Legal Issues in School Volunteer Programs

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This is Part III of a four-part series discussing issues of liability in school volunteer programs. Part I discussed circumstances in which volunteers themselves could be liable for harm they cause while performing services for a public school. Part II addressed the potential liability of a school board for its own negligence in circumstances in which a volunteer is harmed, or causes harm, during school service. Part III discusses a school board's potential vicarious liability for harm that is caused by someone else in a school volunteer program.

Part II of this series **[1]** discussed circumstances in which a school board may be held liable when the board's own negligence or intentional wrongdoing causes harm in a school volunteer program. A school board may also be held liable, in appropriate circumstances, for harm caused by others—even when the board itself had no involvement in or blameworthiness for the harm. Under the doctrine of *vicarious liability,* the board can be held legally responsible for harm caused by a person who stands in a *master-servant relationship* with the board, so long as the harm occurred within the course and scope of that relationship (see " A Note on Terminology: *Master and Servant*," below).

> *Example 1:* A student is injured when, during an in-class demonstration, a science teacher negligently spills a caustic solution on the student's skin. The student sues both the teacher and the school board to recover damages for her injury. Although the board itself had no direct involvement or fault in causing the injury, it can still be held liable, because it has a master-servant relationship with the teacher and the teacher caused the student's injury during the scope of the teacher's duties.

As Example 1 shows, the employer-employee relationship is a master-servant relationship for the purposes of vicarious liability and, in fact, is the most common master-servant relationship for which

vicarious liability is imposed. It is not, however, the only such relationship. There are strong reasons to believe that a board may be held vicariously liable for harm caused by school *volunteers* in the course of their duties.

After a brief discussion of the fundamentals of vicarious liability, Part III examines circumstances in which the relationship between a board and its volunteers may give rise to vicarious liability. It concludes with an examination of an antiquated doctrine called the *fellow-servant rule,* which has interesting implications for volunteers who do stand in master-servant relationships with their boards.

Part III: Vicarious School Board Liability

Vicarious liability—defined as "indirect legal responsibility" [2]—is based on the concept of *agency.* An *agency relationship*is one in which a person (the agent) agrees to perform services for, or act on behalf of, another (the principal), subject to some degree of control by the principal. [3] Not all agency relationships provide the basis for holding a principal vicariously liable for harm caused by the agent: the determining factor is the degree of control the principal has over the way in which the agent performs his or her duties. There are two primary kinds of agency relationships. The agency relationship that does give rise to vicarious liability is the master-servant relationship. [4] The agency relationship with which master-servant is most often contrasted, and for which vicarious liability (generally) may not be imposed, is that involving *independent contractors*. [5]

A *servant* is one who is " employed" [6] to perform services in the business of another and who is subject to the control of that person in how the services are performed. [7] An *independent contractor,* on the other hand, is a person who "exercises independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." [8]

The element of control is key to the determination of whether an agent is a servant or an independent contractor. Several "control" elements are commonly identified as being present more often in a master-servant relationship than in an independent contractor relationship. (These elements will be discussed below.) The right to control an agent, however, is not sufficient to make the agent a servant: There must also be an agreement between the master and the servant for the receipt of services. [9]

To summarize, a board may be held liable for harm caused by its servants acting in the course of their duties. A servant is a person over whom the board has the right of control and with whom the board has an agreement for services. The board generally will not be held liable for harm caused by independent contractors it hires.

Volunteers as Servants, Generally

Can a volunteer qualify as a servant of a board for purposes of holding that board liable for his or her negligence? The question has not been resolved in North Carolina (nor has the effect of volunteer status on the master-servant relationship more generally).[10] At first glance, it might seem that school volunteers—at least as they are currently handled by boards—cannot be characterized as servants of the board.[11] The two key elements of the traditional master-servant relationship —consent to services and the element of control—exist only tacitly, if at all, in most current volunteer-board relations.

There are, however, several reasons to believe that, as a general matter, volunteers *can* qualify as servants of their school boards. First, the authoritative statement on the law of agency, *Restatement (Second) of Agency,* explicitly provides that an agency relationship may exist without any contractual basis[12] and that a person who volunteers services without an agreement for or expectation of compensation may be a servant of the person accepting such services.[13] Other commentators on the issue have accepted this position without argument, and it seems well settled—at least among academics—that there is no reason that unpaid status, in and of itself, would prevent a volunteer from being a servant for purposes of vicarious liability.[14]

Second, lawmakers also appear to agree with this conclusion. There are indications from both the federal and the state legislatures that volunteers may be, or are, servants of their organizations. The Volunteer Protection Act[15] [see *School Law Bulletin* 28 (Summer 1997): 5–7], a federal law passed last year to limit volunteer liability, allows states to condition volunteer immunity on a requirement in state law that makes an organization liable for the acts or omissions of its volunteers to the same extent that an employer is liable for the acts or omissions of its employees.[16] In other words, the federal government has told states that they may hold organizations vicariously liable for harm caused by their volunteers.

