *infra* beginning on page 24.

74. The jury found that "the School Board negligently failed to supervise" Wyke, "that the failure was the proximate cause of his death . . . and that the percentage of fault attributable to the School Board was 33%." *Wyke*, 129 F.3d at 566.

75. *Wyke*, 129 F.3d at 574 [quoting Florida Dep't of Health & Rehabilitative Services, *School Health Services*, HRS Manual No. 150-25, at 6-6 through 6-7 (Feb. 1, 1989)].

76. *Id.*

77. It is unlikely that the monetary value attributed to Wyke's death was easily determined. The jury determined it to be \$500,000. Because the school board was found to be only 33 percent liable for Wyke's death, its total liability came to \$165,000. See *id.*

78. Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 33 (1996). Gardner offers an excellent, in-depth analysis of the history and application of North Carolina's contributory negligence system.

Governmental Immunity

Even if a school board would otherwise be found liable for a student's suicide, it may, in proper circumstances, assert governmental⁷⁹ immunity and escape liability. The government and its agents are immune from suit except to the extent that the government consents to liability. Because a board of education is a governmental agency, it is not liable in a tort or negligence action unless it has waived its governmental immunity pursuant to statutory authority.⁸⁰

In North Carolina, governmental immunity is addressed in Section 115C-42 of the North Carolina General Statutes:

Any local board of education by securing liability insurance . . . is hereby authorized . . . to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education. . . . [Governmental] immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified⁸¹ by insurance for such negligence or tort.⁸²

The North Carolina Court of Appeals has ruled that the "primary purpose" of this statute was "to encourage local school boards to waive immunity by obtaining insurance protection while, at the same time, giving such boards the discretion to determine whether and to what extent to waive immunity."⁸³

Liability Based on Due Process

The Fourteenth Amendment to the United States Constitution provides that "no State shall . . . deprive any person of life, liberty, or property without due process of law . . ." ⁸⁴ This Due Process Clause offers constitutional safeguards to persons affected by governmental actions or judgments.

79. Governmental or "sovereign" immunity originated in the common law of England. It was "[b]ased upon the idea that the king could do no wrong." KEETON ET AL., *supra* note 15, at § 131, p. 1043. One who could do no wrong, or the representative of one who could do no wrong, certainly could not be sued. This doctrine was adopted by American courts "in the early days of the republic" and has been part of the U.S. legal system ever since. *Id.* at § 131, p. 1033.

80. See *Daniel v. City of Morganton*, 125 N.C. App. 47, 52, 479 S.E.2d 263, 267 (1997).

81. *Indemnified* means compensated, reimbursed.

82. G.S. 115C-42.

83. *Daniel*, 125 N.C. App. at 53, 479 S.E.2d at 267 [quoting *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990)].

84. U.S. CONST. amend. XIV, § 1.

Both procedural and substantive due process must be satisfied for a government action affecting life, liberty, or property to be constitutional. Procedural due process stipulates how government actions are to be carried out. It requires that specific safeguards be fulfilled before a government action affecting life, liberty, or property can take place.⁸⁵ Substantive due process, by contrast, is a generalized protection requiring governmental actions affecting life, liberty, or property to be "fair and reasonable in content as well as application."⁸⁶ When a governmental action is both unfair or unreasonable and damaging to life, liberty, or property, it is said to violate substantive due process.

In student suicide cases, claims typically center on the school system's failure to take steps that would have prevented the suicide. A major hurdle for these plaintiffs is that substantive due process does not require the government to guarantee any one person's safety.⁸⁷ The Due Process Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."⁸⁸ Plaintiffs may overcome this hurdle, however, by invoking an affirmative right to government protection under the Due Process Clause. Courts have recognized such an affirmative right where a "special relationship" exists between a state and the individual or where a "state-created danger" exists.⁸⁹

Section 1983: The Enforcement Mechanism

The Fourteenth Amendment does not, in itself, guarantee that due process violations will be actionable in a court of law. For the enforcement of these and other constitutionally granted rights, another mechanism is necessary. This mechanism, Section 1983 of

85. For example, persons whose life, liberty, or property will be affected by a government action have the right to be present before the decision maker and to offer proof, to dispute facts and issues that will influence the action to be taken. See BLACK'S LAW DICTIONARY, *supra* note 3, at 500.

