THE MODIFICATION OF THE SCHOOL DISTRICT'S IMMUNITY FROM TORT LIABILITY IN SELECTED STATES WITH SOME IMPLICATIONS FOR SCHOOL DISTRICT AGENTS AND EMPLOYEES

By

GEORGE A. ROWLEY

Bachelor of Arts
Northwestern State College
Alva, Oklahoma
1949

Master of Science
Phillips University
Enid, Oklahoma
1953

Submitted to the faculty of
the Graduate College of
the Oklahoma State University in partial
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Thesis Approved:

H E Sorenson
Thesis Adviser

Kenneth St. Clair

Gerry R. Dowell

D D Durham
Dean of the Graduate College

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CHAPTER I

INTRODUCTION

The ancient doctrine of governmental immunity from tort liability is being increasingly challenged today by lawyers, jurists, educational writers, and lay persons. This slow but persistent assault on the wall of immunity set up by the courts has caused widespread concern on the part of school officials and employees.

The rapid increase in the school-age population of the United States in recent years has caused added pressure on already crowded educational facilities. The task of the teacher in supervising children under these difficult conditions has become hazardous and the likelihood of litigation involving the teacher and his pupils increases each year. Modern educational practice extends beyond the earlier "four-walls" concept of instruction. The extension of the teacher's role into broadened teaching areas has created new legal relationships imposing a greater obligation on the teacher to possess at least a fundamental knowledge of the liability provisions of school law.

Purpose of Study

It is generally recognized that education is one of the most important functions of state and local governments. This importance is exemplified by our compulsory attendance laws and our ever-increasing expenditures for education.

There appears to be a slow modification of the governmental immunity from tort liability doctrine by the courts and the legislatures of the states. This study will trace certain aspects of governmental immunity modification in selected states. It is hoped that recommendations can be made or guidelines developed which may reduce costly legal entanglements and encourage school personnel to make the school premises safe and provide adequate supervision of the student body.

It may, in the future, prove difficult to secure board members, administrators, teachers, and service personnel unless liability insurance or some other form of protection is secured. The salary schedule in most schools is so low at present that potential applicants may be unwilling to accept the additional burden of a possible lawsuit.

Teachers should realize that they must always take precautionary measures to prevent pupil injuries. They should have a basic understanding of the legal principles of negligence and tort liability. This study will attempt to present important legal concepts and tort liability trends in a concise form useful to all educators. It will be especially

concerned with the effect of liability trends on the agents and employees of the public school.

Statement of Problem

Our changing society and the role played by the schools has caused many informed persons to press for a re-examination of the immunity doctrine. Schools are engaged in transportation, entertainment, food service, retailing, and a host of other activities far removed from earlier concepts of education. As the schools have become involved in these ever-expanding activities, the risks of individual liability have multiplied. In our modern society, should the individual's interest in being reimbursed for injuries suffered through negligence of the school district's agents and employees give way to a greater interest of the public at large in effective operation of the schools? This fundamental question is only one of many that may arise if the trend to abrogate governmental immunity for tort liability continues.

Does the increasing practice of purchasing liability insurance completely waive immunity, or does it waive it only to the extent of the insurance? Unless the purchasing of liability insurance is compulsory, would it not be possible to secure damages in one district, but not in another for similar injuries? If damages cannot be satisfied from regular revenue, a special assessment may be required. What if this special assessment pushes the levy above the constitutional or statutory limit? If a small school is unable to

satisfy a judgment rendered against it in a reasonable time, would the district be forced to annex to a financially stronger district? Would the annexing district have a choice in this procedure?

What effect will the abrogation have on the officers and employees of the district? Will the out-of-class activities be drastically curtailed? Will field trips be eliminated? Will the teacher-pupil relationship worsen? How much of the teacher's time will be taken up by court action? Is the "save harmless" legislation now in effect in several states the ultimate answer? Will litigation increase to the extent that the very educational process itself is threatened?

Background of Study

In the United States, unlike most other countries of the world, the national government theoretically has no direct control in the field of public education. Education is not mentioned in the Federal Constitution so under our system of enumerated and reserved powers, it becomes a function reserved for the states. Except for Hawaii, the states have established local school districts with boards of education to operate the schools. By this policy, public education is kept closer to the control of the people than most other aspects of state government.

The pattern for organizing and administering the public schools in the fifty states varies greatly in detail, but

little in terms of general structure. Although actual control of educational matters remains with the state legislatures which enjoy plenary powers, the operation of the schools, except in Hawaii, is largely delegated to local boards of education. These boards operate the schools as "quasi-corporations" which means they have limited powers or specifically those granted by the state to educate the pupils.

School districts, as arms of the state engaged in carrying out the educational plan of the state, generally fall within the category of state agencies immune from liability for torts committed while engaged in their governmental function.

Immunity from tort liability enjoyed by the state and its sub-agencies is usually based on the ancient theory of sovereignty, whereby "the king could do no wrong." In America, we had no king, but the state was assumed to be sovereign and as an involuntary arm of the state, the school usually was given immunity also.

Method and Procedure

The project undertaken is one of historical research and the techniques employed in legal research will be utilized.

The origin of the governmental immunity doctrine will be reviewed and its American background stemming from certain landmark cases will be traced. The historical

philosophy behind the doctrine and the present change in philosophy will be researched and delineated.

An examination of the statutes and constitutions of the states selected for the study will be made and those having statutory or constitutional provisions dealing with waiver of immunity will be studied in greater depth. State attorney generals' opinions will be reviewed in the selected states and those dealing with tort liability and especially the effect of liability insurance on immunity will be carefully analyzed.

The principal phase of the study will consist of locating pertinent court cases through use of the National Reporter System. These cases will be checked by using Shepherd's citations for subsequent judicial rulings. An analysis of the cases will be made to trace the trend toward abrogation of governmental immunity from tort liability and to determine the implications of these judicial decisions for school personnel today.

Data in this research will be limited to tort liability relating to actual bodily injury. It will not include psychological and emotional stress that might have led to bodily injury and no attempt will be made to research contractual liability or workmen's compensation.

States selected for the study are New York, California, Illinois, and Oklahoma. The sample states of New York, California, and Illinois were chosen because they have apparently abrogated immunity either by judicial decisions,

statutory provisions, or both. Oklahoma was selected because it seems to be one of the states still maintaining the wall of immunity around school districts.

Court decisions to be investigated in the selected states will be limited to decisions of the supreme court or highest state court. The opinions of attorney generals and statutes will be limited to the current opinions and statutes. The court cases, attorney generals' rulings and statutes will be placed in broad categories according to the type of activity and the agent or employee involved. The weight of opinion or general procedure followed in each category will be summarized in a nontechnical form readily comprehended by the school staff. Attention will also be given those legal patterns that appear to deviate markedly from normal procedure.

Definition of Terms

Abrogate. To abolish or revoke a previously held doctrine by authority.

Action. An ordinary proceeding in a court by which one party prosecutes another for the enforcement or protection of a right, the redress of a wrong, or the punishment of a public offense. In common language, a "suit" or "lawsuit."

Agent. One who undertakes to transact some business, or to manage some affair for another, by authority and on account of the latter, and to render an account of it.

Assault. An attempt to beat another, without touching him.

Attractive nuisance. A condition, instrumentality, machine or other agency, dangerous to young children because of their inability to appreciate its danger, because they may be expected to be attracted to it.

Battery. An unlawful beating or other wrongful physical violence inflicted on another without his consent. The offer to commit a battery is an assault. Assault and battery are usually used together.

Common law. The case decisions of courts and administrative agencies, as distinguished from enacted legislation.

Damages. Compensation or indemnity which may be recovered in court by the person who has suffered loss or injury to his person, property, or rights through the unlawful act or negligence of another.

Decision. A judgment rendered by a competent tribunal.

Defendant. The party against whom relief or recovery is sought in a court action.

Employees. Administrators, teachers, bus drivers, custodians and other service personnel of the school.

Governmental immunity. Immunity from tort actions enjoyed by governmental units in common-law states.

In loco parentis. In place of the parent; charged with some of the parents' rights, duties, and responsibilities.

Judicial citations. Reference to court decisions, citations in the case materials in this study refer to official state reports and the National Reporter System.

Landmark case. A very significant court case.

Liability. The state of being bound or obligated in law or justice to do, pay, or make good on something.

Libel. Written defamation of another person's character.

Negligence. The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do.

Plaintiff. Person who brings an action; he who sues by filing a complaint.

Plenary. Complete power, usually applied to legislatures over matters within their entire jurisdiction.

Precedent. A decision considered as furnishing an example or authority for an identical or similar case afterward arising on a similar question of law.

Quasi-Corporation. An organization with semi-corporate powers; it is created by the state with limited powers to act in the place of the state for a given local area.

Respondeat Superior. The responsibility of the master for acts of his servant or agent.

Save harmless. To exempt or reserve from harm. Where a statute reserves or saves vested rights.

School officials. School board members, trustees, clerks, and treasurers.

Stare decisis. Principle that when a court has made a declaration of a legal principle, it is the law until

changed by competent authority; upholding of precedents within the jurisdiction.

Statute. Act passed by the legislature.

Tort. In modern practice, is used to denote an injury as wrongful act. A private or civil wrong or injury. A wrong independent of contract.

Ultra vires. Acts beyond the scope of authority.

CHAPTER II

REVIEW OF RELATED LITERATURE

Origin of Governmental Immunity From Tort Liability Doctrine

One of the chief reasons cited by the courts for school district immunity has been "the state is sovereign and cannot be sued without its consent." The theory that "the king can do no wrong" is one of the very oldest principles of common law. In spite of the fact that we had no king in the United States, the principle has been applied by the courts to the United States Government and the several states as well. Gauerke believes the English idea of immunity of government for injury to citizens is an outgrowth of historical events and circumstances. He feels the origins date back to feudal times.[1] Blachly and Oatman further explain this principle. "The doctrine that sovereignty is the highest power of the state; that it is subject to no law, and that it resides in the monarch, did much to place the state in a position of irresponsibility for its torts."[2]

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[1]Warren E. Gauerke, School Law (New York, 1965).

[2]Frederick Frank Blachly and Miriam E. Oatman, Administrative Legislation and Adjudication (Washington, D. C., 1934), p. 182.

Garber believes the judicial origin of the immunity doctrine "may be traced to two cases, one decided in England --Russell v. The Men Dwelling in the County of Devon--in 1788; the other decided in Massachusetts--Mower v. Leicester --in 1812."[3] The cases are very important or so-called "landmark cases" because the English and American common law pays extraordinary deference to precedents. The judges of one state usually follow the decisions of judges of another state. It should be noted that the Russell case was later overruled by the English Courts, and that in 1890 it was definitely established that in England a school board or school district is subject to suit in tort for personal injuries on the same basis as a private individual or corporation.[4]

Reasons for Justifying Governmental Immunity

Anglo-Saxon law included the rule of stare decisis--"to stand by decided cases." Under this theory, once a point of law has been decided by the highest court of appeal, it is fixed law and can be changed only by legislation. The principle of stare decisis or following of precedents applies only to decisions of the highest courts. Wormser gives a clear concept of this principle:

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[3]Lee O. Garber, Yearbook of School Law (Danville, Ill., 1965), p. 235.

[4]American Law Reports Annotated (San Francisco, 1962), 2d, 86, p. 474.

> For example, a judge in the Supreme Court of New York does not have to follow a decision by another judge of his own court. He can differ and the true rule of law may not be known until the case has been appealed to a higher court for final decision. The principle of stare decisis is not absolutely immutable. Courts, on occasions, have reversed themselves, when they thought that conditions had changed sufficiently to warrant, or when they were willing to admit that they had previously been in error.
>
> We have separate legal jurisdiction in the U. S., therefore it is not surprising to find that the principle does not compel a court of one state to follow a precedent set by courts of another. Each state may interpret its domestic law as it sees fit, and the highest court of a state cannot be overruled even by the U. S. Supreme Court unless the question comes under the Federal Constitution. When a point of law is settled in one state, a lawyer in another state has no assurance that his own courts will follow it, and so we have duplication of decisions as well as duplications of statutes.[5]

Frequently the courts refer to other reasons for justifying governmental immunity. Gauerke[6] and Garber[7] list similar sets of reasons:

1. Schools should not be charged with liability since they receive no advantage from operating schools.

2. School districts have only those powers given them by the legislatures and state school officers, not including permission to commit errors.

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[5]Rene' Albert Wormser, The Story of the Law and the Men Who Made It From the Earliest Time to the Present (New York, 1962), p. 389.

[6]Gauerke, p. 86.

[7]Lee O. Garber, Law and the School Business Manager (Danville, Ill., 1957), p. 195.

3. School taxes are trust funds, not to be used to pay claims.

4. School property is exempt from attachment.

5. The personal interest of private citizens must give way to the idea of public good.

One or more of these reasons is often given in addition to the commonly used principle of state sovereignty. In the Molitor case, the Supreme Court of Illinois, however, in forceful language, met every reason given above and declared them all outmoded or not legally sound. The court went on to overturn governmental immunity in Illinois.[8]

Education As a State Function

Although the federal government has always encouraged education, the words "education" or "school" are not to be found in the Constitution. Garber in his Handbook of School Law points out that education is a state function. As a result of the Tenth Amendment, the courts have repeatedly held that the matter of maintaining a system of public schools is reserved to the states. The legislature, unless restricted by the constitution has unlimited discretion. "So it may be said that the power of the legislature over education is plenary."[9]

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[8]Molitor v. Kaneland Community Unit District No. 302, 163 N. E. (2d) 89 (Illinois, 1959).

[9]Lee O. Garber, Handbook of School Law (New London, Conn., 1954), pp. 4-5.