The North Carolina General Assembly has also indicated—although much less concretely than the United States Congress—that it considers volunteers, particularly school volunteers, servants of their organizations. In 1997 the General Assembly considered, without passing, a bill to provide local school boards with limited immunity for liability stemming from negligent acts by public school volunteers.[17] The bill's sponsor certainly thought school volunteers were the boards' servants. There is no reason to grant such immunity to school boards unless they can be held vicariously liable for harm caused by their volunteers. Both the bill and the Volunteer Protection Act are in accordance with the doctrine of respondeat superior liability.

Third, and most specifically, courts in many other states have concluded that volunteers can be servants of the persons and organizations accepting their services.[18] The issues to be addressed, these courts have held, are the same as in cases involving paid employees: Does the presumed master have the right to control the servant? Did the master and servant have an agreement for receipt of services? Did the injury complained of occur while the servant was acting within the scope of his or her duties?

In applying this analysis, at least one state court has held directly that a volunteer for a school district could qualify as a servant. The volunteer in this case was a family hosting a student from another school district during a basketball tournament. The visiting student was injured in a car accident that occurred while a member of the host family was driving. Rejecting the lower court's ruling that the volunteer could not be the school district's servant as a matter of law, the court pointed out that "[o]n the face of it, it seems unjust that a student could recover for injuries attributable to the negligence of a paid teacher's aide but not in the same circumstances if the aide is working without compensation. Assuming that liability would otherwise exist because of the master-servant relationship, it seems extraneous to inquire if the servant was motivated by civic virtue rather than personal gain."[19] The court went on to find that the activity in which the volunteer was engaged (transporting students) was an ordinary school activity, that the use of volunteers was reasonably foreseeable, and that the appointment of volunteers was within the implied authority of school personnel. Most importantly, the

court found that even though school personnel exercised no immediate control over the volunteer, they had a "residuum of authority and commensurate responsibility" for the students: The school was responsible for looking into and responding to complaints concerning the host's driving and had the authority to terminate the volunteer's service at will.[20]

So, in what circumstances might the relationship between a volunteer and a North Carolina school board meet the requirements for a master-servant relationship and give rise to vicarious liability?

Volunteers as Servants of North Carolina School Boards

To reiterate the standard: The board will be vicariously liable for the harms caused by a volunteer if

- a master-servant relationship has been established in which
- the board has the right to control the physical conduct of the volunteer and
- the board has consented to receive the volunteer's services and
- the volunteer is acting within the scope of his or her duties.

These four elements are discussed in this section.

Establishing the Master-Servant Relationship

A master-servant relationship may be established informally through a course of conduct; it does not require a specific agreement by the master to receive the servant's services and a reciprocal agreement by the servant to render those services subject to the master's control or right of control. This informal method is exactly the way most volunteer-board relationships are established. And although a given volunteer probably has little, if any, direct contact with the school board, the conclusion that the volunteer performs his or her services subject to the control and consent of the board is compelling.

The general rule is that a master cannot be held vicariously liable for injury caused by a third party unless that third party was acting for the master, with the master's authority or with the consent of someone the master authorized to employ the third party.[21] In plain English, a board will not be held liable for injury caused by a volunteer unless it consented to the volunteer's assistance or authorized one of its employees to consent to the services. Authorization does not have to be explicit: "Where there has been continuous or customary use of an assistant by the employee, and the employer has known of this practice and acquiesced in it, the employer is liable for the negligence of the assistant as though actually employed by himself."[22] It seems clear that just such an authorization has occurred in most school districts in the state. The reasoning behind this conclusion is as follows.

The use of volunteer services in North Carolina public schools (and public schools across the nation) is extensive, continuous, and customary. Every school board is aware of the ubiquitous presence of volunteers in its schools. The board, as the entity with general responsibility for the operation of the schools, including control over school personnel, has the right to decide whether the use of volunteers in its schools is permissible and, if so, under what conditions.

By tolerating the normally casual way that volunteers are brought into its schools, the board—given its knowledge of the situation and its authority to regulate it—consents to it and approves of the way in which it occurs. Thus the procuring and control of volunteers has, through custom and a

well-established course of conduct, been delegated to personnel at the individual school level and is within their inherent authority. Unless a board takes affirmative action to exercise control over volunteer use directly, or acts to prohibit it all together, action at the level of the individual school is legally attributable to the board.