86. See *id.* at 1429.

87. "The Fourteenth Amendment is phrased as a limitation on the State's power to act; not as a guarantee of certain minimal levels of safety and security." *Appfel v. Huddleston*, 1999 U.S. Dist. LEXIS 8691, at *5 (D. Utah 1999) [citing *DeShaney v. Winnebago*, 489 U.S. 189, 194-95 (1989)]. *DeShaney*, a watershed case, held that the purpose of the Fourteenth Amendment "was to protect the people from the State, not to ensure that the State protected them from each other" and that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 196 & 195.

88. *DeShaney*, 489 U.S. at 196.

89. See *Appfel*, 1999 U.S. Dist. LEXIS 8691, at *5 (citing *DeShaney*, 489 U.S. at 194-95). These two exceptions are discussed in detail beginning on page 26.

Chapter 42 of the United States Code,⁹⁰ provides that:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

This short paragraph, commonly known as Section 1983, creates no new cause of action; no new rights were born with its passage.⁹¹ It is a neutral device which “merely provides ‘a method for vindicating federal rights elsewhere conferred.’”⁹² Nevertheless, it has had an enormous impact on the federal court system; it has been said that a complete catalog of “constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics.” Among these topics are the “mistreatment of school-children, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard—to identify only a few.”⁹³ Though deemed necessary for “detering unconstitutional uses of state power,”⁹⁴ Section 1983 cases have sometimes overwhelmed federal dockets.⁹⁵

Analysis of Section 1983 in the Context of School Board Liability for Student Suicides

Courts have held school employees, including teachers and school board members, to be proper “persons” subject to suit under Section 1983.⁹⁶

90. Hereinafter Section 1983.

91. The broad language of Section 1983 has allowed it to be expanded far beyond its original focus. Enacted as the Ku Klux Klan Act of 1871, its original purpose was to protect newly freed ex-slaves. See Lessie Gilstrap Fitzpatrick, *Limiting Municipal Liability in Section 1983 Litigation*, 35 HOUS. L. REV. 1357, 1358 n.4 (1998).

92. *Carroll v. Fayette County Bd. of Educ.*, 19 F. Supp.2d 618, 622 (1998) [quoting *Albright v. Oliver*, 510 U.S. 266, 271 (1994)].

93. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, ___ U.S. ___, 119 S. Ct. 1624, 1646 (1999) (Scalia, J., concurring in part and concurring in the judgment) [quoting *Wilson v. Garcia*, 471 U.S. 261, 272–73 (1985) (footnotes omitted)].

94. Kevin R. Vodak, *A Plainly Obvious Need for New-Fashioned Municipal Liability*, 48 DEPAUL L. REV. 785, 790 (1999) [citing *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)].

95. See *id.* at 797 n.84 (1999) [citing ERWIN CHEREMINSKY, FEDERAL JURISDICTION 8.1, at 428 (2d ed. 1994)]; see also Douglas S. Miller, *Off Duty, Off the Wall, but Not Off the Hook: Section 1983 Liability for the Private Misconduct of Public Officials*, 30 AKRON L. REV. 325, 326 (1997) (“The past thirty-five years have seen a tremendous expansion in the use of Section 1983 to redress abuses of power. The expansion has been well documented, and most federal judges could probably recite Section 1983 verbatim immediately upon waking from a deep sleep.”) (footnotes omitted).

96. See *B.M.H. v. School Bd. of the City of Chesapeake*, 833 F. Supp. 560, 564 n.6 (E.D. Va. 1993).

According to the Supreme Court, acting under “color of state law” traditionally requires that a defendant “exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’”⁹⁷ This element excludes “merely private conduct, no matter how discriminatory or wrongful”⁹⁸ from the reach of a Section 1983 cause of action.

The clause “shall be liable to the party injured” is what permits constitutional pronouncements like the Fourteenth Amendment to be enforced in federal courts.

Section 1983 and Student Suicide Actions

Plaintiffs in student suicide cases wishing to pursue substantive due process claims may reach federal courts through Section 1983. A federal Section 1983 claim may be attractive to plaintiffs for many reasons; including the following:

(a) It offers the option of conducting the suit in a federal court. If the pertinent state court is unsympathetic to liability cases involving student suicide, a plaintiff may seek redress in a federal forum.