Pierce notes that the state courts "have repeatedly upheld the doctrine that in America, education is a function of the state and is, therefore fundamentally a matter of state policy. It would seem that even if the state constitutions or statutes failed to mention education, it would still be a state function.[10]

The Supreme Court of Indiana gave a clear statement of the relative status of the individual, the local government and the state in an early case:

> The right of local self-government is an inherent not a derivative, one. Individualized, it is the right which man possesses in virtue of his character as a free man. It is not bestowed by the legislatures, nor derived from statutes. But the courts which have carried to its utmost extent the doctrine of local self-government have never so much as intimated that it exists as to a matter over which the constitution has given the law-making power supreme control; nor have they gone beyond the line which separates matter of purely local concern from those of state control. Essentially and intrinsically the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of state, and not of local, jurisdiction. In such matters the state is a unit and the legislature the source of power. It is for the law-making power to determine whether the authority shall be exercised by a state board of education, or distributed to county, township, or city organizations throughout the state.[11]

The legislature may enact any law it sees fit concerning education consistent with state and federal constitutions, but it cannot delegate legislative authority to another

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[10]Truman Mitchell Pierce, Federal, Local, and State Government in Education (Washington, D. C., 1964), p. 83.

[11]State ex rel Clark v. Haworth, 23 N.E. 946 (Indiana, 1890).

agency. Goldhammer indicates that the pattern is to delegate the state's responsibility in education to specially created, local subdivisions. He states that school boards exist only to provide for the maintenance of the public schools in the area subject to their jurisdiction.[12]

Hamilton, in a similar vein, says that:

> Local school districts are in fact state agencies, therefore it follows that members of local boards of education are state and not local officers. They have only such powers as the legislature, by specific law, confers upon them, and those powers which are implied for the purpose of enabling boards to carry out their express legislative powers.[13]

The legal basis of public education can be found in constitutional law, statutory law or case law. States have complete authority over schools if they choose to exercise it, limited only by violation of constitutional provisions. Although legal responsibility for education clearly resides with the state, the actual exercise of this responsibility is not as clear-cut as the placing of legal responsibility indicates.

School districts can operate only through their officers and employees. Officers and employees are, therefore, referred to as agents of the districts. In most states the immunity doctrine holds that a district may not be required to pay for the wrongful acts of its board members, teachers, and other employees. Hamilton attacks this doctrine by pointing out that:

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[12]Keith Goldhammer, The School Board (New York, 1964), pp. 15-16.

[13]Robert R. Hamilton, Legal Rights and Liabilities of Teachers (Laramie, Wyo., 1956), p. 3.

> ...districts may, for example, permit the school premises to become dangerous or employ incompetent bus drivers or other employees from which injury or damage results, but it is protected by the old obsolete and unjust immunity rule.[14]

He goes on to advocate the rule be abolished by legislative enactment and the districts be required to carry liability insurance for the protection of their children.

Garber, in his Handbook of School Law, correctly states that "school officers are not generally held individually liable for torts of the school corporation, on the ground that action by the board is not the action of school officers personally."[15] He goes on to say that "school officers are not liable for injuries resulting from errors in judgment."[16] Unless they act in bad faith or from corrupt or malicious motives, they are not personally liable for torts committed by the boards' employees and contractors. They are, however, "liable for injuries resulting from their refusal to act, from failure to perform ministerial or discretionary duties, and from the improper performance of ministerial duties which are imposed upon the individual officers."[17]

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[14]Ibid., p. 5.

[15]Garber, Handbook of School Law, pp. 85-86.

[16]Ibid.

[17]Ibid.

The Negligence Theory

The personal liability of teachers does not come under the governmental immunity rule. The principle underlying a teacher's liability is that of negligence. Negligence as a separate tort emerged about 1825 according to Garber. He believes certain elements are necessary to establish negligence:

> (1) The duty to act as to protect others from unnecessary risks
> (2) The failure to so act
> (3) The injury, of another, causing loss or damage, as the result of such failure.[18]

The burden of proof is on the plaintiff and juries and judges differ on what constitutes negligence. Gauerke defines negligence as "any conduct which falls below the standard established by law for the protection of others against unreasonable harm."[19] Under the legal system of the United States every person enjoys the right to be free from bodily injury, intentionally or carelessly caused by others.

Nolte and Linn view negligence as "the failure to use such care and caution as a hypothetically reasonable and prudent person would ordinarily have exercised under the same or similar conditions."[20] Hamilton also notes there is no rule-of-thumb for determining what is negligent action in

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[18]Garber, Law and the School Business Manager, p. 194.

[19]Gauerke, p. 87.

[20]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Ill., 1963), p. 243.

all cases.[21] It should be emphasized that it is only the negligence of the district employees, such as teachers, that involves them in legal action. They do not guarantee that no injuries or damages will result from their acts.

The legal cause of an injury has been defined as "that cause which in the natural sequence of events produced the result."[22] An unbroken connection is necessary between the negligent act and the injury. The N. E. A., in a booklet called Who is Liable for Pupil Injuries? points out that the courts consider the nature of the conduct, legal cause of injury and forseeability of harm.

> An act of negligence may be one which involves unreasonable risk of harm to others, even though it is done with reasonable care, skill, preparation and warning. The negligence is inherent in the act. In other types of conduct, the act may become negligent through the lack of care, skill, preparation, or warning, although the act in itself would not have constituted negligent conduct had reasonable care, skill, preparation, or warning been used.[23]

Nolte and Linn sum up the discussion of the nature of negligence by saying it is what a jury of twelve people say it is.[24]

Garber lists seven specific cases whereby a school employee may be negligent:

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[21]Hamilton, p. 30.

[22]Garber, Law and the School Business Manager, p. 195.

[23]Who is Liable for Pupil Injuries? NEA Research Division, (Washington, D. C., 1963), p. 11.

[24]Nolte and Linn, p. 244.

(1) Allows pupils to use dangerous devices although they were not competent to do so
(2) Does not control abnormal pupils
(3) Does not give adequate warning
(4) Acts without sufficient skill
(5) Does not make sufficient preparation
(6) Fails to inspect and repair mechanical devices
(7) Prevents someone else from assisting a pupil, although the peril was not caused by his negligence[25]

Some of the defenses used against negligence are intervening cause, contributory negligence, last clear chance theory, and plaintiff assumed risk. Perhaps the one most successfully used is intervening cause. If it can be established to the satisfaction of the jury that the connection between the allegedly negligent act and the injury has been broken, then the defendant is not liable. Contributory negligence is not too successful as a defense since most cases involve children and greater care must be exercised by those in charge than if the case involved adults alone. The last clear chance theory implies that the injured person had more opportunity to avoid the accident than the defendant did to cause it. The defense that the plaintiff assumed the risk is usually effective in athletic events where some risk of injury is bound to be assumed.

Regardless of the status of immunity from tort liability for the school district in a particular state, the teacher or other employee is not immune from suit for negligence in any state and is protected only to the extent of liability insurance or save harmless legislation.

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[25]Garber, Law and the School Business Manager, p. 198.

Save Harmless Statutes

The changing public attitude toward tort liability has caused several states to search for some method to protect their employees. Hamilton expresses the sentiments of many educators concerning this protection:

> The business of education has become so large that it is palpably unfair to impose upon teachers and administrators the risks involved in their respective positions. At least four states, namely Connecticut, New Jersey, New York, and Wyoming, have enacted so-called "save harmless" statutes for the protection of teachers. These laws require or permit districts to pay judgments recovered against teachers. It also requires or permits them to defend teachers in suits against them for damages caused by their negligent acts while in the course of their teaching duties. This is enlightened legislation and should be adopted widely. It is submitted that teachers organizations owe the duty to its several members to urge the legislatures of the respective states to enact such laws. Laws imposing tort liability on individuals responsible for the school program are obsolete and can not be defended in modern society. Districts should be required to protect their teachers and cover itself (sic) with appropriate insurance. It is unfair to everyone concerned to attempt to operate a modern educational program under "Model T" tort liability laws. Save harmless statutes should be mandatory in nature; they should not be merely permissive.[26]

Nolte and Linn write in a similar vein concerning this need for protection for school employees:

> Five states have adopted statutes requiring or permitting boards of education to come to the aid of school personnel who are found liable for damages in pupil injury cases. Four of the five states require boards to protect and save harmless financially the teacher who has been required to respond in damages for his negligence in the line of duty.

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[26]Robert R. Hamilton, Legal Rights and Liabilities of Teachers (Laramie, Wyo., 1956), p. 41.

> One state permits boards to protect the teacher financially if the board so chooses.[27]

These state statutes designed to protect school employees are usually patterned after the save harmless law passed by New York in 1937. This law also included an authorization to carry liability insurance. A closer examination of the statute in New York should provide some clarity to the discussion which follows.

New York, unlike most other states in the United States, applied the common-law principle of respondeat superior or holding an employer liable for the torts of his employees in school cases. The "save harmless law"[28] provided that judgment obtained against an employee is payable out of school funds under certain circumstances. The New York courts interpreted the "save harmless" law as, in effect, imposing direct liability on the school board, saying it was unnecessary to sue an employee and obtain a judgment first and then seek settlement of the judgment from the school board.[29] The terminology "save harmless" comes from its usage in the New York statute of which a key portion is given below:

> Liability of a board of education, trustee, trustees, or board of cooperative educational services. Not withstanding any inconsistent provision of law, general, special, or local, or the limitation contained in the provisions of any city

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[27]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Ill., 1963), pp. 266-267.

[28]New York Education Law, Section 3023.

[29]Reeder v. Board of Education of New York City, 50 N.E. (2d) 236 (New York, 1943).

> charter, it shall be the duty of each board of education, trustee, trustees, in any school district having a population of less than one million, and each board of cooperative educational services established pursuant to section nineteen hundred and fifty-eight of this chapter, to save harmless and protect all teachers and members of supervisory and administrative staff or employees from financial loss arising out of any claim, demand, suit, or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person within or without the school building, provided such teacher or member of the supervisory or administrative staff or employee at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment and/or under the direction of said board of education, trustee, trustees or board of cooperative educational services: and said board of education, trustee, trustees or board of cooperative educational services may arrange for and maintain appropriate insurance with any insurance company created by or under the laws of this state, or in any insurance company authorized by law to transact business in this state, or such board, trustee, trustees or board of cooperative service may elect to act as self-insurers to maintain the aforesaid protection.[30]

The Reeder case decided by the New York court furnishes further clarity to the "save harmless" statute.[31] In this case the teacher and the Board were named as defendants when a boy was hurt assisting the teacher move an automobile motor on a dolly. Before the trial, action was discontinued against the teacher and the board's defense was the interpretation of the "save harmless" statute providing for indemnity by the board to the teacher for any loss sustained by the latter's negligence. The plaintiff urged that the statute

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[30] New York Education Law, Sec. 3023.

[31] Reeder v. Board of Education of New York City, 50 N.E. (2d) 236 (New York, 1943).

imposes on the board direct liability to persons injured through the negligence of its teachers and other employees. To this the court concurred and awarded damages to the plaintiff. After this decision the courts have held it was unnecessary to sue an employee and obtain judgment first and then seek settlement of the judgment from the school board.

It is theoretically possible for a district required to pay damages because of the negligence of one of its agents or employees, to seek indemnity from the individual whose negligence caused the district's liability. Therefore these "save harmless" statutes do not entirely relieve individuals from responsibility for their negligent acts although the district is not likely to seek this indemnity because of the financial condition of its employees.[32]

Other states have minor variations from the New York law. California, directly through its statute, provides for action against a school district on account of injury to person or property arising out of the negligence of its officers or employees.[33] Like New York, California does not cover school board members acting as agents of the Board. California does require the District Attorney to defend employees sued for negligence while in the line of duty. Most other state "save harmless" laws require boards to furnish legal counsel and pay expenses of defense. Wyoming's law

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[32]Lee O. Garber, Law and the School Business Manager (Danville, Ill., 1957), p. 200.

[33]California Education Code, Sections 1026-1029.

covers only teachers, supervisors and administrators while New Jersey's law covers all employees and members of the board of education. Washington has a law similar to California's law concerning direct suit against boards of education. In the Washington statute however, accidents involving playgrounds, athletic apparatus, and manual training equipment are excluded.

In addition to New York, New Jersey, Connecticut, Wyoming, California and Washington, four other states have enacted at least modified "save harmless" laws during the 1965-66 legislative sessions. Illinois in S. B. 801 provided for "save harmless" protection rather than insurance for school officers and employees; including student teachers. Florida Ch. 65-42 authorizes county school boards to provide legal service for employees who may be sued for damages for accidents occurring while on duty supervising, and gives legal status to student teachers so as to provide similar protection. Utah S. B. 4 and Nevada S. B. 185 passed nearly identical laws waiving immunity from suit of state and political subdivisions including school districts and providing that public funds may be used to insure public employees against liability for injury due to their negligent acts or omissions. The Nevada statute has a recovery limit of $25,000.00.

Generally these laws do not affect the basic liability of the district, but they do make the district liable for the payment of damages assessed by a court against an employee

for injuries to a third party arising out of the employee's negligence when acting within the scope of his employment and in the line of duty. The teacher is therefore "saved" from financial "harm" by the district's paying the judgment.

Nolte and Linn summarize the benefits of "save harmless" statutes:

> The teacher who must pay damages for a single mistake in conduct may be saddled with a judgment for the remainder of his professional life or be forced into bankruptcy proceedings. The growing complexity of the educational enterprise indicates that the number of pupil injury cases will doubtless increase. In the interests of school morale, boards will find it increasingly expedient to "save harmless" those who are taking the risks in classrooms throughout the land. State associations of school boards should therefore urge the enactment of mandatory save harmless legislation in their states. Teachers' associations can do no less.[34]

Liability Insurance

One of the most important exceptions to the doctrine of school district immunity still found in most states is through legislation which permits or requires local school boards to carry liability insurance.[35] About twenty states specifically require that liability insurance be carried on school buses and approximately twenty others permit local boards to carry such insurance.

> In only four states, Alabama, Mississippi, South Dakota and Texas, are school boards forbidden

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[34]Nolte and Linn, pp. 266-67.

[35]Who is Liable for Pupil Injuries? NEA (Washington, D.C., 1963), pp. 65-66.