The Board's Right to Control the Volunteer

In general, vicarious liability may attach only when the master has the right to control the actions of the servant. The key point is the *right* to control. The failure of a school board to exercise *actual* control over school volunteers will not prevent a board from meeting the legal definition of *master.* **[23]** Of course, as discussed above, school employees in fact do control school volunteers, and that control is attributable to the school board. But in addition, in the legal test of whether the master has the right to control servants, it is axiomatic that where the *right* to control exists, it is irrelevant whether the master actually *exercises* it. **[24]**

A Wisconsin case illustrates this point. A county was held liable as master for the negligence of volunteer drivers it had recruited to transport citizens who were elderly or disabled. The county did not exercise control over the volunteers. It did not supervise the drivers, the users of the transportation service contacted the drivers directly, the drivers determined their own schedules and could terminate their participation at will, and the county never met with the drivers after an initial orientation meeting. Nonetheless, the right to control was established, the court said, by the agreement signed by each driver when he or she volunteered to help. **[25]**

> *Example 2:* A school requires all volunteers to sign in at the front office before going off to perform their tasks. The sign-in sheet contains the following statement: "My signature below indicates that I agree to abide by the policies of the school district." Below the statement is a list of selected policies singled out for special attention. The existence of this sheet with a volunteer's signature is probably sufficient to establish the right to control.

In any particular case the evidence of the right to control may be less direct than a signed agreement by the volunteer. For example, many boards are members of the North Carolina School Boards Association insurance trust fund, which provides some coverage for harm suffered or caused by volunteers. **[26]** This coverage is limited to actions performed by the volunteer "within the scope of the written authorization provided to each individual volunteer by the school district or other educational entity." **[27]** This provision explicitly recognizes the right of control, through "written authorization," over "each individual volunteer." Both the insurer and the member boards assume, rightly, that a volunteer renders only those services that are authorized by the board or its agent. Another indirect manifestation of the right to control might be an agreement to provide legal defense in certain cases of volunteer harm. **[28]**

Most importantly, a board's general authority to regulate its schools, in and of itself, is probably sufficient to establish its right to control volunteers in its schools. (The case cited above involving the school board and its volunteer driver seems to say so.) But the general authority must extend beyond the mere right to control a volunteer's access to school premises and general conduct while he or she is there; it must embrace the details of how the volunteer performs his or her particular task. Whether

it does extend to this point depends not so much on the board's authority as on the kind of volunteer services in question: If the volunteer meets the definition of a servant, the right to control does extend so far, but if the volunteer instead meets the definition of an independent contractor, it does not.

In determining whether an agent is a servant or an independent contractor, courts will ask

- is there an agreement for, or actual, close supervision?
- does the job require a low level of skill?
- does the master supply the tools and place of work?
- has there been employment over a considerable period of time with regular hours?
- is the work part of the employer's regular business? and
- do the parties believe that a master-servant relationship exists? **[29]**

None of these factors alone is necessarily sufficient to support imposition of vicarious liability; on the other hand, not all of them need be present to support it.

For example, although close supervision of a volunteer may establish the right to control, some jobs—particularly those requiring low skill levels—generally will not be closely supervised. Yet the performance of them may create a master-servant relationship.

> *Example 3:* A volunteer regularly comes in at the end of the school day to copy the next day's class assignments, which teachers leave for him in a designated box. He makes as many copies of each assignment as a particular teacher specifies, and when he is done he follows the instructions given by the principal for locking up. This volunteer probably qualifies as a servant for purposes of vicarious liability. He performs, on a regular basis, a low-skill job that is an ordinary part of the school's business, he follows the instructions given to him in performing it, and he uses school tools. He is not, however, closely supervised.

In other cases, while there may be some level of supervision from school personnel, the task may be one that is not in the regular business of the board.

> *Example 4:* The members of the high school cheerleading team decide to hold a dance marathon to raise money for their favorite charities. They establish a committee that assigns duties, they get a school employee to act as a chaperone, and they rent a site. During setup the school employee asks a nearby student whether she knows who is in charge of setting up the musical equipment. The student doesn't know, and the employee suggests the student start doing it herself and gives her some duct tape for holding down wires. Another student is injured when the equipment falls, and he sues the board and the employee. Is the board vicariously liable for the negligence of the student in setting up the equipment at the suggestion of the board employee? No. Even though a school employee was present at the setup, asked a student to perform a task, and provided some equipment, the evidence that the employee controlled the student's actions is insufficient to impose liability on the board. The school did not decide to hold the event, and it was not in furtherance of school business. The school did not select students to perform the various tasks or have control over how, or even whether, the students performed the setup of musical equipment. **[30]**

Even if a volunteer project is within the scope of business usually performed by the board or school, it may be performed by volunteers who are insufficiently under the school's control to hold the board liable for their activities.

> *Example 5:* Each year the doctor father of an elementary school student voluntarily comes to the school to provide vaccines for students. One student turns out to be allergic to the vaccine, and his parents sue the doctor and the board for the medical costs incurred in treating his allergic reaction. Is the board vicariously liable for the negligence of the doctor? No. Even though the doctor is on school premises and comes regularly, he provides his own tools and is not subject to the control of the school in the way he performs the duty. He is subject to state requirements, such as professional boards and so forth, but the nature of his duties is such that the board is unqualified to do anything more than to make a careful investigation of his qualifications to perform the services.