(b) Some state-specific immunities and defenses are not pertinent to a Section 1983 claim. For example, as previously noted, a North Carolina plaintiff suing under a state negligence claim will recover nothing if found to be even 1 percent contributorily negligent. Contributory negligence is not applicable, however, in a Section 1983 claim arising from the same incident. State-based governmental immunity also is irrelevant in a Section 1983 suit. Federal law alone determines immunity in regard to Section 1983 claims. This is because allowing states to immunize violations of federal law would “transmute a basic guarantee into an illusory promise.”⁹⁹

(c) The prevailing plaintiff in a Section 1983 cause of action is permitted to recover reasonable attorney fees. This is contrary to the traditional American rule, which holds that each party, win or lose, will be responsible for their own legal fees. State negligence claims operate under the American rule.¹⁰⁰

Despite the aforementioned advantages to filing suit under a Section 1983, this avenue is not a magical road to recovery. While it is common for violations of

97. *West v. Atkins*, 487 U.S. 42, 49 (1988) [quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)].

98. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S. Ct. 977, 985 (1999) [quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982)].

99. *B.M.H.*, 833 F. Supp. at 564 [quoting *Howlett v. Rose*, 496 U.S. 356, 376 (1990)].

100. A plaintiff may sue under multiple theories of liability but may recover fully only once. For example, a school board or official whose negligence and violation of a constitutional right creates a single injury is not

constitutional rights to be labeled as “constitutional torts,”¹⁰¹ the Due Process Clause “does not transform every tort committed by a state actor into a constitutional violation.”¹⁰² Additional requirements beyond the ordinary tort elements must be met for a Section 1983 cause of action to be successful. Also, plaintiffs may be sabotaged by the same difficulties that haunt ordinary negligence suits. Two recent cases will help demonstrate the complexities of a Section 1983 cause of action.

The case of *Armijo v. Wagon Mound Public Schools*¹⁰³ involved a sixteen-year-old special education student, Philadelfio Armijo, who was suspended for threatening a teacher.¹⁰⁴ The school’s principal, Mary Schutz, notified police of the suspension and asked them to detain Armijo if he was caught returning to school. Contrary to stated school disciplinary policy,¹⁰⁵ however, Schutz did not attempt to notify Armijo’s parents of the suspension. Instead she told the school’s counselor, Tom Herrera, to drive Armijo home immediately. Herrera knew that Armijo had access to firearms and observed that Armijo was very angry as he was being driven home. Still, Herrera made no attempt to contact Armijo’s parents or to check to see if they were home before leaving Armijo. Armijo had made a practice of confiding in a school aide, Pam Clouthier. Several times that fall, and on the day of this suspension, Armijo told her that “maybe I’d be better off dead.” Clouthier apparently did not inform any school official of these threats.

Armijo’s parents returned home to find their son dead of a self-inflicted gunshot wound to the chest. They subsequently filed suit in federal court against Schutz, Herrera, Clouthier, and the school district claiming a violation of Armijo’s substantive due process

rights.¹⁰⁶ While, in general, substantive due process does not mean that school officials must guarantee a student’s safety, Armijo’s parents pointed out that in two particular circumstances, both recognized by the U.S. Supreme Court in *DeShaney v. Winnebago*, such an affirmative duty may indeed fall to school officials. One such circumstance is where school officials have entered into a “special relationship” with the student; the other is where school officials have themselves created the danger.

The special relationship exception to the general rule that governments have no obligation to protect their citizens from danger was created by the following passage in the *DeShaney* opinion:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . [I]t is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.¹⁰⁷

Almost all courts have interpreted this language to mean that a “special relationship” can exist only in custodial situations.¹⁰⁸ Armijo had been restricted from returning to school on the day of his death, but “[b]anning a student from the school grounds does not rise to the same level of involuntary restraint as arresting, incarcerating, or institutionalizing an individual.”¹⁰⁹ Even had Armijo been in the custody of Herrera while confined in his car during the drive home from school, Armijo’s suicide occurred after he had been released from the car and “was no longer under any involuntary restraint by a school

required to pay an increased amount because the liability can be based on two legal theories. The negligent party must fully pay for the injury caused, but that is the full extent of the liability.

101. See James E. Robertson, *Cruel and Unusual Punishment in United States Prisons*, 36 AM. CRIM. L. REV. 1, 4 n.7 (1999) [citing *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), and Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323–24 (1965) (“It is not quite a private tort, yet contains tort elements; it is not ‘constitutional law,’ but employs a constitutional test.”)].

102. *DeShaney v. Winnebago*, 489 U.S. 189, 202 (1989).

103. 159 F.3d 1253 (10th Cir. 1998).

104. Armijo was classified as learning disabled and was known to suffer from psychological and emotional problems, including “impulsivity and depression.” *Id.* at 1256.

105. According to the Wagon Mound Public School Parent/Student Handbook: “If a student is placed on out-of-school suspension, but his/her parents will not be home, that student will be placed instead on in-school suspension without credit for any work done.” *Id.* at 1257.