> by court decisions, attorney general opinions, or other rulings from insuring their buses against liability and Alabama and Mississippi otherwise provide for the payment of pupil transportation accident claims.[36]

It should be noted that where legislation requires or authorizes a school district to purchase liability insurance, the immunity of the district is not waived by taking out the insurance. These statutes usually specify that recovery of damages resulting from negligence may be had only up to the limit of insurance carried. Since tax money is used to pay insurance premiums, courts have traditionally held that a school district has no legal power to carry liability insurance unless the legislature authorizes it.

Oklahoma's statute concerning liability insurance for transportation accidents is typical of those statutes in states where liability has not been waived.

> The board of education of any school district authorized to furnish transportation may purchase insurance for the purpose of paying damages to persons sustaining injuries proximately caused by the operation of motor vehicles used in transporting school children. The operation of said vehicles by school districts, however, is hereby declared to be a public governmental function, and no action for damages shall be brought against a school district under the provisions of this Section but may be brought against the insurer, and the amount of the damages recoverable shall be collectible from said insurer only. The provisions of this Section shall not be construed as creating any liability whatever against any school district which does not provide said insurance.[37]

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[36] Ibid., p. 65.

[37] School Laws of Oklahoma, 1965.

In a few states it is permissible for a state to act as a self-insurer. California is an example and the law is as follows:

> In districts situated within or partly within cities having a population of more than 50,000, any board of education may provide from its own funds for the purpose of covering the liability of the district, its officers, agents and employees, in lieu of carrying insurance in insurance companies as provided in Section 1029. Nothing contained herein shall be construed as prohibiting the board of education of the district from providing protection against such liability partly by means of its own funds and partly by means of insurance written by insurance companies as provided in Section 1029.[38]

Many prominent writers in the field feel that liability insurance, not only in transportation, but in other areas as well, is necessary if schools are to fulfill their responsibility to the pupils and the public as well. Gauerke, in his recent book School Law, says:

> As long as judges are reluctant to act as lawmakers by over-throwing the long-settled principle of immunity-from-suit for torts enjoyed by government, then insurance protects against the disaster of a large verdict. Safeguarding others who must get involved with the educational program is a moral and legal responsibility of the school district. School boards cannot take too much caution to prevent injuries. Insurance rightly spreads the risks involved.[39]

The pupil in most instances is required by law to be in school and needs some protection if injured. The teacher too needs some protection since by the very nature of his job he is vulnerable to suits for damages. These suits arise

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[38]California Education Code, Section 1029.1.

[39]Warren E. Gauerke, School Law (New York, 1965), p. 107.

because of some act or incident which causes harm to the body or property of another person and which is due to the alleged negligence of the teacher in performing his duties.

In a few states the statutes either make the school district liable for the negligence of its employees or else authorize the use of district funds for paying judgments against teachers and other personnel. In the remaining states, teachers must pay damages when judgments are handed down against them unless state law allows the district to purchase liability insurance for its employees, or the employees either purchase it themselves or procure it through membership in an outside organization.

Teachers in increasing numbers are protecting themselves against tort liability by insurance and the state teachers' associations in Ohio, Vermont and Maryland have blanket policies covering their entire membership.

Governmental-Proprietary Distinction

In holding school districts immune from liability for torts, many authorities predicate such immunity on the governmental nature of the functions which such districts were performing at the time of the commission of the tort.[40] Other authorities hold that a school district, being only a quasi-corporation not clothed with full corporate powers, cannot be sued in tort for negligence or wrongful acts

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[40] Sanders v. City of Long Beach, 129 P. (2d) 511 (California, 1942).

regardless of whether such acts were committed in governmental or proprietary capacity.[41] Still other courts take the position that school districts, school boards, and other agencies or authorities created exclusively for the purpose of conducting public schools of elementary or high school grades are merely public agencies or instrumentalities of the state, established for the sole purpose of administering the state system of public education, and that all their authorized functions or activities are of a governmental character.[42,43] In the Rose case cited above, the court stated that:

> A board of education is a quasi-municipal corporation and its operation of a public school system including school playgrounds, constitutes the performance of a governmental function as distinguished from a proprietary one, and with respect to tort liability, is governed by the same rules applicable to a city or other governmental instrumentality engaged in a governmental function.[44]

There is no general agreement on the distinction between governmental and proprietary functions. In New Jersey, the court concluded that a municipally operated swimming pool is not a governmental activity[45] while in Connecticut the court came to the opposite conclusion in holding that a municipally

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[41] Shirkey v. Keokuk County, 281 N.W. 837 (Iowa, 1938).

[42] Braun v. Trustees of Victoria Independent School District, 114 S.W. (2d) 947 (Texas, 1938).

[43] Rose v. Board of Education of Abilene, 337 P. (2d) (Kansas, 1959).

[44] Ibid.

[45] Weeks v. City of Newark, 168 A. (2d) 211 (New Jersey, 1961).

operated skating rink is a governmental function.[46] It was held in an Arizona case that a school district acted in the exercise of a proprietary function when it leased its football stadium to another school district for compensation, and in the exercise thereof it was liable for an injury sustained as a result of negligence in the maintenance of the stadium.[47] A recent (1958) case in a Pennsylvania court was decided in favor of the plaintiff when it was held that operating a summer recreational program was a proprietary rather than a governmental function.[48] A child, who was enrolled in the summer program, drowned while playing in a pool. The school charged a fee and the court used the following words to define proprietary:

> If a district is conducting a given activity which a local government unit is not statutorily required to perform, or it may be carried on by private enterprise, or if it is used as a means of raising revenue, then it is a proprietary function.[49]

Most states agree with the court in Illinois in the Ludwig case when it said that action could not be sustained on a governmental-proprietary distinction because such distinction

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[46]Wolf v. Town of Bedford, 167 A. (2d) 924 (Connecticut, 1960).

[47]Sawaya v. Tucson High School District, 281 P. (2d) 105 (Arizona, 1955).

[48]Morris v. School District of the Township of Mount Lebonon, 144 A. (2d) 737 (Pennsylvania, 1958).

[49]Ibid.

does not apply to quasi-municipal corporations such as school districts.[50]

School districts seldom have proprietary functions. This distinction is more commonly used in referring to cities. If school districts are to be held liable, it would seem that courts will follow the lead of the Illinois court in the Molitor case and make them liable for injury due to negligence regardless of the type of activity.[51]

Discretionary vs Ministerial Duties

Another distinction sometimes used by the courts to decide whether liability accrues to a district or its board has been to determine if the activity is mandatory. Goldhammer, in discussing the historical and legal foundations of the American school board makes this clear differentiation of the two activities:

> A discretionary power of the board is one which gives the board the power or right to act in the event that it chooses to do so. There is no legal necessity to act unless the board considers that there are conditions which warrant its performance or which necessitate that it make a decision. In some cases in which damages have accrued to individuals because of a board's failure to act, or even of its acting in a fashion that may have been construed as negligent, the courts have ruled that since the board was operating within the discretionary powers granted to it, there was no legal liability of board members for either failing to act or acting in a negligent fashion.

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[50] Ludwig v. Board of Education, 183 N.E. (2d) 32 (Illinois, 1962).

[51] Molitor v. Kaneland Community Unit District No. 302, 182 N.E. (2d) 145 (Illinois, 1962).

> Ministerial functions are functions which the law imposes upon the board and which it must perform regardless of the presence of any condition which in the minds of the members of the board, would indicate a desirability not to act. The failure of the board to act when it is clearly indicated that the function to be performed is ministerial results in the incurring of legal liability on the part of individual members of the school board.[52]

Several courts have expressly rejected any distinction between discretionary and ministerial functions in connection with tort liability of school districts, school boards, or similar agencies or authorities in charge of public schools.[53,54] The Alaska court held in the Tapscott case that a school district was not liable for negligence of a school bus driver which caused a collision between his bus and an automobile, even though the authority conferred upon the territorial board of education to provide transportation for school pupils was not mandatory.[55] The court said the true test was whether or not the transportation of pupils was a governmental function, and that the absence of a mandatory duty did not take the act of transportation out of the status of a governmental function.

A duty is ministerial when the law imposes upon a public officer performance of a duty involving no exercise of

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[52]Keith Goldhammer, The School Board (New York, 1964), p. 58.

[53]Consolidated School District v. Wright, 261 P. 953 (Oklahoma, 1927).

[54]Tapscott v. Page, 17 Alaska 507 (1958).

[55]Ibid.

judgment. He must perform such an act and do so in a proper manner. The performance of many duties by school officers requires the exercise of judgment. In order for liability to attach to acts of individuals, they must have violated mandatory legal prescriptions.[56]

Judicial-Legislative Conflict

As the governmental body farthest removed from the control of the people, criticism of the judiciary is common at all levels and especially at the highest level in the state and in the nation. The recent decisions at the national level concerning desegregation and religious ceremonies brought forth criticism of the courts not equalled in our history. There has been great pressure by the people to modify these decisions through curtailing of the courts' power by legislative means. The courts have historically been conservative and slow to change so perhaps the criticism of the Supreme Court as it is presently constituted reflects the people's will for the courts to retain their historic role of conservatism.

Judicial-legislative conflict is not new, dating back at least as far as the time of John Marshall when the Supreme Court first assumed a major role in our governmental structure. At the state level, the principle of governmental immunity from tort liability has been the cause of numerous

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[56]Gauerke, pp. 95-96.

conflicts between the legislative and judicial branches of government.

There is no doubt that the rule of governmental immunity can be limited or abrogated entirely by acts of the legislature. Statutes to this effect are definitely on the increase, and over the years the legislatures of several states have enacted statutes which have created a liability of governmental entities for torts in connection with public schools. These statutes may waive the state's immunity from liability in tort, abrogate the common-law rule of nonliability with respect to school districts, render school boards liable for the negligence of district officers or employees, or impose liability upon certain educational agencies for negligence in the operation of motor vehicles.

According to the American Law Reports, in 1962 the rule of governmental immunity in regard to torts committed in connection with the public schools has been substantially affected by statute in Alaska, California, Connecticut, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Washington and Wisconsin.[57] Since that time, the legislatures of Nevada (S. B. 185) and Utah (S. B. 4)[58] have also at least partially abrogated governmental immunity in their respective states.

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[57] American Law Reports (annotated 2d, 86 [San Francisco, 1962]), p. 503.

[58] High Spots in State School Legislation, NEA Research Division, School Law Series, 1965.

Where the rule of immunity with respect to particular torts has been abrogated by legislative enactment or judicial decision, the liability of the agency or authority involved is, generally speaking, determined by the same rules and principles that apply in connection with the liability of private persons or corporations.

It is significant that while a majority of courts consider governmental immunity from tort liability to be outmoded there is no such agreement concerning abrogation by the courts themselves. Even the Molitor case which is often referred to as the "break through" or landmark case in court abrogation of immunity from tort liability was not a unanimous decision.[59] Davis, in a strong dissent states that the common law of England shall be the rule of decision and shall be considered as of full force until repealed by legislative authority. He further states that:

> Neither Illinois nor any other state of the United States adopted the theory of governmental immunity from tort liability from the maxim 'the King can do no wrong', as it existed in 1606, but rather predicated such immunity on various theories of the common law adaptable to the exigencies, customs, and usages of the people of our various States, as applicable under the particular governmental practices of each State.[60]

In still stronger language he maintains the court has gone beyond its range of judicial action:

> I denounce the contention of the court that these legislative limitations on the doctrine of

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[59] Molitor v. Kaneland Community Unit District No. 302, 182 N.E. (2d) 145 (Illinois, 1962).

[60] Ibid.

> governmental immunity are a justification for its abolition by judicial fiat. The legislature, in restricting the scope of such immunity, is acting in its area of special competence. This court in abolishing it, has unwisely ventured beyond the range of judicial action.[61]

Davis deplores the majority decision and predicts that it will release a flood of litigation in order to establish new boundaries in this area of liability. He also shares the feeling of many persons that the efficiency of the schools might be impaired by harassment.

A rather unique approach to this question of whether the power to abolish governmental immunity lies with the courts or exclusively with the legislatures has been taken by the Delaware Supreme Court.[62] The court stated that because local units of government are creatures of the state, their immunity against liability for negligence was derived from the state's sovereign immunity. The court then reasoned as follows:

1) sovereign immunity was a principle of the English common law;
2) Delaware's first Constitution (like those of other founding states) provided that the common law of England should remain in force until altered by a future law of the State legislature;
3) the immunity rule in Delaware was therefore not judicially created by the courts of that State, but by the State's Constitution;
4) the current State Constitution provides that suit against the state may be brought "according to such regulation as shall be made by law", i.e., a law of the legislature;

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[61] Ibid.

[62] Shellhorn and Hill, Inc. v. State, 187 A (2d) 71 (Delaware, 1964).

5) the doctrine of sovereign immunity is a part of the basic law of this State which may be waived solely by law enacted by the legislature.[63]

The court went on to state that the result "may be unwise as a matter of policy"[64] and suggested to the legislature for its consideration the desirability of permitting suits, to some extent against the state for injuries caused by the torts of State employees.

In an Arizona case against the State Highway Commission for wrongful death resulting from a highway accident, the court abolished the rule of governmental immunity from tort liability in Arizona not only for the instant case, but for all pending cases and those not yet filed which are not barred by the statute of limitations, and all future causes of action. All prior decisions to the contrary were overruled.[65]

In so holding, the court reviewed the history of the rule of governmental immunity and referred to its limitations or abrogation in many states, and to precedent in Arizona that school districts had governmental immunity. The rule would appear to include school districts as governmental sub-divisions.

In a decision rendered on December 14th, 1962, the Minnesota Supreme Court also prospectively overruled

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[63]Ibid.

[64]Ibid.

[65]Stone v. Arizona Highway Commission, 381 P. (2d) 107 (Arizona, 1963).

governmental immunity as a defense in actions against all governmental entities, except the state itself, arising out of torts committed after the 1963 legislature adjourned.[66] However, the 1963 legislature restored the governmental immunity rule in actions against school districts, but provided that when a school district procures liability insurance, it becomes subject to the statutory provisions relating to tort liability to the extent of the coverage obtained.

The Colorado Supreme Court in 1963 upheld the rule of government immunity, adhering to the view that it was the function of the legislature and not the judiciary to change the rule. In this case, a high school student sued to recover damages for injuries sustained while practicing basketball.[67] It is interesting to note that while governmental immunity was upheld, three judges dissented, calling governmental immunity an anchronism today.