> *Example 6:* The Elks Club holds an annual fair at the local elementary school and gives the proceeds to the school. The fair booths are staffed by a mixture of Elks and school personnel. Much of the equipment for the fair is rented by the Elks from a local company that gives them a break on the rental cost because "it's for the school." If an Elk causes harm by his negligence, is the board vicariously liable? Even though this event is held on school premises and its proceeds go to the school, the board probably could not be held vicariously liable. The Elks Club is an organization that chooses its own members. It arranged the fair and provided its own equipment. Furthermore, it is unlikely that an objective observer at the fair would believe that the Elks were servants of the board.

The last indicator of the right to control—the belief by both parties that a master-servant relationship exists—may be a useful one in school cases. Surely most volunteers believe that the services they are rendering the school are subject to the school's control; and surely school boards and school employees believe this also.

> *Example 7:* A teacher asks a high school student to help him move the desks in the classroom into a new position. While doing so, the student accidentally rams a desk into another student's leg. That student is injured and sues the board. Is the desk-moving student a servant of the board for purposes of vicarious liability? Probably not. Although the student was moving the desks at the request of, and under the direction of, a school employee, neither of them probably thought that the student was a servant: the student probably thought (and rightfully so) that assisting a teacher was part of *his* regular business as a student.

Other indicators of control over a volunteer include some fairly obvious candidates. For example, a board might exert control over the conduct of volunteers through the establishment of an official policy governing volunteers' activities. **[31]** Elements such as job descriptions, training requirements, and reference checks are all clear mechanisms of control. Lists of certification have been admitted as evidence of control. **[32]** The existence of a particular hierarchical structure within which the volunteer renders service may also be evidence of the right to control, as may be a simple list containing volunteers' names, skills, and hours of availability. More persuasive yet would be the listing of the volunteer's name on a schedule or timetable showing when volunteers arrive at school to

perform their service.

The Board's Consent to Receive the Volunteer's Services

In general, vicarious liability may attach only when the master has consented to receive the services of the servant. That consent need not be in the form of a written agreement. Volunteers are so common in the public schools that the fact that a board has taken no action to remove them from its schools indicates that it has acquiesced to their presence and that the authority to give consent has devolved to employees at individual schools. In most cases, whether consent has or has not been given will be easy to determine. For example, soliciting volunteers for a certain project clearly indicates consent.

Consent, like the right to control, may be explicit or implicit. Implied consent can be manifested in a number of ways. For example, a board might procure a liability policy that provides coverage of volunteers. Or a board might establish an agreement that, in certain circumstances, it will handle the legal defense of a volunteer who is being sued for harm that arises from his or her volunteer services. **[33]** Individual schools and school employees are quite as capable of giving implicit consent to volunteer presence as their boards are.

> *Example 8:* Without seeking permission, a neighborhood resident plants flowers in a small plot around the flag pole in the front yard of the school. The school principal occasionally sees the neighbor weeding the plot and watering the flowers. One day a young student eats some of the dirt from the flower bed and becomes violently ill—from what turns out to be toxic fertilizer. The student's parents sue the volunteer and the board. Did the board, via the principal, consent to the neighbor's services? Probably so. Because the principal is responsible for the day-to-day operations at his school and because he has the authority to remove trespassers from school premises, the fact that he knew of the neighbor's presence and did not ask her to leave indicates consent.

Another indirect, but fairly obvious, method of consenting to volunteer services might be keeping a sign-in sheet at the front desk.

Of course, most often, schools will directly solicit volunteer assistance.

> *Example 9:* At the beginning of each year the school sends each student home with a "driver registration" form for his or her parents. If a parent would like to transport students to and from designated school functions, the parent must fill out the form, giving information about his or her driver's license, traffic infraction history, and liability insurance. Thereafter a list of "approved drivers" is prepared from which parents can be called to drive for school-sponsored functions. In a suit concerning injuries arising from an accident that occurred while an approved parent driver was at the wheel, a court will probably deem the board to have consented to this service (even though the consent was not given by the board and was not given in the specific instance). The solicitation and the existence of a formalized routine seal the deal.

> *Example 10:* If, on the other hand, a parent arrives to drive his or her child to an away game and spontaneously agrees to drive several of the student's teammates as well, the board will probably not be found to have given consent for this service.

Acting within the Scope of Employment

If the relationship between a school board and a volunteer meets the standards of a master-servant relationship, then the board may be vicariously liable for harm caused by that volunteer if one more criterion is met: when the volunteer caused the harm, he or she must have been acting within the scope of the volunteer's duty. Conduct does not fall within the scope of duty merely because it occurred while a volunteer was "on duty." **[34]** The harm must arise from conduct that the board either authorized beforehand or ratified after the fact. For this reason, if harm results from an intentional wrongful act by a volunteer (such as assault and battery or slander), it will generally fall outside the scope of his or her duty.