106. The plaintiffs also claimed that Wagon Mound Public School (WMPS), the WMPS school board, and the WMPS superintendent had violated Section 1983 by failing to properly train school officials on how to deal with possibly violent and suicidal students. These claims were dismissed by the district court, and the published court of appeals decision, which addressed interlocutory appeal of the individual defendant, declined to address them, therefore they will not be addressed in this article. For a more extended analysis of a failure-to-train Section 1983 cause of action, see *Wyke v. Polk County School Board*, 898 F. Supp. 852 (M.D. Fla. 1995) (dismissing failure to train claim: “Before municipal liability can attach . . . the failure to train must amount to deliberate indifference to the rights of the plaintiff.”) (internal quotation marks omitted). *Id.* at 857.

107. *DeShaney*, 489 U.S. at 199–200 (internal citations and footnotes omitted) (emphasis added).

108. See *Brum v. Darmouth*, 704 N.E.2d 1147, 1157–58 (Mass. 1999) (overviewing case law interpreting the *DeShaney* special relationship).

109. *Armijo*, 159 F.3d at 1261.

official.”¹¹⁰ Therefore the *Armijo* court held that no special relationship existed between Armijo and the defendants at the time of his death.

The danger-creation exception grew out of the Supreme Court’s comment in *DeShaney*, that even though “the State may have been aware of the dangers that [the plaintiff, a child severely abused by his father] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.”¹¹¹ This comment has been interpreted—perhaps stretched—to mean that a state may be liable for an individual’s injury “if it created the danger that harmed the individual.”¹¹² Merely creating the danger is not enough, however; “the danger creation theory must ultimately rest on the specifics of a substantive due process claim—i.e. a claim predicated on reckless or intentional injury causing state action which ‘shocks the conscience.’”¹¹³

When deciding if the facts of a particular case shock the conscience, a court must bear in mind certain principles highlighted by the Supreme Court. These are “(1) the need for restraint in defining [the] scope [of substantive due process claims]; [and] (2) the concern that § 1983 not replace state tort law.”¹¹⁴ To constitute a substantive due process violation, therefore, an action must be more deliberate, damaging, and outrageous than an ordinary tort.

The *Armijo* court articulated a six-part test to determine whether a defendant had created a special danger for the plaintiff:

Plaintiff must demonstrate that (1) [Plaintiff] was a member of a limited and specifically definable group; (2) Defendants’ conduct put [Plaintiff] . . . at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct when viewed in total is conscience shocking.¹¹⁵

110. *Id.*

111. *DeShaney*, 489 U.S. at 201.

112. *Brum*, 704 N.E.2d at 1260 [quoting *Liebson v. New Mexico Corrections Dep’t*, 73 F.3d 274, 276 (10th Cir. 1996)].

113. *Armijo*, 159 F.3d at 1262 [quoting *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995)]. The Fourth Circuit has acknowledged that the “‘creation’ of a danger implicates the alternate framework of § 1983 liability wherein a plaintiff alleges that some conduct by an officer [of the state] directly caused harm to the plaintiff” but warns that although “inaction can often be artfully recharacterized as ‘action’, courts should resist the temptation to inject this alternate framework into omission cases by stretching the concept of ‘affirmative acts’ beyond the context of immediate interactions between the officer [of the state] and the plaintiff.” *Pinder v. Johnson*, 54 F.3d 1169, 1176 n.* (1995).

114. *Id.* (quoting *Uhlrig*, 64 F.3d at 573) (internal citations omitted).

115. *Id.* at 1262–63 (quoting the pre-*DeShaney Uhlrig* case, 64 F.3d at 573).

Also, in light of *DeShaney*,

(6) Plaintiff must demonstrate that “the charged state entity and the charged individual defendant actors created the danger or increased the plaintiff’s vulnerability to the danger in some way.”¹¹⁶

The *Armijo* court held that, where Schutz and Herrera were concerned, the facts of the plaintiffs’ case could be construed as conscience shocking under this test but that Clouthier could not be held liable under a danger creation theory.¹¹⁷ The court thus sent the claims against Schutz and Herrera back to the district court for trial.

The second case, *Hasenfuls v. LaJeunesse*,¹¹⁸ concerned a cluster of attempted suicides at a middle school in Maine, where seven students attempted suicide in a three-month period. Several of the attempts occurred at school or at school events. The school responded by not responding; no special counseling or monitoring programs were set up within the school, and no special information was provided to parents about the rash of incidents.