A suit against the city of Milwaukee concerns the abrogation of governmental immunity of all government units in Wisconsin, including school districts.[68] The court reversed its previous opinions that such abrogation of the rule was within the province of the legislature only. Since the rule had judicial origins, the court felt empowered to overrule

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[66] Spanel v. Mounds View School District No. 621, 118 N.W. (2d) 795 (Minnesota, 1962).

[67] Tesone v. School District No. RE-2 in the County of Boulder, 384 P. (2d) 82 (Colorado, 1963).

[68] Holytz v. City of Milwaukee, 115 N.W. (2d) 618 (Wisconsin, 1962).

it. The opinion stated that "henceforward, so far as governmental responsibility for torts is concerned, the rule is liability--the exception is immunity."[69] In determining tort liability of a municipality, the court stated it was no longer necessary to divide its operations into those which are proprietary and those which are governmental. As in the case of Minnesota, the state itself cannot be used.

The Supreme Court of Oregon in the Vendrell case reached the opposite decision handed down by the Wisconsin Court.[70] In this case, a former high school student sued for damages resulting from a tackle in a football game. One issue before the court was whether a provision allowing districts to buy liability insurance could be interpreted as impliedly waiving the sovereign immunity of the school district from tort liability to the extent of the coverage of the insurance policy. Although expressing its dissatisfaction with the governmental immunity doctrine, the court stated it could not be abrogated by judicial decision in view of a state constitutional provision that this doctrine protecting the state and its political sub-divisions, including school districts, from tort liability, could be changed only by action of the legislature. The court interpreted the statute authorizing liability insurance as a legislative declaration of abandoning immunity only to the extent of the insurance. School districts which do not purchase liability insurance are immune.

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[69] Ibid.

[70] Vendrell v. School District No. 26C Molheur County, 360 P. (2d) 282 (Oregon, 1961).

Present Status of the Governmental Immunity Doctrine--Research Studies

In an attempt to clarify the somewhat cloudy picture of governmental immunity from tort liability, several studies have been completed in recent years. Cleetwood, in 1959, made a study of the legal liability of public schools in a program of interscholastic athletics. He found that the courts in general view interscholastic athletics as an integral part of the school program.[71] The public schools are not regarded as insurers of the participants in, or spectators of athletic contests even though incidental fees are charged.

Another study by Schaerer, completed in the same year, was concerned with the liability status of Indiana Public Schools. In his background material, Schaerer classified the tort liability of public schools under state laws as:

> (1) Ultra-liberal, where immunity has been waived,
> (2) Ultra-conservative, where immunity is upheld and purchase of liability insurance is prohibited; and
> (3) A compromise position, where immunity is upheld but liability insurance is permitted.

He classified Indiana in the latter category and concluded that in general, schools are moving to the liberal position.[72]

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[71]Cleet C. Cleetwood, "Legal Liability for Injuries Sustained in a Public School Program of Interscholastic Athletics" (unpub. Doctoral dissertation, Duke University, 1959).

[72]Robert W. Schaerer, "The Liability Status of Indiana Public Schools" (unpub. Doctoral dissertation, University of Indiana, 1959).

A study by Fisher, in 1963, analyzed the patterns of liability decisions in the states of Texas, New Mexico, Arizona, and Oklahoma. He recommends that the state legislatures abolish governmental immunity and make the purchasing of liability insurance mandatory by the school districts.[73]

Another doctoral study by Hartman also recommends that the state legislatures abolish governmental immunity. He believes a separate agency should be established to hear all tort claims below state level.[74] The study was principally devoted to liability in Illinois but also included New York, California, Minnesota, Oregon, and Washington.

A study by Kigin, later developed into a book published in 1963, is concerned with teacher liability in school shop accidents. The author suggests a pupil compensation plan on a state-wide compulsory basis be established to protect the pupils. His proposal is similar to the present social security system with the state department of education acting as self-insurer for the local districts. He also recommends mandatory save harmless statutes by the state legislatures.[75]

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[73]Leslie R. Fisher, "An Analysis of Patterns of Liability Decisions in the Public Schools of Selected States of the United States" (unpub. Ed.D. dissertation, University of Oklahoma, 1963).

[74]Robert D. Hartman, "The Nonimmunity of School Districts to Tort Liability" (unpub. Doctoral dissertation, University of Illinois, 1963).

[75]Denis J. Kigin, Teacher Liability in School-Shop Accidents (Ann Arbor, Michigan, 1963).

A very recent study by McClanahan checked the tort liability of school districts in Oklahoma, Kansas, and Illinois. He criticizes the doctrine of governmental immunity but says that if it were changed "there would be a deluge of suits that would harass the school district and prevent its carrying out its prescribed duties."[76] He further states that "the doctrine is eroded by court action and legislation" and that "one-fourth of the states now have at least limited waiver of the doctrine."[77] The author recommends legislation requiring school districts to carry comprehensive liability insurance against suits in tort. He feels the school district should be held fully accountable for its acts, regardless of governmental or proprietary function.

The foregoing studies focus on the modification of the immunity doctrine and the effect on the school district. The present study will attempt to pinpoint the implications of the modifications for school personnel.

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[76]Winfred Lyle McClanahan, "Trends Reflected in the Investigation of Bodily Injury Liability of Public School Districts in Selected State School Systems." (unpub. Doctoral dissertation, O. S. U., 1966), p. 179.

[77]Ibid., p. 180.

CHAPTER III

TORT LIABILITY OF SCHOOL DISTRICTS, OFFICERS AND EMPLOYEES

Tort Liability in General

A tort may be thought of as an act or omission which violates the private rights of an individual and for which the appropriate remedy is a common-law action for damages. Generally, torts are predicated upon or grow out of negligence.

In general, the courts are in agreement that a school district as an arm or agency of the state is immune from liability for tort in the absence of statute to the contrary.[1,2] Despite the fact that Illinois, in 1959, and to a limited extent Minnesota and Wisconsin later have abrogated the doctrine of tort immunity for school districts, there has been no widespread rush by the courts of other jurisdictions to follow suit.[3] With a few exceptions such as maintaining a nuisance, the general rule in those states

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[1] Campbell v. Pack, 389 P. (2d) 464 (Utah, 1964).

[2] Consolidated School District v. Wright, 261 P. 953 (Oklahoma, 1927).

[3] Garber, Yearbook of School Law (1965).

not abrogating immunity by judicial or statutory means is that liability does not accrue to the district itself.

The immunity that cloaks a school district under the common law is no shield to individual school officials and employees whose actions are found to be negligent.[4] Reutter summarizes the status of school board members as follows:

> It is relatively rare that a school board member is held individually liable for negligence. Partly this is due to the fact that most acts of school board members are not the direct cause of injuries. Furthermore, because the school board has power to act only as a corporate unit, the actions of board members as individuals are limited. Also, under the common law public officers are not responsible for damages resulting from mere mistakes in judgment when they have acted with good intentions. If such were not the situation, it would be very difficult to get people to accept public office, particularly an unpaid office such as that of school board member.[5]

However, if a board member does not act honestly and in good faith, he is not protected from responsibility for his actions. If it can be shown that the board members have acted with gross negligence or with intent to deviate from statutory procedure, they may be held personally liable for their actions.

Although the position of public school teacher has many of the characteristics of public office holding, the courts have been almost unanimous in classifying them as employees rather than as officers. Garber, in referring to

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[4]E. Edmund Jr. Reutter, Schools and the Law (New York, 1960).

[5]Ibid., p. 73.

teachers, says "they are governed by laws applicable to employees and not officers with the result that their liability is not the same as that of school officers, necessarily."[6]

Gauerke feels the "immunity" rule has lent "moral support" if not actual legal protection to teachers in their relationships with pupils. He says "a teacher has felt shielded from possible court action because the school district could not be called into court to answer for a tort."[7]

The courts are in agreement that the teacher stands in loco parentis with respect to the pupil during the time he is under the jurisdiction of the school. Liability of a teacher, in the event of an injury, is real in spite of this protection. A teacher needs competent legal counsel when faced with a suit. Professional employees of the board such as superintendents, principals and teachers have the authority to govern pupils under their direction. They may enforce all rules made by the board and in the absence of such rules, they may formulate those rules needed as long as they are reasonable. In enforcing these rules, it is generally held that employees are not liable if these rules are administered in a reasonable manner. A teacher may be held liable if he is actuated by malice, or if he causes a permanent injury to the child.

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[6]Garber, Handbook of School Law (1954), p. 89.

[7]Warren E. Gauerke, Legal and Ethical Responsibilities of School Personnel (Englewood Cliffs, New Jersey, 1959), p. 263.

Nolte and Linn, writing about the question of supervision, say:

> Parents have entrusted their children to the public schools for instructional purposes as the compulsory laws direct. The law anticipates that the children will be protected and their best interests looked after by those in charge. Sometimes children are injured at school; the question then becomes is the teacher liable? The adequacy of teacher supervision is not always easy to determine.[8]

A teacher may not assume that the mere fact that "it was an accident" will absolve him of a charge of negligence. Where a known hazard exists, the teacher has the duty of forseeing the danger, and preventing an accident before it occurs.

> The teacher is not expected to exercise extraordinary or unremitting supervision; he cannot continuously keep under his eye all the students in his care, and sometimes accidents occur when the teacher is looking in the opposite direction.[9]

Teachers will do well to minimize the number of times they must be absent from their posts, inasmuch as such absences may amount legally to failure to provide adequate supervision. There should be supervision for all aspects of activity during the time the child is on the school grounds. This of course includes recess and lunch periods.

When the child is under the care of school authorities, the law requires that these authorities act in a reasonably

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[8]Nolte and Linn, p. 247.

[9]Ibid.

prudent manner under the circumstances.[10] The standard of care varies with the maturity of the child and the nature of the activity in which the child is engaged.

Teachers and other professional personnel are held legally to a standard of care according to their professional training. The question for the courts to decide is not what a reasonably prudent person would do but what a reasonably prudent teacher would do. As mentioned earlier, foreseeability is often the key element. For a teacher to be liable for injuries to a pupil, the latter must not have contributed to his own injury. The child assumes normal risks in football and other strenuous sports. Negligence constitutes a question of fact to be determined by the court in each individual case.

Oklahoma Tort Liability

The general rule in Oklahoma is that a school district or school board is not subject to liability for injuries to pupils of public schools suffered in connection with their attendance at such school, since the district or board, in maintaining a school, acts as an agent of the state, and performs a purely public or governmental function or duty, imposed upon it by law for the benefit of the public, for which it receives no profit or advantage.

The Supreme Court in 1927, in the Wright case, said:

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[10] Morris v. Douglas County School District No. 9, 403 P. (2d) 775 (Oregon, 1965).

> Those who are carrying out the plan adopted for our free school system and especially those who are devoting time and attention, without compensation, to making the same effective, are entitled to know whether or not they are to be held liable in actions for negligence, or whether they are protected in performing governmental functions of the state in the same manner that the state itself would be protected, where they act in good faith without malice, without compensation, and solely for the public good and after a most careful consideration, we are led to hold that they should be so protected, in the absence of a positive statute of our lawmaking power indicating a wish to the contrary.[11]

The Supreme Court in a much later case involving lunch hour supervision upheld the decision of the trial court when it stated that:

> . . . a school board in discharge of its duties is performing a mandatory governmental function and school district is not liable for negligent or tortious acts of its employees, and school district was immune from liability for injury sustained by a pupil when he was attacked by two other boys in a school gymnasium during noon hour.[12]

The court noted that a direct appeal was being made to "recede from our previously announced rule which immunizes a municipal corporation, such as a school district, against liability for torts of its agents or employees."[13] The court thus refused to follow the reasoning of the Illinois court[14] and at this time it would seem that immunity from tort liability is in effect with regard to Oklahoma schools.

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[11] Consolidated School District v. Wright, 261 P. 953 (Oklahoma, 1927).

[12] Dahl v. Hughes, 347 P. (2d) 208 (Oklahoma, 1959).

[13] Ibid.

[14] Molitor v. Kaneland Community Unit District No. 302, 163 N.E. (2d) 89 (Illinois, 1959).

Those districts authorized to furnish transportation are given the authority to purchase liability insurance. The statute is as follows:

> The board of education of any school district authorized to furnish transportation may purchase insurance for the purpose of paying damages to persons sustaining injuries proximately caused by the operation of motor vehicles used in transporting school children. The operation of said vehicles by school district, however, is hereby declared to be a public governmental function, and no action for damages shall be brought against a school district under the provisions of this Section but may be brought against the insurer, and the amount of damages recoverable shall be limited in amount to that provided in the contract of insurance between the district and the insurer and shall be collectible from said insurer only. The provisions of this Section shall not be construed as creating any liability whatever against any school district which does not provide said insurance.[15]

This statute used the word "may" with regard to purchasing of liability and is careful to emphasize that no liability exists in those schools refusing to purchase liability insurance.

Tort Liability in Illinois

Illinois throughout most of its history has adhered to the doctrine of governmental immunity from tort liability and this doctrine has been applied to the schools by the courts.[16,17] In 1950, however, this doctrine was cracked

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[15] School Laws of Oklahoma, 1965.

[16] Leviton v. Board of Education, 30 N.E. (2d) 497 (Illinois, 1940).

[17] Lindstrom v. City of Chicago, 162 N.E. 128 (Illinois, 1928).

by a decision in the Moore case as far as charitable institutions protected by liability insurance was concerned.[18] In 1952 the rule recognizing the tort liability of charities protected by liability insurance was extended to apply to school districts in the Broadlands case.[19] In this case the court held that the school district was liable in an action in tort since the only justifiable reason for immunity of quasi-municipal corporations from suit for tort is the public policy to protect public funds and public property and that where liability insurance was available to protect the public funds, the reason for the rule of immunity vanished to the extent of the available insurance.

The Illinois legislature in an amendment to the school code in 1953 passed a statute which gave school districts the power to carry comprehensive liability policies to cover any loss or liability of the district or its agents, employees, teachers, or officers.[20] The insurance company issuing such policy must waive any right to assert the defense that the school district is immune from suit as an agency of the state engaged in governmental function.