Determining whether a board or school explicitly authorized an act by a volunteer presents no great difficulty. Nor should determining whether the board approved the volunteer's actions after the fact. However, given the general lack of control exercised over most volunteer activities, authorization of a volunteer's conduct will often be implicit at best. *Implicit authorization* exists when the conduct that caused harm was (1) within the range of duties the servant was engaged to perform and (2) in furtherance of the master's business. **[35]** Whether conduct falls within the range of the servant's duties will depend on factors such as the job description; the limits of time and space in which the servant is supposed to perform the job; and the instruments or methods that are expected to be, or customarily are, used in performing it. **[36]**

The analysis required to answer the scope of duty question is the same for all servants—whether paid or unpaid, ongoing or onetime. But performing this analysis in the context of a volunteer program may be difficult. For example, the fact that many, if not most, volunteers do not have a formal job description complicates the task of assessing the range of a volunteer's duties: a volunteer may not be limited to the performance of one type of job (he or she may have multiple roles within the school); the volunteer may have no specified role at all; or the volunteer may have had a specified role that has, through a course of conduct, been expanded beyond its original definition.

> *Example 11:* A parent volunteers as a hall monitor at his local elementary school. The principal tells him that his duty is to "keep an eye out" and to call for help from the nearest school employee if there is trouble of any kind. During his third week on the job the volunteer notices that a young boy on crutches is having trouble getting down the stairs. The volunteer begins the practice of carrying the boy down the stairs. On various occasions different school personnel see the volunteer doing this and comment during coffee breaks how kind the practice is. One day, the volunteer slips while carrying the boy, and the boy is injured. The boy's parents sue the board. Is the board vicariously liable for the volunteer's negligence? Yes. The board contends that while the volunteer may have been its servant, he was acting outside of the scope of his duty—and in violation of specific directions—in carrying the boy down the stairs. However, the fact that the volunteer had been engaging in this conduct over a period of time and with the knowledge of school personnel effectively rebuts that argument.

Also, of course, determining whether the volunteer's conduct occurred within the limits of time and space in which he or she was supposed to perform a task may be difficult because often volunteer service is structured as a onetime/one-task affair or has no particular established hours. In addition,

much volunteer work is performed off school premises under no direct supervision, making problems of proof much more difficult. Finally, determining whether a volunteer's conduct was within the scope of his or her duty by examining standards particular to the field in which the volunteer acted may be difficult because of all the factors cited above.

Even if the volunteer's harmful conduct is found to be within the range of duties he or she was asked to do, it must still be found to be in furtherance of the master's business before it will satisfy the legal test for scope of duty. The volunteer's intent in engaging in the conduct in question is relevant, and if the intent was to further school business, it does not matter whether he or she also had other motives in engaging in the behavior. In certain cases, it may not even matter that the master has specifically prohibited the conduct. **[37]** Thus, although intentional harmful conduct generally falls outside the scope of a servant's employment, if it is used to further a business interest of the master (and does so, even though in some perverse way), it may fall within the scope.

> *Example 12:* An elementary school principal is accused of sexually assaulting a student. If the student's parents bring suit against the school board, seeking to hold it vicariously liable for its employee's acts, a court will probably find that the assault was motivated by a purely personal objective and served no purpose of the board's. Thus it did not occur within the scope of the principal's duties. **[38]**

> *Example 13:* A volunteer hall monitor is sued for battery—an intentional tort—by a student whose arm he sprained when pulling him out of a fight on school premises. The student also sues the school board. Because the volunteer presumably pulled the student out of the fight to keep order in the hall, the conduct probably occurred within the range of his duties and in furtherance of the board's business. The board could be vicariously liable for the harm.

Summary

Although the vast majority of cases imposing liability on a master for harm caused by a servant involve employers and employees, a master-servant relationship can exist between a volunteer and the person or organization that receives the services. The exchange of wages for service is not a requisite element of the relationship—at most it is a proxy for the crucial element of the right to control. So long as a board, directly or through its agents, has the right to control the way volunteers perform their school services and has consented to the receipt of those services (again, either directly or through its agents), a master-servant relationship may exist. A board may thus be held liable for harm caused by volunteers so long as it occurred during the scope of their "employment" with the schools.

The Fellow-Servant Rule

Suppose a volunteer is injured by the negligence of a school employee or a fellow volunteer. Can the school board be liable to the injured volunteer through vicarious liability? If the employee or fellow volunteer was in a master-servant relationship with the board and was acting within the scope of his or her duties when the injury occurred, then at first blush the answer seems clear: Yes, vicarious liability attaches to the board. But in such a case the board may have a defense based on the *fellow-servant rule*.