At the end of the three-month period, another incident occurred. Jamie Hasenfuls tried to hang herself in the school locker room after being sent there alone for misconduct during a physical education class. The fourteen-year-old survived but was left with permanent impairments. Hasenfuls had been raped at the age of thirteen and had testified against the rapist. School officials were aware of the rape and that she was an acquaintance of at least two of the students who previously had attempted suicide. Hasenfuls’s parents brought suit against the town, its board of education, the superintendent of schools, the school principal, and the gym teacher who sent her into the locker room alone. Their 1983 cause of action charged that “specific acts and omissions by defendants acting under color of state law deprived Jamie of her Fourteenth Amendment rights, including, [among other things], rights to life and physical safety.”¹¹⁹ The parents also claimed that their own right to family integrity had been violated.¹²⁰

A federal magistrate judge and the district court ruled that even if all these facts were true, the plaintiffs

116. *Id.* at 1263.

117. The court did note that “the facts presently before us are very thin to establish a number of the six factors required for liability.” *Id.* at 1264 n.9.

118. 175 F.3d 68 (1st Cir. 1999).

119. *Id.* at 70.

120. Parents have a liberty interest in their relationship with their children. Known as a “familial right of association,” this interest is protected by the Fourteenth Amendment. See *Wyke v. Polk County Sch. Bd.*, 898 F. Supp. 852, 855 (M.D. Fla. 1995) (mem.).

could not recover damages under Section 1983. The district court therefore dismissed the Section 1983 claims. On appeal the First Circuit agreed with the lower court and affirmed its judgment. *DeShaney*¹²¹ unequivocally stated that “[t]he affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.”¹²² Therefore, the courts found that the school’s knowledge of Hasenfus’s depression and the alarming rash of suicide attempts were not enough to create a special relationship. The *Hasenfus* court emphasized that the special relationship rule is unique, usually applying to persons who, like incarcerated prisoners or involuntarily committed mental patients, are obviously in the custody of the state.

Almost every court that has considered the issue has refused to base a custodial relationship on compulsory attendance laws.¹²³ Although the *Hasenfus* court rejected the attempt by these particular plaintiffs to liken a student’s situation to that of a prisoner or patient, it did leave open the possibility of creating a mandatory attendance/custodial special relationship. In a highly unusual passage, the court stated that it was “loath to conclude now and forever that inaction by a school toward a pupil could never give rise to a due process violation,” noting that “[f]or limited purposes and for a portion of the day, students are entrusted by their

parents to the control and supervision of teachers in situations where—at least as to very young children—they are manifestly unable to look after themselves.” If a young child fell down an elevator shaft, the court wondered, “could the school principal ignore the matter?”¹²⁴

This reasoning invokes, perhaps deliberately, the “deliberate indifference” theory already used to establish municipal liability under Section 1983.¹²⁵ The deliberate indifference theory holds a defendant responsible only for injuries that the defendant knew were likely and could have prevented or reduced. Inaction incurs liability “only where the recipient’s response to the [situation] or lack thereof is clearly unreasonable in light of the known circumstances;”¹²⁶ this is very near to the “shock the conscience” standard already entrenched in examining a special relationship.

Conclusion

It is not easy for bereaved parents to hold a school board liable for their child’s suicide. It is not likely that a North Carolina school board will be forced to pay damages for the suicide of a child. Even if legal liability is uncertain, however, no agent of a school board should ignore a student’s cries for help; and no school board should ignore the possibility that a well-defined suicide-prevention policy, combined with staff training and accessible higher officials, could further reduce the chances that this sort of suit will ever be considered. ■

121. 489 U.S. 189 (1989). See *supra* note 87.

122. *DeShaney*, 489 U.S. at 200.

123. The Fourth Circuit has held that, as a matter of law, mandatory attendance laws create no special relationship under the Fourteenth Amendment. See *B.M.H. v. School Bd. of the City of Chesapeake*, 833 F. Supp. 560, 571 (E.D. Va. 1993). For an extensive sampling of cases that have considered this issue, see *Brum v. Dartmouth*, 704 N.E.3d 1147, 1158–59 (Mass. 1999).

124. *Hasenfus*, 175 F.3d at 72.

125. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641 (1999).

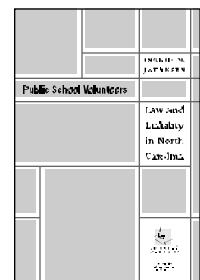
126. *Id.* at 645.

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