The previous cases and statutes were but forerunners of the complete break with the doctrine of governmental immunity handed down by the Illinois Supreme Court in the Molitor

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[18] Moore v. Moyle, 92 N.E. (2d) 81 (Illinois, 1950).

[19] Thomas v. Broadlands Community Consolidated School District, 109 N.E. (2d) 636 (Illinois, 1952).

[20] Illinois Revised Statutes, 1957, Chapter 122.

case.[21,22] This case, involving a bus accident will be discussed more fully in the Transportation Section which follows. The court rejected all reasons in favor of the immunity doctrine as being contrary to the American theory of government and had no rightful place in modern society. Drechsler, in the American Law Reports, feels the particular significance of the Molitor case:

> . . . lies not only in the fact that it abolishes school district immunity from tort liability in the state of Illinois but that the abrogation of the rule is effected by the court and not the legislature, thus giving the case a potential effect as persuasive authority outside its own jurisdiction.[23]

The Illinois legislature passed a bill limiting recoveries against public and nonprofit private schools to $10,000 for each separate cause of action.[24]

In the Bergman v. Board of Education case the Illinois court stated that the rule of the Molitor case does not apply to actions against a school district for injuries sustained after the date of the original opinion but before the opinion on rehearing was rendered, which limited the application of the rule to cases arising out of future occurrences.[25]

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[21]Molitor v. Kaneland Community Unit District No. 302, 163 N.E. (2d) 89 (Illinois, 1959).

[22]Molitor v. Kaneland Community Unit District No. 302, 182 N.E. (2d) 145 (Illinois, 1962).

[23]American Law Reports (annotated 2d, 86 [San Francisco, 1962]).

[24]Illinois Revised Statutes, 1959, Chapter 122, pp. 821-831.

[25]Bergman v. Board of Education, 173 N.E. (2d) (Illinois, 1961).

California Tort Liability

The tort liability of public schools in California has its basis in the various statutory provisions of state law. There are provisions in the California Education Code making school boards liable for the negligence of officers and employees.[26]

The California Public Liability Act provides that school districts, as well as other sub-divisions of state government, are liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing board, officer or person having authority to remedy such condition, has knowledge or notice of the defective or dangerous condition and fails or neglects, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy the condition or to take such action as may be reasonably necessary to protect the public against the dangerous or defective condition.[27]

In another statutory provision, the Vehicle Code, the school district is responsible for negligence in the operation of a motor vehicle owned by it and operated by an officer, agent, or employee acting within the scope of his office, agency or employment.[28]

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[26] California Education Code, Section 903.

[27] California Government Code, Section 53050-53051.

[28] California Vehicle Code, Section 17150.

The California Education Code provides that the governing board of a school district is liable in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, its officers, or employees, in any case where a verified claim for damages has been properly presented.[29]

The statute has been construed as providing authorization to sue a school district for injuries arising from negligence of its agents as well as its officers or employees.[30] In justifying its position the court used these words:

> Although the statute mentions only the "district, or its officers or employees" and does not specifically mention agents, a reasonable construction of the statute would seem to be that it intends to impose liability on the school district also for the acts of its agents, especially in view of the statutory rule that the code provisions should be liberally construed, with a view to effect its objects and to promote justice.[31]

Tort Liability in New York

There are a number of statutes in the state of New York affecting the tort liability of the state and other governmental agencies or authorities with respect to public schools.

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[29] California Education Code, Section 903.

[30] Grover v. San Mateo Junior College District, 303 P. (2d) 602 (California, 1956).

[31] Ibid.

The Court of Claims Act waives the state's immunity from tort liability, and the statute has been held as also abrogating the immunity of other political subdivisions including schools.[32] In addition, the New York Legislature, in statutes relating only to the schools, has prescribed specifically that boards of education shall "save harmless" teachers, supervisors, officers, or employees from damages arising out of negligence resulting in personal injury or property damage.[33] These so-called "save harmless" statutes have been discussed in greater detail in earlier sections of this study.

One section of the New York Education Law affects schools and districts where the population exceeds one million, one section is applicable to cities having a population of 400,000 or more, and the others cover all other districts. In the section affecting New York City, (the only city over one million) there is a direct liability provision. In the section pertaining to the other areas it is provided that district boards can arrange for insurance or can act as self-insurers.

Court cases are also controlled by other statutes in which regulations are effected about school equipment, curriculum, and personnel leaving little discretion to board members.

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[32] New York Court of Claims Act, Section 8, Chapter 860.

[33] New York Education Law, Sections 2560-2562, 3023-3024.

The status of tort liability in New York may be clarified by citing a few recent cases involving schools and school personnel. In one case dealing with the governmental-proprietary distinction the court stated that under the common law the state and municipal corporations were subject to liability when exercising corporate or proprietary functions but immune from liability when exercising governmental functions. It further stated that the operation of a public school system is a governmental function and includes the maintenance of playgrounds and of athletic and manual training equipment used in connection therewith, and that the present rule rendering the state and its municipal adjuncts liable in negligence in the same manner as individuals or corporations is statutory in origin.[34]

The court in Ohman v. Board of Education held that the Board of Education in New York City was liable for the negligence of a school teacher under the provisions of the applicable New York Statute.[35] Judge Conway, in a dissenting opinion, concluded that the high standard of supervision and care in the crowded schools of New York City should be imposed upon principals and teachers.[36]

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[34]Brown v. Board of Trustees, 104 N.E. (2d) 866 (New York, 1952).

[35]New York Education Law, Section 2510.

[36]Ohman v. Board of Education of City of New York, 90 N.E. (2d) 474 (New York, 1949).

CHAPTER IV

TORT LIABILITY IN SELECTED ASPECTS OF THE SCHOOL PROGRAM

Transportation

Probably no other phase of the educational program is as fraught with danger as the transporting of pupils to and from school. Increasing numbers of pupils and increasing motor vehicle traffic combine to make public school transportation a fertile field for litigation. Damage suits involving the driver, district, board, or administration are quite common.

The furnishing of free transportation is generally considered a governmental rather than a proprietary function.[1] It is furthering the educational program of the state, and in the absence of legislative enactments or judicial fiat to the contrary, it is the general rule that school districts and school boards are not liable for personal injuries or deaths of pupils sustained in connection with transportation.[2]

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[1] Consolidated School District v. Wright, 261 P. 953 (Oklahoma, 1927).

[2] Thurman v. Consolidated School District, D. C. Kan. 94 F. Supp. 616 (Oklahoma, 1950).

Statutes authorizing boards of education or school districts to provide insurance against the negligence of drivers of their busses and the fact that they do carry such insurance does not change the common-law immunity of the board or district from liability for negligence in the operation of school busses for school purposes. The general topic of liability insurance has been discussed in the preceding chapter.

Regardless of whether or not school districts are liable for torts committed in the operation of motor vehicles or in the transportation of pupils generally, drivers and operators of school busses whether acting as employees of the district or as independent contractors, are as a rule held liable for injuries resulting from their negligence in the course of transportation of pupils.[3] The driver cannot escape liability on the grounds of governmental function. The precise precautions which an operator or driver of a school bus must take in order to satisfy the requirement of due care will necessarily depend on the circumstances of the case. The driver is ordinarily under duty to deposit the school children riding in his bus at a reasonably safe place for alighting and crossing the street or road, and this duty continues until the child is safely off the highway.[4] The bus driver occupies a different relation to the student than

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[3]Tipton v. Willey, 191 N.E. 804 (Ohio, 1934).

[4]Ibid.

does the common carrier to its passenger. In the latter, it is voluntary, but on a school bus it is compulsory to attend school and if no other means of getting there are available, one must ride the bus. As a child, he has the natural right to parental control and protection while at home and has this same right going to and from school. There is no reason, however, why the immunity enjoyed by the board of education should attach to the driver, who as a private individual, undertakes for hire to safely transport the child to the school grounds. It is not questioned that he may be liable for his negligence, the only question being whether he was negligent. In order to recover against the owner or operator of a school bus on the grounds of negligence, all the essential elements of actionable negligence must be present and the driver's negligence must have been the proximate cause of the injury.

A driver's supervision does not end when the pupils alight from the bus. In a California case two school children were struck by a city passenger bus after leaving a school bus. The court held that the driver was negligent because he surveyed traffic only once before authorizing the children to cross the street before it was safe to do so, even though the city bus would have been clearly visible in his rearview mirror according to the court.[5]

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[5]Porter v. Bakersfield and K. E. R. Co., 225 P. (2d) 223 (California, 1950).

A somewhat similar case in Oklahoma involving liability insurance was decided in the same manner by the Oklahoma court.[6] This case involved an injury to a child who, on being allowed to alight from a school bus, walked around in front of it and was struck by a passing truck. Even though the bus was not actually being operated at this time, the court held the accident to be within the coverage of the liability insurance policy providing for the "payment of damages for bodily injuries, including death at any time resulting therefrom, sustained by any person or persons, caused by accident arising out of the ownership, maintenance or use of the bus."[7]

At least in New York, the courts have held that the school district must provide supervision of the pupils while they are awaiting the school busses on the school grounds. In the Barth case in 1951, the court held the district negligent in failing to provide supervision when a school bus backed upon school property and killed a twelve-year-old boy.[8]

Governmental immunity from tort liability appears to have been settled in Oklahoma to the present time by the

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[6]Ibid., p. 223.

[7]Earl W. Baker & Co. v. Lagaly, 144 F. (2d) 344 (Oklahoma, 1944).

[8]Barth v. Central School District, 102 N.Y.S. (2d) 263 (New York, 1951).

Wright case decided in 1927 and involving transportation.[9] In this case, the plaintiff through her father alleged the bus driver was an inexperienced and incompetent driver; that the defendants, the school district and the individual members were negligent, in that they knew or should have known that the driver was incompetent and inexperienced, and that he had had a number of accidents, and that he was an unsuitable and improper person to have charge of the transportation of pupils. The court set forth the following questions to consider:

1. Are school districts in Oklahoma liable in tort?
2. Are the members of the school board liable in tort as individuals for an act done by them as a board?
3. Is transportation a proprietary function rather than a governmental one?[10]

The court held in the negative on all three questions and apparently set an immunity pattern followed to the present time. A federal case in 1951, involving an Oklahoma school district, was also concerned with the immunity doctrine. The senior class was being transported on a senior trip in a district-owned school bus and was involved in an accident in Kansas. The court, holding that the district could assert its immunity said:

> It would be anomalous to say the least, if a school district which cannot be required to pay damages when legally transporting its children to

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[9] Consolidated School District v. Wright, 261 P. 953 (Oklahoma, 1927).

[10] Ibid.

> school could be subjected to such damages because its board permitted such bus to be used in an illegal out-of-state excursion.[11]

It is the general view of the courts that the furnishing of transportation by school districts is not mandatory. A California case will serve as an example of this line of thinking.[12] A nine-year-old pupil was killed when struck by an automobile while crossing a busy street on his way home from school. The parents contended the district was negligent in permitting a child to enroll in a school so located as to require him to cross a heavily traveled street. The court held that this would have been a remote rather than a proximate cause of the pupil's death. In another California case,[13] a six-year-old student became ill while attending school and the school authorities directed his eleven-year-old brother, who was also a student at the school but who was absent due to illness, to come to the school and take his brother home. The boy received injuries when the bicycle on which he and his younger brother were riding tipped over and the parents sued the school district on the grounds that it had a duty either to provide transportation or to supervise the manner in which the two children went home. The court held that the district was not liable on either count.

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[11] Thurman v. Consolidated School District, D. C. Kan. 94 F. Supp. 616 (Oklahoma, 1950).

[12] Girard v. Monrovia City School District, 264 P. (2d) 115 (California, 1953).

[13] Kerwin v. San Mateo County, 1 Cal. Rptr. 437 (California, 1959).

Transportation Involving the Classroom Teacher

Transportation accidents may involve the classroom teacher. Frequently teachers use their private cars to transport pupils to athletic contests, music festivals and similar meetings. In court action involving pupil injury under such conditions, the courts have consistently ruled that the teacher may be held liable for damages while transporting school pupils, even though the trip is a regular part of the teacher's duties.[14] Hamilton says "this practice involved so many legal dangers as to be almost frightening."[15] Some states have so-called "guest-statutes." These laws, in general, provide that persons riding in a car as guests, that is without paying, may not recover from the driver except in cases of gross negligence. Hamilton points out that the situation becomes much more involved if those riding with the teacher pay him for the privilege of riding in the car.

> The mere sharing of expenses with the teacher has been said to be compensation to the teacher, and the teacher is held to have been transporting persons for hire. The common type of automobile liability policy which protects the owner and/or driver of the auto from damage suits, usually contains a provision that it does not protect the owner of the car if he is transporting passengers for hire. This means that if there are persons riding with the teacher, and either the riders or the school district so much as contribute to the

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[14]Nolte and Linn, School Law for Teachers.

[15]Hamilton, p. 40.

> cost of gasoline and oil for the trip, the owner may have no protection during that trip.[16]

Frequently a number of teachers travel to a teacher's institute, workshop, or other such meeting, in the auto of one of the teachers, and agree to share the expenses of the trip. If each of the parties has equal control of the trip, they are said to be joint venturers. Under such circumstances, each person riding in the car is equally liable for damages or injuries caused by the negligent act of the driver of the car.

Transportation and Judicial Abrogation

The widely heralded Molitor case in Illinois, in 1959, signalled a radical departure from previous decisions concerning tort liability.[17] The Supreme Court of Illinois abruptly overthrew the doctrine of governmental immunity as applied to school districts, in actions for tort damages. The facts of the case show that the plaintiff brought action against the school district for personal injuries sustained when the school bus in which he was riding left the road, allegedly as a result of the driver's negligence, hit a culvert, exploded, and burned.

The court was faced with the highly important question:

> . . . in the light of modern developments, should a school district be immune from liability for

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[16] Ibid.

[17] Molitor v. Kaneland Community Unit District No. 302, 163 N.E. (2d) 89 (Illinois, 1959).