The fellow-servant rule absolves the master of liability to a servant who is injured by the negligence, carelessness, or misconduct of fellow servants. [39] This rule, originating long ago in the common law, is based on the notion that once an employee accepts employment, risks that are not the duty of the employer to address—such as a fellow employee's negligence—are strictly the concern of the employee. It was thought that the employee himself or herself had as much of a chance, if not a better one, to be aware of the risks posed by fellow employees. [40]

Because of modern workers' compensation laws, the fellow-servant rule rarely comes into play anymore. Workers' compensation laws essentially eliminated "fault-based" inquiry in cases of employee injuries. Employees receive compensation for their injuries so long as they arise out of and during the course of their employment. There are no defenses available to the employer, and this is the exclusive avenue of compensation available to the injured employee against the employer. Thus an employee who is injured by a colleague's negligence will be compensated for his or her injury under (and only under) the workers' compensation system.

> *Example 14:* A volunteer who has been serving as a classroom tutor once a week for the last year, under the supervision of a teacher, injures the teacher by negligently handling a Bunsen burner. The teacher will be compensated under the Workers' Compensation Act (which is her exclusive remedy), because working with volunteers is a normal part of her job and the injury she suffered arose out of and during the course of her job. [41]

Because most servants are employees and are entitled to workers' compensation benefits, the fellow-servant rule applies only in the small number of cases where the injured servant is not an employee entitled to workers' compensation benefits. Volunteers who qualify as servants of the school board are just such servants. Although their unpaid status does not prevent them from meeting the definition of servant, it does prevent them from meeting the definition of employee covered by the Workers' Compensation Act. The whole system is based on the notion of wages: responsibility for payment of workers' compensation benefits is allocated among the state, the local government, and the employer, based on the source of the employee's wages. The level of compensation corresponds to the employee's rate of compensation. [42]

> *Example 15:* Again a volunteer has been serving as a classroom tutor once a week, but in this case the teacher's negligent handling of the Bunsen burner harms the volunteer. The volunteer is not eligible for workers' compensation benefits but seeks to hold the board vicariously liable for the teacher's negligence. The volunteer will not recover against the board if the board raises the defense of the fellow-servant rule.

The same defense would apply if the volunteer was harmed by the conduct of another school volunteer who also qualified as a servant of the board. Of course, if either the injured volunteer or the volunteer who caused the injury did not qualify as a servant, the fellow-servant rule would not apply to bar recovery against the board.

As mentioned earlier, the fellow-servant rule is very old, and the justifications for it are not very persuasive in the modern workplace. Most jurisdictions have abolished it or severely limited its use; North Carolina has not yet done so. A case in which a dedicated volunteer is injured by the negligence of a school employee may provide just the impetus to abolish or restrict this rule.

Conclusion

A school board is vicariously liable for harm caused by its servants acting in the scope of their employment—even when the board itself bears no fault. Because school volunteers can meet the legal definition of servant, boards may be held liable for the harm they cause. But one exception to this general rule exists: When a volunteer who qualifies as a servant is injured by a fellow servant —whether a board employee or another volunteer who meets the definition of servant—the fellow-servant rule will probably prevent the board from being held liable in North Carolina.

The fact that a board may be held liable for harm caused by its volunteers even when the board itself is blameless might seem a disincentive to developing a system for screening, training, and supervising volunteers. The risk-reduction benefits of such a system, however, in terms of assuring that volunteers who gain access to the schools are qualified for their jobs, know how to perform them, and operate under other qualified agents of the school system, may be significant. This topic will be the focus of Part IV of this series.

Part IV in this series, upcoming in the Spring 1998 issue of School Law Bulletin, will provide suggestions for structuring a school volunteer program.

A Note on Terminology: *Master and Servant*

Some relationships between principal and agent lead to vicarious liability and some do not. The typical kind of principal-agent relationship that does lead to vicarious liability is the relationship between employer and employee. The employer is the principal, and the employee is the agent, and the employer is often vicariously liable for the negligent harms caused by the employee.

Employer and *employee*are the modern terms replacing the older, common-law terms *master* and *servant,*which to our ears today have connotations far removed from the employment relationship and from questions of vicarious liability.

Part III makes use of the old terms master and servant specifically because at issue is the potential vicarious liability of boards of education for actions of *volunteers,*who may be the "servants" of the board in the master-servant sense but who are not "employees" in the usual sense of that term.

A Note on Sovereign Immunity

Neither direct nor vicarious liability may be imposed where sovereign immunity applies. Under the doctrine of *sovereign immunity*(also known as governmental immunity), a governmental body such as a school board may not be sued for harm resulting from its own negligence (*direct liability,*discussed in Part II of this series) or the negligence of its officers or employees or other agents (*vicarious liability,*the subject of Part III), if the negligence occurred during the performance of a governmental function. **[43]**

A school board may waive this immunity and thus consent to suit, however, simply by purchasing liability insurance. **[44]** Purchasing liability insurance waives immunity only for the *kind*of claims

covered by the policy and only up to the *amount*of coverage the policy provides. For example, if a student riding a school bus is injured because of the driver's negligence, and the board's policy excludes coverage for injuries arising out of the operation of a motor vehicle, the board retains immunity from that student's suit. **[45]** If a school employee causes someone damages in the amount of $50,000, but the board's policy provides coverage of only $20,000, the injured person can receive only $20,000. Also, if the board has insurance covering only damages of more than $1,000,000 and the plaintiff alleges damages of only $45,000, the board is immune from suit. **[46]**

Most, if not all, North Carolina school boards have purchased liability insurance covering some kinds of injury and in doing so have waived their sovereign immunity. The discussion of vicarious liability in Part III assumes that sovereign immunity does not bar suit in a given case.

Notes

1. "Legal Issues in School Volunteer Programs Part II: Direct School Board Liability," in *School Law Bulletin*28 (Summer 1997): 1–15.

2. BLACK 'S LAW DICTIONARY (5th ed. 1979).

3. RESTATEMENT (SECOND) OF AGENCY § 1 (1) (1958) (hereinafter AGENCY 2D).

4. AGENCY 2D at § 219.

5. A principal may in limited circumstances be held vicariously liable for harm caused by an independent contractor—as in cases where the principal has delegated a nondelegable duty to the independent contractor or where the task the independent contractor has been hired to perform is inherently dangerous. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 511–515 (5th ed. 1984) (hereinafter PROSSER).

6. As in Part II, the term *employed*is used in a broad sense to mean "made use of" rather than "exchanged wages for labor." *See*"A Note on Terminology: *Master and Servant,*" above.

7. AGENCY 2D at § 225.

8. Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 384, 364 S.E.2d 433, 437 (1988).

9. Some commentators have identified a third requirement: that the master must expect to receive some benefit from the services. *See* AGENCY 2D, § 2; Jeffrey D. Kahn, "Organizations' Liability for Torts of Volunteers," UNIVERSITY OF PENNSYLVANIA LAW REVIEW 133 (July 1985): 1439 (hereinafter Kahn). The ease with which this requirement is satisfied (if the servant is performing services in the master's business, this fact alone is generally sufficient) and the dearth of any serious discussion of it in case law involving the master-servant relationship make it unworthy of separate consideration.

10. The classification of volunteer firemen as employees (servants) for the purpose of workers' compensation, Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551, *disc. rev. denied,*340 N.C. 260, 456 S.E.2d 831 (1995), is not relevant here. The fact that North Carolina's Workers' Compensation Act specifically provides a method for calculating the average weekly wages for volunteer firemen in

the event of on-the-job injury [N.C. GEN. STAT. § 97-2(2–5)] removes them (and other specified unpaid workers) from the general universe of unpaid servants. (Hereinafter, the General Statutes will be cited as G.S.)

11. And this conclusion would not necessarily be inconsistent with the conclusion drawn in Part II of this series: that the board can be held directly liable for the negligent employment of a volunteer. An employer has a duty of reasonable care in the selection of all employees, whether they be servants or independent contractors. This is true even though the employer will not, generally, be held vicariously liable for the negligent action of independent contractors.

12. AGENCY 2D at § 220 cmt. b.

13. AGENCY 2D at § 225.

14. Allen Manley, Annotation, *Liability of Charitable Organizations under Respondeat Superior Doctrine for Tort of Unpaid Volunteer,* 82 A.L.R.3d 1213 (hereinafter Manley); Kahn at 1438–43. *Compare* Joseph H. King, Jr., "Exculpatory Agreements for Volunteers in Youth Activities—the Alternative to 'Nerf (registered)' Tiddlywinks," OHIO STATE LAW JOURNAL 53 (1992): 700–701 (Author states that "some cases have precluded the vicarious liability of sponsoring organizations for the tortious conduct of volunteers." However, cases cited in support of proposition did not preclude the possibility, but merely found that the relationship between volunteer and organization did not meet criteria of master-servant relationship.)

15. Pub. L. No. 105-19, 111 Stat. 218 (1997).

16. *Id*. at § 4(d)(2).

17. Senate Bill 695, 1997 N.C. Session (1997). The bill would also have provided limited immunity to volunteers and school personnel. Shortly after its introduction, the bill was referred to the judiciary committee, from which it did not emerge before the end of the 1997 legislative session.

18. Baxter v. Morningside, Inc., 521 P.2d 946 (Wash. Ct. App. 1974); Burns v. Sams, 458 So. 2d 359 (Fla. Dist. Ct. App. 1984); Jones v. Herr, 594 P.2d 410 (Or. App. 1979); Manor v. Hanson, 356 N.W.2d 925 (Wis. Ct. App. 1984); Trinity Lutheran Church v. Miller, 451 N.E.2d 1099 (Ind. Ct. App. 1983).