> tortiously inflicted personal injury to a pupil thereof arising out of the operation of a school bus owned and operated by said district?[18]

All through the report of the case there is evidence that the court disregarded precedent for timeliness. In attacking the immunity rule based upon the medieval idea that "the king can do no wrong" the Illinois Supreme Court emphasized that "in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' in which the theory is based."[19]

In answer to the contention that the old immunity rule was justified in its protection of public funds and property, the court said:

> We do not believe that in this present day and age, when public education constitutes one of the biggest businesses in the country, school immunity can be justified on the protection-of-funds theory.[20]

The defendant in the Molitor case contended that, if immunity is to be abolished, it should be done by the legislature and not the courts. To this contention the Supreme Court replied:

> The doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. We closed our courtroom doors without legislative help, and we can likewise open them.[21]

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[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Ibid.

It was widely predicted that a host of other states would follow the lead of the Illinois Court, but at the present time there has been no indication of mass desertion of the immunity doctrine by the other states. It should be noted that the Illinois legislature quickly passed legislation limiting damages to $10,000 and limiting court action to cases after the Molitor case.

Transportation Precautions for School Personnel

There has been a definite increase in the number of states permitting or requiring school districts to purchase liability insurance. In most cases the legislatures carefully point out that no liability accrues in the districts that do not purchase liability insurance.

Regardless of the immunity status of the district, certain precautions should be taken. The N. E. A. booklet, Who is Liable, lists the following aids to school administrators to avoid or reduce school transportation accidents:

> Use of only safe and properly equipped vehicles. School buses should measure up at least to the minimum standards and specifications set by the state department of education
>
> A regular check of the mechanical condition of the buses by qualified mechanics
>
> Employment of drivers who are competent, experienced, and physically fit
>
> Regular and systematic instruction to bus drivers on driving and traffic regulations, particularly as they relate to school buses

Establishment of a definite pattern for school bus drivers to use in approaching, loading, parking, and leaving the school grounds

Adoption and enforcement of rules and regulations for supervising pupils during loading and unloading

Promotion of safe bus riding habits among pupil passengers

Specific instructions to drivers to park in a safe place before discharging pupils and to caution pupils to use care in crossing streets and highways after alighting from the school bus

Establishment of definite and well-understood procedures and regulations to safeguard the bus and its passengers from accident whenever the bus is used for field and other non-route trips.[22]

Playground Supervision

Most schools now in existence were built without adequate provision for playground activities. When we consider the crowded conditions usually present during playground activities, it is hardly surprising that a large number of accidents occur here. These accidents are more common at the elementary level where games are usually not organized and the children are more excitable. Another reason for a greater incidence of accidents at the elementary level is the use of many types of playground apparatus.

Adequate supervision should be provided by the administration and such supervision should be appropriate for "the size and nature of the grounds, the play apparatus thereon,

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[22] Who is Liable for Pupil Injuries? NEA Research Division, (Washington, D. C., 1963), p. 41.

and the number and ages of the children using the area."[23] It is not necessary or even possible to keep pupils under constant scrutiny at all times. The acts of pupils cannot always be anticipated and the courts are aware of this. In the majority of cases, accidents are probably the fault of the individual involved. Nevertheless, failure to adequately supervise the activities of children is frequently alleged in court cases involving pupil injury and the classroom teacher supervising the activity is most frequently named as defendant.

The school district should make rules and regulations for pupils' conduct so as to minimize playground dangers. A regular and systematic inspection of the playground area should be made by the principal and teachers. Broken equipment or hazardous conditions should be corrected immediately.

The courts decide each case on its merits but a few cases taken primarily from California and New York will illustrate a general viewpoint concerning supervision. The New York court held the teacher not liable when a pupil fell off a horizontal ladder.[24] The pupil was a first grade student at Farmingdale and the ladder was six feet above the ground. The court said "the evidence was insufficient to show that there was lack of adequate supervision or that the ladder was

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[23]Ibid., p. 44.

[24]Bennett v. Board of Education, 226 N.Y.S. (2d) 594 (New York, 1962).

unsuitable for children of the pupil's age."[25] A similar case in California involving a fall from a horizontal ladder resulted in the death of the pupil.[26] Action was brought by the parents charging the school district was negligent in not providing closer supervision. The court stated that "the statute requiring public school teacher to hold pupils to strict account for their conduct does not make school district insurers of safety of pupils at play or elsewhere."[27] The case was complicated by the fact that the deceased pupil suffered from a type of cerebral palsy and was subject to seizures. The mother had previously insisted to the teacher that the child could take care of himself and needed no special treatment. The court held the teacher and district not liable.

Another California case resulted when a pupil was pushed by a classmate and broke his front teeth in the subsequent fall.[28] Still another case involved the district and a pupil injured when he ran into a flagpole.[29] In both cases the court said that every action of the pupils cannot be forseen

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[25]Ibid., p. 594.

[26]Rodrigues v. San Jose Unified School District, 322 P. (2d) 70 (California, 1958).

[27]Ibid., p. 71.

[28]Woodsmall v. Mt. Diablo Unified School District, 10 Cal. Rptr. 447 (California, 1961).

[29]Hough v. Orleans Elementary School of Humbolt County, 144 P. (2d) 383 (California, 1943).

and that teachers are not required to constantly have all pupils under their immediate scrutiny.

The line between adequate and inadequate supervision is thin and not clearcut. Neither the school district nor the teacher will be held liable where supervision of playground activities is judged adequate and reasonable. In states such as California and New York where districts are not immune from suits for tort liability, the districts may be held liable for not providing adequate supervision.

A New York court held the district liable when a pupil suffered injuries after she jumped off backwards from a five-foot bleacher in an unsupervised play area.[30] The decision was 4 to 3 and Justice Burke, in a dissenting opinion, pointed out that the teacher was on duty about 1,000 feet away and stated that the "reckless attempt by the plaintiff to accomplish this foolhardy feat (jumping off backward) was the proximate cause of the injury."[31] He went on to state that even vigilant supervision could not anticipate the "unorthodox impulsive self-instigated act of the plaintiff." In another New York case [32] the court held that the district's failure to enforce adequate play rules was negligent and awarded damages to the plaintiff when she ran into a ball

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[30] Decker v. Dundee School District 4, 167 N.Y.S. (2d) 666 (New York, 1957).

[31] Ibid.

[32] Germond v. Board of Education, 197 N.Y.S. (2d) 548 (New York, 1960).

field and was struck by a bat swung by an older pupil. A school district in California was held responsible for the death of a ten-year-old boy who fell and struck his head on the pavement while involved in a game of "blackout."[33] The court said there was substantial evidence from which the jury could find there was no teacher in the yard at the time of the accident or for an appreciable period before it. Supervision was held to be adequate in another California case involving an injury in a game of touch football.[34] The physical education teacher had warned the boys on previous occasions not to play rough and had warned them again prior to the accident. The player was a voluntary participant injured by a larger opponent in a game played according to the rules.

It would seem that districts will be held liable for injuries if playground apparatus is defective and the school officials are aware of it or have had time to become aware of it. If the equipment is not in a state of disrepair, damages are not usually allowed. Extra care must be taken at the elementary level since pupils of widely divergent ages and sizes may be tempted to use the playground equipment and apparatus.

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[33]Tymkowicz v. San Jose Unified School District, 312 P. (2d) 388 (California, 1957).

[34]Pirkle v. Oakdale Union Grammar School District, 253 P. (2d) 1 (California, 1953).

Playground Supervision After Hours

In New York a school district may be held liable for injuries sustained on the playground when the playgrounds are kept open for after-hours use.[35] A fifteen-year-old boy on a Sunday morning entered a playground maintained by the board of education and kept open to allow the public to use the facilities. While playing softball, he slipped on a patch of ice and was injured. There was evidence to the effect that there were several such patches of ice and the court held the district liable on the ground of negligence, stating that a playground can be kept closed until the danger is removed or disappears and that young boys playing ball in a playground cannot be expected to be watchful for dangerous areas.

In a similar case involving a boy playing in an unsupervised school yard after school hours, the New York court held that the district was not liable.[36] The child was struck by a bicycle ridden by a playmate who was leaving the school yard. Holding that the city board of education was not liable for the injury, the court said that this was not a case involving the necessity for supervision because of maintenance or operation of some appliance furnished by the board of education, that there was nothing involved here but the

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[35] Streickler v. City of New York, 225 N.Y.S. (2d) 602 (New York, 1962).

[36] Diele v. Board of Education, 146 N.Y.S. (2d) 511 (New York, 1954).

natural dangers inherent in the play of children. It went on to state that where the board provided a place for play which would be safer than the public street, there should not be imposed upon it the burden of personal supervision of such play.

The California Court reached a similar decision in a case involving injury to a six-year-old boy.[37] The boy was injured when a large wooden box was pushed on him as he played in the school playground on a Sunday when the grounds were closed and the gates locked. It was held that the evidence was insufficient as a matter of law to support a finding that the box was in a dangerous or defective condition so as to sanction recovery under the applicable California Public Liability Act rendering the school district liable for dangerous or defective conditions of which it had knowledge.

It is clear from the cases discussed here that the courts are not in complete accord concerning the extent of supervision required on the playground after school hours. In a slight majority of cases reviewed, the courts have not held the schools responsible for negligence when injuries resulted from after-hours activity on the school grounds.

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[37] Novack v. Los Angeles School District, 206 P. (2d) 403 (California, 1949).

Precautions for Reducing Playground Accidents

The N. E. A. booklet Who Is Liable lists some precautions and suggestions for reducing playground accidents:

> Adequate and competent supervision is provided
>
> Use of play area is scheduled to avoid crowding
>
> Older children are separated from younger ones
>
> Bicycle riding and other inherently dangerous activities in the play area are prohibited
>
> Rules and regulations are adopted for the control of pupil conduct on the playground
>
> Playground equipment and apparatus are of the types recognized as safe for the use of children, and are kept in good repair
>
> The playground area is kept free of obstructions and rubbish piles and the surfaces are properly maintained.[38]

Corporal Punishment

The legislatures have generally been silent regarding the use of corporal punishment in disciplining a pupil, since the school's authority to use force springs from the power and duty and restraint vested by law in the parent. In the great majority of states, the legal right of a teacher to inflict reasonable corporal punishment is clear. He must use the proper instrument under the circumstances and is legally obliged to take into account the character of the offense, the sex, age, size, and physical strength of the

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[38] Who Is Liable for Pupil Injuries? p. 47.

pupil. All of the courts agree that a teacher will not be permitted to deal brutally with a pupil so as to endanger his life, limb or health.[39] It becomes a question for the courts to decide in most cases whether the punishment was reasonable or excessive according to current interpretation of these words.

Corporal punishment is usually administered as a result of a violation of some rule or regulation set forth by the school officials. Most rules and regulations governing student conduct are established by the local governing board and not at the state level. Some rules are set up in board policies, some are set forth by the superintendent, principal or teacher and some are not even written but rather implied. These rules must be consistent with policies of the state board of education, state statutes, state constitutions and with the federal constitution. In addition, they must be reasonable and designed to achieve proper ends. The burden of proof is on the complaining party, the legal presumption being that the rule is proper.

It is possible that a reasonable rule can result in an unreasonable enforcement. The punishment must fit the offense and the penalty must be for a legitimate purpose. Reutter explains how most cases involving corporal punishment are decided:

> Generally it may be said that local school authorities may make reasonable rules governing

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[39]Hamilton, p. 36.

> pupils designed for effective school management and may punish pupils for violation of such rules in a reasonable manner. Thus, the overwhelming number of cases hinge on whether the rule in question is one that is in the power of school authorities to make, whether the method of enforcement is legally sound, or both.[40]

There are at least three distinct types of legal action that may result from corporal punishment:

1. Criminal action for assault and battery brought by the state against the teacher
2. Civil action for assault and battery brought against the teacher by parents of the child
3. Proceedings against the teacher by the school board charging that the particular instance of corporal punishment constitutes incompetency and therefore grounds for dismissal.[41]

Most suits instituted are civil action cases by the parents against the teacher charging unreasonable punishment or enforcement of an unreasonable rule. Punishment may be either excessive or improper. Excessive punishment refers to a situation where the punishment is proper but the extent of the punishment is questioned while improper punishment refers to a situation where the mode of punishment is questioned.

Because of the special privilege accorded by law to the teacher, liability is not imposed in every case where a conviction would be required in the absence of this loco parentis standing. Except where prohibited by statute, the infliction of corporal punishment on a child for disobedience or other misconduct does not in itself constitute assault and battery.

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[40] Reutter, p. 63.

[41] Ibid.

There are limits, of course, to how far the punishment can go and here the courts are not in general agreement. The weight of opinion seems to be that one must not exceed the bounds of moderation, and must not be cruel or merciless. There is no disagreement that punishment inflicted with malice, or causing permanent injury or death, exceeds the privilege accorded by law to a teacher and renders such teacher criminally liable under the same circumstances as if the privilege of loco parentis did not exist.

Two Iowa cases illustrate the general thinking of courts concerning excessive punishment. In both cases the teachers were convicted of assault and battery. In the Mizner case the teacher struck a 21-year-old female student about a dozen times with a whip, producing marks which remained for two months.[42] In the Davis case, the teacher whipped a 14-year-old female student with a stick, giving her 20 or 25 licks for her refusal to carry water from a neighboring well. The court held that the punishment was inflicted for an unwarranted cause and in an immoderate degree.[43]

A New York court set aside a teacher's conviction of assault in the third degree upon a 15-year-old male pupil.[44] The teacher struck the pupil a number of times with a half-inch rubber siphon hose for not having his English lesson.

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[42] State v. Mizner, 50 Iowa 145 (1853).

[43] State v. Davis, 139 N. W. 1073 (Iowa, 1913).

[44] People v. Petrie, 198 N.Y.S. 81 (New York, 1923).

The pupil then attended all his other classes and returned to school next day. There was no evidence that there was any anger, malice or passion on the part of the defendant.

In a later New York case in 1944 the court reversed a conviction of a teacher of an assault in the third degree upon a ten-year-old male pupil, on the law and the facts, upon evidence that for infractions of discipline in deliberately throwing or dropping a book from the balcony of the auditorium to the seats below and injuring several pupils, the teacher struck him several times on the buttocks with a yardstick. The court held the punishment was moderate and no anger or malice was evidenced.[45]

It has been specifically held in these New York cases that under New York statute, a teacher may, in the exercise of lawful authority to correct a pupil, use force or violence if it is reasonable in manner and moderate in degree. A teacher accused of assault on a pupil in the infliction of punishment for misconduct may show on the prior conduct of the pupil, in support of the position that the punishment conformed to the statute.

The California court upheld the finding of the trial court of the guilt of a teacher in violating a statute penalizing any person who wilfully inflicts on any child "unjustifiable" physical pain or mental suffering.[46] Evidence

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[45]People v. Mummert, 50 N.Y.S. (2d) 699 (New York, 1955).

[46]People v. Curtiss, 300 P. 801 (California, 1931).

disclosed that in the punishment of a seven-year-old male pupil for fighting with another boy, the defendant whipped him with a wooden paddle about twenty inches long, three inches wide and one-half inch thick, as he lay flat on his stomach on a table, striking him about thirty times. The court held the punishment was unreasonable under the circumstances.

Physical Education and Athletics

The organization of school athletics is generally considered to be an integral part of physical education and therefore it is the general rule that school districts or school boards in charge of public schools are immune from liability for injuries sustained in practice or games.[47] The same principle generally holds true with regard to spectators, even if they are charged a fee for admission. A few states including the two sample states of California and New York have statutes making them liable to the same extent as private persons or corporations for torts in connection with matters pertaining to injuries in school athletics. The physical education teacher is obligated to exercise reasonable care to prevent injuries and to assign pupils to such activities as are within their ability and to adequately supervise such activities.

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[47]Cleet C. Cleetwood, "Legal Liability for Injuries Sustained in a Public School Program of Interscholastic Athletics" (unpub. Doctoral dissertation, Duke University, 1959).

A teacher in New York was held negligent in the La Valley Case when he allowed two pupils to engage in a dangerous exercise without adequate instruction.[48] In this case, the defendant teacher directed two untrained pupils to box three rounds of one minute each, with a minute of rest intervening. One pupil suffered a cerebral hemorrhage caused by a blow on the temple. It was shown that the teacher did not inform the pupils of the dangers of boxing nor did he instruct them on the principles of defense. The court held the teacher negligent.

Ordinarily a pupil who voluntarily takes part in the school's competitive sports program assumes the normal risks of the game for which he has been properly instructed. A California case in 1958 resulted in the largest judgment discovered in this study.[49] A football player was injured and his injury was alleged to have been aggravated by the negligent way he was removed from the scene of the accident. The original award was for $325,000 but this amount was later reduced to $207,000 by the court. Extra-ordinary care must be used in handling or removing an injured player from the athletic field. A doctor should be available at each game and where practical, at scrimmages too.

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[48] LaValley v. Stanford, 70 N.Y.S. (2d) 460 (New York, 1947).

[49] Welch v. Dunsmuir Joint Union High School District, 326 P. (2d) 633 (California, 1958).

A case in Washington, in 1965, illustrates the thinking of most state courts on spectator injuries.[50] In this case a 67-year-old grandmother of a football player was injured when struck by a player who was knocked out-of-bounds. No admission had been charged and the court said that one attending a football game sponsored by a school district which charged no admission had duty to protect herself not only against dangers of which she had actual knowledge but such dangers incident to the game as would be apparent to a reasonable person in exercise of due care.

The school board was held liable under the doctrine of respondeat superior in a recent New York case.[51] The school board and two teachers assigned as playground supervisors were sued for damages when a softball player was injured by falling over a bench. The jury found the supervisors had been negligent and that the board was liable for the negligence of its employees. Most courts in other states do not follow this line of reasoning.

The physical education instructor or coach must periodically inspect his equipment and apparatus. Any defects should be promptly remedied or the defective material or equipment removed. Pure accidents occur in sports and physical education classes and if there is no negligence, then of course there is no liability. Extra caution must be used

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[50] Perry v. Seattle School District No. 1, 405 P. (2d) 589 (Washington, 1965).

[51] Domino v. Mercurio, 234 N.Y.S. (2d) 1011 (New York, 1962).

however since large numbers are the rule in these classes and greater bodily contact is almost inevitable.

First Aid

Although minor first aid is administered on many occasions by teachers and principals, the subject of first aid has been the basis of court action.[52,53] When immediate first aid seems needed, the teacher is obligated by his relationship to the pupil to do the best he can. Failure to act may be a cause for court action, just as giving medical treatment may be a cause. Only the first aid knowledge expected of laymen is expected of teachers. It is generally agreed that there is a duty to render first aid in case of injury to a pupil but where the permissible limits are is not always clear. Medication should not be offered by a teacher and where possible, the teacher should await the arrival of a medically trained person. If an injury does not demand immediate attention, teachers should wait until after school or call the parents or family physician instead of providing treatment. Two teachers in Pennsylvania were held to be negligent when they held a pupil's infected hand in scalding water causing blisters and permanent disfigurement.[54]

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[52] Guerrieri v. Tyson, 24 A. (2d) 1011 (New York, 1962).

[53] Welch v. Dunsmuir Joint Union High School District, 326 P. (2d) 633 (California, 1958).

[54] Guerrieri v. Tyson, 24 A. (2d) 468 (Pennsylvania, 1942).

The court said that, "Though public school teacher stands in loco parentis to pupil and, under delegated parental authority implied from relationship of 'teacher and pupil', may inflict reasonable corporal punishment on pupil to enforce discipline, there is no implied delegation of authority to exercise her lay judgment as a parent may in matter of treatment of injury or disease suffered by pupil."[55] The court went on to say that the teachers were not acting in an emergency and neither of them had any medical training or experience.

In a California case, a physical education coach was found to have acted negligently when he permitted an injured football player to be carried off the playing field without a stretcher.[56] In another football injury case, the court found no negligence against the coaches when a teacher snapped a dislocated shoulder back into place, placed the boy's arm in a sling and sent him home.[57] The court said there was an absence of a showing that there was an immediate pressing necessity for medical aid before the boy went home. In still another physical education case, a physical education teacher walked a boy a short distance to the supervisor's office after he broke his arm jumping over a gym horse.[58]

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[55]Ibid.

[56]Welch v. Dunsmuir Joint Union High School District, 326 P. (2d) 633 (California, 1958).

[57]Duda v. Gaines, 79 A. (2d) 295 (New Jersey, 1951).

[58]Sayers v. Ranger, 83 A. (2d) 775 (New Jersey, 1951).

First aid was given there and he was then taken to a hospital. The parents thought the boy should not have been directed to walk to the office but the court stated that the steps taken to aid the injured boy were better than waiting for a doctor to come to school.

Prior parental consent to administer first aid or treatment at school is sometimes requested from the home and kept in the principal's office. This is probably a good practice although a teacher may still be found negligent even if prior permission to administer first aid is received.

Classrooms and Shops

Accidents frequently occur in the classrooms of our schools. Usually these accidents are not the fault of the teacher but teachers are vulnerable, especially in science and shop classes. While school shops and science rooms are potentially dangerous places, they can when properly equipped, arranged, and managed, provide a relatively safe environment in which youth and adults may work and learn. In addition to the normal responsibilities of the regular teacher, these instructors have the additional task of maintaining a wide variety of equipment and materials for safe and effective use. They must provide instruction in the safe use of tools, materials and equipment. These teachers

especially need the facts about the legal aspects of accidents and the extent and conditions of liability.[59]

Adequate instruction, careful supervision, constant inspection and written rules are necessary if shop and science teachers are to avoid litigation. Most of the cases selected for this study were from California or New York and while the list is not meant to be comprehensive, fifteen cases involving shop teachers alone were found from 1935 to the present time. Many cases allege negligence in supervision. A New York case in 1946 resulted in the board being held liable for the negligence of the shop teacher when a pupil was injured while trying to extricate a piece of metal from a machine and another pupil stepped on the foot treadle.[60] Another New York case involved failure to provide protective equipment and resulted in the school district being held liable.[61] A student crushed his thumb while trying to free his sweater which was caught in a lathe and the court said the school district was under an obligation to furnish the same protective clothing to pupils in the machine shops that the New York Statute require industrial employers to furnish to their employees working on similar machines.

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[59]Denis J. Kigin, Teacher Liability in School-Shop Accidents (Ann Arbor, Michigan, 1963), p. 7.

[60]De Benedittis v. Board of Education of New York City, 67 N.Y.S. (2d) (New York, 1946).

[61]Edkins v. Board of Education of New York City, 41 N.E. (2d) 75 (New York, 1942).

A similar view was adopted by a California court in an action brought by a pupil who caught his fingers in a printing press that had no guard.[62] The court held that violations of safety regulations of the Division of Industrial Safety protecting employees was applicable to school districts and their violation is an act for which a board of education may be held liable. Even Oklahoma, where ordinarily no liability accrues, had similar legislation passed by the last session of its legislature. The section is as follows:

> Section 582 Safety Goggles--School Board to Provide for Certain Personnel
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> The school board of each school district in Oklahoma shall provide safety goggles as approved by the National Safety Council for all personnel using materials and machines that may damage the vision of such personnel because of flying particles, intense light, severe heat or other harmful effects. Approved May 3, 1965.[63]

Pupils frequently make knives or other weapons in shop classes if they are not closely supervised. A fifteen-year-old boy sued the school district and his shop teacher for damages for injuries when a toy cannon he had made accidently was fired.[64] His claim was based on the allegation that the shop teacher failed to warn him of the dangers involved in loading the cannon. The jury verdict was for the defendants in this case.

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[62] Lehmann v. Los Angeles City Board of Education, 316 P. (2d) 55 (California, 1957).

[63] School Laws of Oklahoma, 1965, p. 241.

[64] Calandri v. Ione Unified School District, 33 Cal. Rptr. 333 (California, 1963).

Negligence on the part of a shop instructor was alleged when a pupil was killed and another injured as a result of an explosion caused by a third pupil.[65] One pupil had a welding torch and was attempting to cut a hole in an automobile frame that had an open gas tank attached to the frame. This pupil was not a member of the defendant's class but the subsequent explosion killed one pupil and injured another pupil who were class members. The trial court ruled in favor of the defendant shop teacher but the judgment was reversed by the appeals court. Frequently the courts decide on negligence according to the care exercised in preparing the pupils. In another California shop case resulting in injury to a pupil, the court held for the defendant shop teacher because it could be shown that precise instructions in using the machines had been given.[66] Even though the youth sustained the loss of a finger in a jointer, the court felt no negligence was exhibited by the teacher.

The federal government's financial backing of area vocational schools and the pupil's interest in missiles, propellants and other potentially dangerous devices and materials indicates that even greater care needs to be exercised by the shop and science teacher. Planning, careful preparation, and close supervision are essential ingredients of a safe

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[65] Dutcher v. City of Santa Rosa High School District, 319 P. (2d) 14 (California, 1957).

[66] Klenzendorf v. Shasta Union High School District, 40 P. (2d) 878 (California, 1935).

classroom. Independent study is generally acknowledged to be an important phase of the educational process, but danger lurks if an accident results from improperly supervised activities. Leaving the classroom unattended is always risky and may result in a lawsuit. Certainly chemicals and other dangerous materials should be kept under lock and key. Access to equipment should be carefully controlled and a student should never be left in charge of the discipline of the class.

Libel

As professional personnel, teachers and administrators are often requested to make official statements about other professional workers and pupils. These statements are qualifiedly privileged and those making them are generally not liable in damages, even if the statements were false, provided they were made in good faith. Although only a few school-connected libel cases reach the courts, two California cases merit some attention here. In Everett v. California Teachers Association, the Assistant Superintendent of Schools sued the California Teachers Association and twelve employees of its Commission on Personnel Standards and Ethics, claiming damages by reason of a defamatory report. The report was an outgrowth of a study requested by the teacher association of a school district in California.[67] The court held there

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[67]Everett v. California Teachers Association, 25 Cal. Rptr. 120 (California, 1965).

was no legal wrong since "publications seeking to convey pertinent information to the public in matters of public interest come within the purview of 'privilege' which is a defense in a libel action." In the other California case, the court held that:

> . . . a Superintendent of a school district could not claim immunity insofar as he may have made defamatory statements concerning students to members of the general public if the statements were not merely reports of official action but instead purported to be statements of facts within his personal knowledge.[68]

The Supreme Court of Wisconsin in a 1963 case, ruled for the defendant superintendent in an action brought by a speech therapy teacher alleging defamatory statements.[69] This is a rather typical case and will be discussed fully. The teacher, when applying for another position, gave the superintendent's name as a personal reference. When the prospective employer asked for comments on the teacher's qualities and competence, the superintendent answered that he was unable to give the teacher an unqualified recommendation, stating that the six principals and the elementary co-ordinator unanimously recommended that he no longer be retained. The teacher contended that his professional reputation was libeled by this allegedly defamatory response. The superintendent used the usual defenses that the statements were true or that they were conditionally privileged because they were

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[68] Elder v. Anderson, 23 Cal. Rptr. 48 (California, 1965).

[69] Hett v. Ploetz, 121 N.W. (2d) 270 (Wisconsin, 1963).

made in discharge of a public duty. The two questions at issue were--whether there was an issue of malice for trial, and whether the superintendent's letter was protected by any privilege. The court held that the superintendent enjoys the benefits of a conditional privilege to give a critical appraisal of the qualifications of a former employee in a letter of reference. On the basis of the facts, the court also held no malice existed.

In a widely publicized case in Oklahoma the publisher of True Magazine appealed a verdict in favor of a member of the University of Oklahoma football team. Denit Morris, a member of the 1956 O. U. football team sued the publisher of True Magazine for damages for libel because of a 1958 article concerning the use of drugs by the team.[70] The article was sensationally written and illustrated. The court held that the publication was not privileged and upheld the judgment for the plaintiff in the sum of $75,000.