19. Swearinger v. Fall River Joint Unified Sch. Dist., 212 Cal. Rptr. 400, 410 (Cal. Ct. App. 1985).

20. *Id*.at 413.

21. Haluptzok v. Great Northern R. Co., 57 N.W. 144 (Minn. 1893). For a more modern version, see Lucas v. Li'l Gen'l Store, 289 N.C. 212, 221 S.E.2d 257 (1976).

22. Annotation, *Employer's Liability for Negligence of an Assistant Procured or Permitted by his Employee without Authority,*25 A.L.R.2d 991.

23. A school board could, of course, give up even the right to control the actions of volunteers and thus dissolve the master-servant relationship. There are two potential ways to achieve this break: (1)

prohibit the use of volunteers on school premises or (2) set up, or accept volunteers only through, a separate organization that satisfies the legal test of an independent contractor. This last possibility will be addressed in Part IV of this series.

24. Trinity Lutheran Church v. Miller, 451 N.E.2d 1099, 1102 (Ind. Ct. App. 1983). *See also*Kahn at 1440 [citing Marvel v. United States, 719 F.2d 1507, 1514 (10th Cir. 1983)]; Coleman v. Board of Educ., 477 Pa. 414, 421–22, 383 A.2d 1275, 1279 (1978).

25. The contents of the agreement were not detailed in the case. Manor v. Hanson, 120 Wis. 2d 582, 356 N.W.2d 925 (Wis. Ct. App. 1984).

26. A New York case involved a program to send underprivileged urban youth to homes in the countryside. One of the program participants drowned while staying at the home of a program volunteer. The court held that an insurance policy, along with an agreement to take complete control of her defense in any lawsuit, was strong evidence of the existence of a master-servant relationship. Garcia v. Herald Tribune Fresh Air Fund, Inc., 51 A.D.2d 897 (N.Y. App. Div. 1976).

27. North Carolina School Boards Insurance Trust Policy, 1996–97.

28. *Garcia,*51 A.D.2d at 898.

29. Other elements are also frequently cited, but they are geared specifically toward the employment context: method of payment—whether by the job or by time—and employment by one employer. Because volunteer work is by definition (at least in this series) work done without desire for or expectation of financial remuneration and is generally performed above and beyond the volunteer's normal employment, these elements will not be considered. The elements listed, in any event, are merely indicators of the right to control and are not requirements for the right of control.

30. Schroeder v. Board of Supervisors of Louisiana State Univ., 653 So. 2d 612 (La. Ct. App. 1995).

31. The Chapel Hill–Carrboro city school system has done this. Elements of its program will be discussed in Part IV of this series.

32. Vind v. Asamblea Apostolica de la Fe en Christo Jesus, 307 P.2d 85 (Cal. Ct. App. 1957).

33. Garcia v. Herald Tribune Fresh Air Fund, Inc., 51 A.D.2d 897 (N.Y. App. Div. 1976).

34. Wegner v. Delicatessen, 270 N.C. 62, 153 S.E.2d 804 (1967).

35. Brown v. Burlington Indus., Inc. 93 N.C. App. 431, 436, 378 S.E.2d 232, ___ (1989) [citing Troxler v. Charter Mandala Center, 89 N.C. App. 268, 365 S.E.2d 665 (1988)].

36. PROSSER at 502.

37. PROSSER at 502. *Compare* Gurley v. Southern Power Co., 172 N.C. 690, 90 S.E. 943 (1916) (custodian of private swimming pool instructed not to admit unauthorized swimmers, but did so. Held that the orders were conclusive and that conduct was outside of scope of duty).

38. Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 464 (1990).

39. So long as he or she was not negligent in a duty owed to the injured servant. Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980).

40. PROSSER at 570–71.

41. G.S. 97-2(6).

42. In addition, the Act specifically covers volunteer firemen [G.S. 97-2(6)] but no other volunteers, leading to the conclusion that all other volunteers are not covered.

43. Minneman v. Martin, 114 N.C. App. 616, 442 S.E.2d 564 (1994). The distinction between governmental and proprietary functions, as well as other niceties of sovereign immunity, will not be discussed here. North Carolina courts addressing school board immunity have consistently operated on the premise that the board is engaged in a governmental activity and cloaked by immunity (unless consent to suit was given). *See, e.g.*, Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Overcash v. Statesville City Bd. of Educ., 83 N.C. App. 21, 348 S.E.2d 524 (1986). For the purposes of this article, the essential point is to note the existence of this barrier to liability and to move on to address the potential for liability when it has been waived.

44. G.S. 115C-42, 115C-47(25).

45. Vester v. Nash/Rocky Mount Bd. of Educ., 124 N.C. App. 400, 477 S.E.2d 246 (1996).

46. Hallman v. Charlotte-Mecklenburg Bd. of Educ., 124 N.C. App. 435, 477 S.E.2d 179 (1996).

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