These cases are illustrative of two important concepts --whether a statement is privileged because of the position of the person making the statement and his official relationship to that person and whether or not malice is exhibited. Most cases involving school personnel will hinge on the court's determination of these two factors.

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[70] Fawcett Publications, Inc. v. Morris, 377 P. (2d) 42 (Oklahoma, 1962).

School Patrols

Control of pedestrians and vehicular traffic is properly a police and not a school function. Frequently the police department is either unable or unwilling to furnish patrolmen so the school undertakes the function for the protection of its pupils. The position of school patrolman is one of great responsibility and the appointment of a minor to the job is a risky decision. If an accident should occur, a skilled plaintiff's attorney could make a strong case out of the contention that a child was appointed to do a policeman's work. It seems strange, but no case has apparently reached the appellate courts involving school patrols. The school patrol operation does have legal implications in spite of the obvious educational value to the pupils involved in the operation. Hamilton expresses this fear when he asks, "Is it 'reasonably prudent' to charge an immature child with the responsibility of conducting groups of children across busy thoroughfares?" He answers by saying, "I have the temerity to suggest that such action by school personnel is not 'reasonably prudent'."[71]

Reynolds Seitz, in an address before the 1962 School Law Conference, suggests that the statutes of a particular state may give some guidance in this controversial area.[72] Most authorities agree that the child should not be placed in a

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[71]Hamilton, p. 115.

[72]School Law Conference Report of 1962 (Miami University, Oxford, Ohio), 1962.

position where he is actually expected to direct traffic from a position in the street. Seitz summarizes his remarks by stating that:

> It is my belief that school authorities should never set up a patrol until they have exhausted all other means of getting crossing protection. School authorities should first turn to the police. If their request is turned down they should ask for volunteer help from adults. If that endeavor brings no results, then the school authorities should consider the possibility of hiring part-time adult help. If funds are not available, then it would seem that the school would be safe in setting up a school patrol. However, remember some crossings may be so hazardous that it would be unreasonable to expect children to function on school patrols.[73]

One California case, in 1964, dealt with the absence of a school patrol.[74] In this case a five-year-old boy attending kindergarten was struck by a car at a major intersection about 500 feet from school. The intersection, controlled by traffic lights, was a heavy traffic artery with peak flows at hours when children walked between home and school. The boy was struck at noontime, one of the peak periods. Safety patrols which the school had maintained at the intersection at a time prior to the accident, had been removed over the protests of a parents' group. The court held that the school was not guilty of negligence in the absence of a specific statute obligating them to provide traffic protection to pupils to and from school.

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[73]Ibid., p. 8.

[74]Wright v. Arcade School District, 40 Cal. Rptr. 812 (California, 1964).

A few states have general protective statutes for school personnel but if school patrols are to be continued, persons in education should insist on statutory protection for those charged with administering the program.

Field Trips and Errands

Field trips are generally acknowledged to be one of the many sound educational procedures that enrich the curriculum. These trips also present hazards that may be encountered during travel and at the site. No case has been found which attempted to hold the teacher or principal liable for pupil injury while on a field trip. Some cases have been instituted by the injured child or his parents against the agency visited. There seems to be some distinction made if the host stands to gain some benefit. In this case the pupils are called invitees and if no benefit accrues to the host the pupils are said to be licensees.

Sometimes the school administration may require written parental consent before permitting a student to participate on a field trip. No language on a field trip permission slip can absolve teachers from the responsibility to supervise during the hours they are away from school. It is necessary, however, to give the parent sufficient information concerning the mode of transportation, route, time and other conditions, so that the parents cannot claim that they really did not understand the full implications of the request to permit students to go on field trips.

Although field trips may be quite educational some should not be taken at all. If the reasonably prudent parent or teacher can foresee that conditions of danger exist to which children of a certain age should not be exposed, field trips should not be taken. A permission slip would not be a defense if the child were injured by encountering a hazard to which he should not have been exposed.

Gauerke, in his book School Law, suggests that when a teacher gets away from the four-walls concept of education, the following steps should be taken:

1. More than ordinary care should be exerted
2. Reasonable rules governing pupil conduct should be formulated
3. Students should be taken only in small groups
4. Secure permission of parents, even though they can't sign away parental rights
5. Secure qualified supervisors
6. Investigate hazards
7. Urge board to accept trips as a part of the educational program[75]

Hamilton notes that the pupils are usually in a holiday mood and are often difficult to manage. He feels the possibilities of accidents multiply as the distance traveled and the number of pupils increase.[76]

There is no legal authority for the teacher to use pupils as messengers, either for the district or for the teacher's own personal needs. Even if the district had the authority to send pupils on errands, it has not been delegated to the teacher. The possibilities of student injury

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[75]Warren E. Gauerke, School Law (New York, 1965), p. 103.

[76]Hamilton.

are greatly increased away from the school's familiar surroundings. It is fairly well settled that a teacher may be held liable for injuries suffered by pupils sent on errands at the direction of the teacher. A teacher may also be liable if the pupil sent on the errand inflicts injury on a third party. The pupil is legally an agent of the teacher, and the laws of agency apply.

A Connecticut case, in 1960, illustrates the prevailing opinion concerning sending pupils on errands.[77] A student in a play production class was sent to a schoolroom to get some paint. In order to reach the paint, she had to move some cumbersome stage scenery which fell and injured her. The court, ruling against the teacher, held that the falling scenery was a foreseeable incident.

Not all cases result in judgment against the teacher or school board. In a Louisiana case a high-school boy was sent on an errand by his teacher with the consent of the principal.[78] He was traveling by car and was struck by another car and injured. His father sued the school board to recover damages and medical expenses arising from injuries sustained in the accident. The court held against the plaintiff on the technicality that the complaint failed to allege that the boy's injuries resulted from any fault or negligence of the school board.

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[77] Snyder v. Town of Newtown, 161 A. (2d) 770 (Connecticut, 1960).

[78] Harrison v. Caddo Parish School Board, 179 So. (2d) 926 (Louisiana, 1965).

School authorities face an even greater hazard by sending students on errands off the schoolgrounds. Indeed, the school has absolutely no right to send a child on errands off the schoolgrounds during school hours unless parental permission is obtained.

Student Teaching

The almost complete absence of reported cases involving student injury which occurred when the student was under the direction of a student teacher leaves the question of liability for such injury uncertain. It is generally believed that student teachers will profit most from their practice teaching if they are sometimes given complete freedom and responsibility but most legislatures have not specifically provided for this, so the supervising teacher is not free to abandon her legal responsibility and liability for the conduct of the class. Certainly no class should be left in charge of a practice or student teacher until the regular teacher and supervisor have observed that the practice teacher has arrived at the point of experience where it is reasonable to expect that she can handle the class. It would probably be advisable for the regular teacher even then to remain within hearing distance on her first few departures from the room.

Two cases involving the liability of student teachers have arisen, both of them in New York, a sample state where school districts are held liable for the negligent torts of

their employees.[79,80] In both cases, the court found the school districts liable and awarded damages to the plaintiff. In the Gardner case, the court reversed the lower court which held an unavoidable accident occurred when a seventh grade female pupil was injured doing a "head stand". The Board of Regents had adopted a syllabus on physical education making it mandatory for all pupils to take courses in physical education. The court pointed out that in order to be certified to teach physical education, one must have completed a four year academic program leading to a degree or its equivalent. The only person present when the accident occurred was a third year junior who was a cadet or student teacher. The court said that this exercise was highly dangerous and the school was grossly negligent in not requiring a qualified person to be present.

The Brittain case also involved an injury in a physical education program. The plaintiff was given a physical fitness test to determine her eligibility for admission to Cortland State Teachers College. She sustained permanent injury to her leg during one of the qualifying tests. Although a qualified physical education instructor was in charge of the tests, he was not actually present when the accident happened. The test was being administered by a senior physical education student and the court, citing

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[79]Gardner v. State, 10 N.Y.S. (2d) 274 (New York, 1939).

[80]Brittain v. State, 103 N.Y.S. (2d) 485 (New York, 1951).

Gardner, held that he was not qualified to administer a potentially hazardous piece of equipment. The court also cited the statute requiring a degree or its equivalent in order to teach physical education.

State legislatures are beginning to recognize the uncertainty governing the legal status of student teachers. During 1965 the legislative bodies of Florida and Illinois enacted laws protecting school employees and specifically included student teachers. The Florida Statute authorizes county school boards to provide legal service for employees sued for damages while on duty supervising and gives legal status to student teachers so as to provide similar protection.[81] The Illinois Statute provides for "save harmless" protection for school officers and employees, including student teachers.[82]

College supervisors, school boards, administrators and teachers should insist that the legislatures of all states clearly define the legal status of student teachers and their supervisors.

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[81]Ch. 65-42 Florida Statutes 1965.

[82]S. B. 801 Illinois Revised Statutes, 1965.

CHAPTER V

SUMMARY AND CONCLUSIONS

Summary

The law is not static, but usually the change is barely perceptible even to the skilled observer. Legal and educational writers have been freely predicting for many years the demise of the immunity from tort liability status enjoyed by governmental agencies. To many, the judicial legislative conflict over the issue seemed resolved by the Molitor Case.[1] The courts of Wisconsin, Arizona and Florida followed suit and Iowa and Colorado failed by one vote margins in their supreme courts to add their states to the list of states throwing off governmental immunity by judicial decree. A few states are also abrogating the doctrine by legislative enactment, the latest being Nevada and Utah in 1965. Many more states have enacted legislation allowing school districts to purchase liability insurance, but most are careful to preserve the immunity status by specifically exempting those districts not choosing to purchase the liability insurance. In spite of these in-roads, governmental immunity from tort liability still prevails in most states today.

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[1]Molitor v. Kaneland Community Unit District No. 302, 163 N.E. (2d) 145 (Illinois, 1962).

The schools are rapidly expanding their activities into areas formerly classified as "proprietary". The courts are increasingly refusing to differentiate between governmental and proprietary functions as far as liability to the district is concerned. This changed attitude of the courts reflects the changing concept of our society concerning the role and function of the schools.

It is likely that employees of the school have enjoyed some benefit from the immunity given the school district. This "carry over" benefit is likely to decline as abrogation of the immunity doctrine increases. Many states, school districts and professional organizations are taking some action now to protect the agents and employees of the district from drastic financial loss in the future.

Conclusions

School districts, school boards or other agencies in charge of public schools are not insurers of the safety of pupils or other persons, but they may be held liable for negligence or the failure to exercise reasonable care under the circumstances. It is the duty of the school authorities to supervise the conduct of children on the school grounds and to provide and enforce such rules and regulations as are necessary for their protection. School district employees who fail to exercise ordinary care are liable for injuries resulting from their negligence. However, such liability attaches, only if the injuries are the proximate result of

the negligence of the school employee. Some of the more common defenses for teachers against negligence are: (1) The student assumed risk, (2) It was an unavoidable accident, (3) Teacher acted as a reasonably prudent person would under the circumstances, (4) Intervening cause, and (5) There was contributory negligence on the part of the student.

All accidents that occur under the jurisdiction of the school are of great concern to the administrator, board member, and teacher. Pupils generally are required by law to attend school and their youthfulness coupled with compulsory attendance calls for the utmost effort from all persons involved in their safety. The National Safety Council publishes a Student Accident Reporting Guidebook[2] which should be required by all districts not presently using a similar standard reporting procedure for accidents. Written records are needed, not only in personal liability cases, but also as guides for developing or changing policies and procedures regarding pupil safety. Dangerous or hazardous conditions can be pinpointed more accurately and quickly when uniform accident reporting forms are utilized.

When the state sets up certain legal provisions for teachers, it grants them certain rights and privileges accorded because of their status and position. It also expects them to recognize certain obligations to society and especially to their pupils. What these obligations are have

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[2]Student Accident Reporting Guidebook, National Safety Council, 425 N. Michigan Avenue, Chicago, Illinois, 1966.

been defined by the state legislatures, state or local boards of education and by individual school policies. A more complete knowledge of these laws and policies is the responsibility of all persons in the public school service.

It seems certain that further change in school district immunity is forthcoming. The primary purpose of school districts is to provide an educational program for the pupils. It is not likely that a drastic change in this purpose will be necessitated by future modification of the immunity doctrine. Several sound procedures already adopted in a few states, are worthy of consideration by other states.

Governmental immunity should be abolished by legislative enactment and a system of compulsory state-wide self-insurance should be initiated to pay claims arising from judgments. Mandatory "save harmless" legislation should be passed to free school district agents and employees from the danger of lawsuit inherent in their positions. Legal counsel should be provided by the district to all employees involved in school-connected tort liability court actions.

If the school district provides a sound program and if the employees and agents of the district exercise reasonable care and judgment in performing their duties, damage claims are not likely to disrupt the program of education.

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VITA

George A. Rowley

Candidate for the Degree of

Doctor of Education

Thesis: THE MODIFICATION OF THE SCHOOL DISTRICT'S IMMUNITY FROM TORT LIABILITY IN SELECTED STATES WITH SOME IMPLICATIONS FOR SCHOOL DISTRICT AGENTS AND EMPLOYEES

Major Field: School Administration

Biographical:

Personal Data: Born at Ringwood, Oklahoma, April 18, 1927, the son of Beulah M. and George A. Rowley.

Education: Attended elementary school in rural Cimarron Valley Consolidated District in Major County, Oklahoma; graduated from high school at Ringwood, Oklahoma, in 1945; received the Bachelor of Arts degree from Northwestern State College, Alva, Oklahoma, in May, 1949, with a major in History and a minor in Social Studies; received the Master of Science degree from Phillips University, Enid, Oklahoma, in May, 1953, with a major in School Administration.

Professional Experience: Appointed classroom teacher of social science and principal at Freedom High School, Freedom, Oklahoma, in 1949; appointed superintendent of Crawford School, Crawford, Oklahoma, in 1951; appointed superintendent of Coyle School, Coyle, Oklahoma, in 1956; appointed director of the Central Food Services for Oklahoma City Public Schools in 1962; appointed superintendent of Perkins School, Perkins, Oklahoma, in 1963; appointed superintendent of Blackwell Schools, July, 1966.